A NEW ABRIDGMENT OF THE LAW.

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THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
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IN SEVEN VOLUMES.

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PREFACE

TO THE

FIFTH EDITION.

IT was the hard fate of the excellent writings of the late Chief Baron GILBERT, to loſe their Author, before they had received his laſt corrections and improvements, and in that unfiniſhed ſtate to be thruſt into the world, without even the common care of an ordinary editor. Thoſe invaluable tracts were for the moſt part publiſhed not only with all their original imperfections, without any attempt to ſupply their defects, or explain or correct what ſeemed in them perplexed or erroneous, but with all the improprieties and inaccuracies which the ignorance and neglect of the amanuenſes, whom the Author's infirmities compelled him to employ, could accumulate upon them.

Some of thoſe tracts, it is well known, fell into the hands of the Compiler of the preſent work, and from them the materials of the greater part of it, as far as the title "*Simony*," were collected. Unfortunately, our Compiler had not the moſt happy diſpoſitions for the work he had undertaken, nor were thoſe parts of the

learned Judge's writings which appeared in the New Abridgment much better prepared to meet the publick eye, than the other tracts which had been publiſhed by perſons to whom chance or an undiſtinguiſhing choice had committed the inſpection of the preſs.

In the courſe of the work, Mr. *Bacon* ſeems to have made different uſe of the materials that lay before him, ſometimes taking the tracts at length, ſometimes giving only extracts from them: but whether he inſerted the whole of any tract, or only a part of it, we have reaſon to think, he inſerted it juſt as he found it. If the Author in different treatiſes, in order to make each treatiſe perfect within itſelf, introduced the ſame matter conveyed in the ſame expreſſion, the Compiler implicitly copied it, and under different titles of his work introduced the ſame paſſages to the extent of ſeveral pages. If the manuſcripts were in any part defective, if the ſubjects were but partially treated of in them *, the titles which related to thoſe ſubjects were left equally defective in the Abridgment. The Compiler ſeemed to have as little inclination to ſupply the deficiencies of his Author, as he had ſagacity to mark or correct his errors.

With theſe defects and redundancies the work has paſſed through three ſubſequent editions; the only anxiety diſcoverable in the later editors being to crowd it with references to caſes inappoſite to the point in the text,

* It ſhould ſeem from ſome manuſcript treatiſes of this author in the poſſeſſion of Mr. *Hargrave*, which have never appeared in print, that he had formed and actually executed the comprehenſive plan of writing diſtinct treatiſes upon every branch of the law, except the criminal juriſprudence.

and

and which, at the beſt, had only ſome relation to remote branches of the general ſubject.

In preparing the preſent Edition for the preſs, it has been the firſt care of the Editor to retrench what was redundant in the work, and to expunge what appeared to him impertinent. In retrenching, he has ſubſtituted reference for repetition; and where the ſame matter which had occurred under one title ſeemed naturally to fall under and belong to another, he has referred to the preceding title inſtead of introducing it again. In expunging, he has not indulged himſelf in any arbitrary or capricious licence; nor has he preſumed to ſtrike out one ſupervenient authority of a later editor, before he had ſatisfied himſelf by careful examination that it had no pretenſions to the place it affected to occupy.

In the original text he has rarely ventured to make any alteration, except where it was manifeſtly corrupted by the careleſſneſs of the copyiſt or of the preſs, or rendered perplexed by the want of due attention to punctuation. One or two paſſages indeed, where the meaning could not be collected either from the expreſſion or the references, he thought himſelf at liberty to expunge. Conjectural emendation is not admiſſible in a work of this kind; and he truſts, no man will complain of the loſs of nonſenſe.

He has attempted to mark, and guard his readers againſt, the miſtakes of the author: but he is ſenſible that many, too many, erroneous paſſages have been ſuffered to paſs without obſervation. In the courſe of ſo long a work it cannot be expected that the exertions of the mind ſhould be always equal, or that it ſhould always be alike diſpoſed to proceed in the taſk it had

undertaken. It muſt occaſionally ſicken at ſome parts of the labour as beneath its attention, and ſhrink from others as beyond its powers. It is well known that the moſt obvious errors ſometimes moſt eaſily eſcape detection. In reading, every man muſt have felt that his mind is ſometimes more attentive to its own preconceptions on the ſubject, than to the ideas of the author, and the better it is ſatisfied with the rectitude of the former, the more ſteadily it purſues them, and the leſs ſenſible it is of the aberrations of the latter. The form too in which error preſents itſelf to us may help to facilitate its eſcape: it is more likely to paſs ſilently and unobſerved when propoſed in the form of a ſimple affirmation, than when it challenges our inquiry in that of an interrogation. We often readily admit upon a ſtatement what we ſhould inſtantly deny, if it were offered to us in the way of queſtion.

It ſhould be obſerved, that even where the Editor has detected error, he has not always immediately appriſed his reader of it: he has ſometimes ſubjoined his remarks upon the erroneous paſſage at the end of the diviſion where it has occurred: he has at other times leſt its confutation to its inconſiſtency with the better-conſidered and more recent determinations which he has afterwards introduced.

In the additions he was to make, he found it neceſſary to preſcribe to himſelf ſome limitations: he therefore in general attempted no more than to fill up the chaſms that were left under thoſe general diviſions into which he found the work already diſpoſed, and then to engraft upon the whole the later deciſions. He has indeed given two new titles, viz. "*Piſcbary*" and "*Set-off;*" and he knows that he might have given others, as the work is

at preſent far from a complete Abridgment of the Law. But he had neither time nor encouragement to go farther. Beſides, much of the learning which is wanting, is to be met with in books that are in every one's hand: and what was to have been gleaned from other writings of the ſame kind, though it might have increaſed the bulk of the work, would not have added to its intrinſick value, or have done any credit to the induſtry or integrity of the Editor. If there ſhould be ſome who complain that more might have been done, there will be others, he fears, who will ſay, perhaps with more juſtice, that much of that which has been done might have been ſpared.

As the Abridgment is written in the ſtyle of diſſertation, he has in his additions availed himſelf largely of thoſe tracts which have been publiſhed upon different parts of the Law, and received the approbation of the Profeſſion. He has been in general careful, whenever he has made an extract from any of thoſe tracts, to acknowledge the obligation by reference to the work itſelf. If he has in any inſtance (and he may have done ſo in many) neglected to make ſuch reference, the author may be aſſured, that it was by mere accident or inadvertency, and not from any deſign to take to himſelf the credit of another man's labours. But wherever ſuch omiſſion may have been made, let not the author be under any uneaſineſs: the world will too eaſily diſtinguiſh what properly belongs to the Editor.

He thought himſelf at full liberty to tranſplant into the work as much of the Chief Baron *Gilbert*'s tracts as he had occaſion for: it was in truth only re-uniting diſjointed members, many parts of the work itſelf being only parts of ſeveral of thoſe tracts. One of the learned

Judge's

Judge's treatiſes, *viz.* the Treatiſe upon the Doctrine of Remainders, from which the collections in the Abridgment under that title were extracted, he has been enabled to give entire by the kindneſs of Mr. *Hargrave.* The manuſcript had been purchaſed by that gentleman at no inconſiderable price: but, diſdaining all private conſiderations where the intereſts of that Profeſſion, of which he is ſo diſtinguiſhed an ornament, ſeemed in any degree concerned, he made a voluntary tender of it to the Editor, as ſoon as he was informed that he was engaged in preparing another edition of the preſent work. By this generous act, Mr. *Hargrave* has highly flattered the Editor, and has added one more to the many obligations his Profeſſion were already under to him.

The Editor has been anxious to ſeparate his own additions, and thoſe of preceding editors, from the original work. Whatever, therefore, he is reſponſible for is included between crotchets, thus [ ]; whilſt the inſertions of the other editors are diſtinguiſhed by one or other of theſe marks, *, †, ‡. It is well known, that Mr. *Bacon* did not live to carry the work any farther than to the title "Sheriff," incluſive, and that the remainder was added by Mr. Serjeant *Sayer* and Mr. *Ruffhead.* It was not thought neceſſary to give any diſtinguiſhing marks to this latter part: it ſeemed ſufficient to give this intimation of it.

HENRY GWILLIM.

Boswell-Court,
Michaelmas Term 1797.

Abatement.

ABATEMENT, in the general acceptation of the word, ſignifies a plea put in by the defendant, in which he ſhews cauſe to the Court why he ſhould not be empleaded; or, if empleaded, not in the manner and form he now is. Gilb. Hiſt. C. P. 186. [For the derivation and different ſenſes of the word Abatement in our law, ſee 3 Bl. Comm. 168. Co. Litt. 134. b. 181. a. 242. b. 271. a. 277. a. Finch's L. 195. Pleas to the juriſdiction, and to the perſon of the plaintiff, are pleas in diſability, and only in the nature of pleas in abatement. Pleas in abatement, ſtrictly called ſuch, are pleas to the writ. Finch. L. 362. 3 Bl. Comm. 301.] For the order of pleading, ſee title Pleas and Pleadings, (A).

We will conſider this title in the following order, though ſeveral of its diviſions are more largely treated of under their proper heads.

(A) Of Pleas to the Juriſdiction of the Court.

(B) To the Perſon of the Plaintiff.

1. Outlawry.
2. Excommunication.
3. Alienage.
4. Premunire.
5. Popiſh Recuſancy.

(C) Of Pleas in Abatement with reſpect to the Perſon of the Defendant; and herein of privileged Perſons.

(D) Of Miſnomer, and want of Addition.

(E) Of Abatement by the Demiſe of the King.

(F) By the Death of Parties.

(G) By reaſon of Coverture.
(H) By a Defect in the Writ.
(I) By the Writ not agreeing with the Count.
(K) Where the Writ is abated de Facto, or only abateable.
(L) Where the Writ ſhall abate in toto, or in Part.
(M) Where it ſhall abate by Reaſon of another Action brought for the ſame Thing.
(N) Where a Perſon may plead in Bar, or in Abatement.
(O) Dilatory Pleas, how reſtrained.
(P) Of the Manner of pleading in Abatement, and the Proceedings and Judgment on ſuch Plea.
(Q) Of the Writ by Journies Accompts.

(A) Of Pleas to the Juriſdiction of the Court.

Gilb. Hiſt. C. P. 187. 22 H. 6. 7. Barnes, 334.

A Plea to the juriſdiction of the Court muſt be put in before (*a*) any imparlance, for by craving leave to imparl, the defendant ſubmits to the juriſdiction.

[(*a*) But after a general ſpecial imparlance, that is, an imparlance with a general ſaving of all manner of exceptions, it ſeems that it may be pleaded: but the granting of ſuch an imparlance is diſcretionary in the Court, and it cannot be had but by ſpecial motion. Grant v. Lord Sondes, 2 Bl. Rep. 1094. Wentworth v. Squib, 1 Lutw. 46. 12 Mod. 529. S. C. Clapham v. Lenthal, Hardr. 365. Barrington v. Venables, Raym. 34.] The plea of ancient demeſne is ſaid to be excepted, becauſe the lord may reverſe the judgment by writ of deceit, and it goes in bar of the action. Dy. in Marg. 210. Style, 30. Latch, 83. Sed Qu.

Doe v. Robinſon, 2 Str. 1120.

[It muſt be pleaded within the firſt four days, unleſs the defendant come in voluntarily before the regular appearance day, in which caſe it may be pleaded afterwards.]

[(*b*) But ancient demeſne cannot be pleaded without leave of the Court, and is put in by attorney.

The defendant muſt plead *in propriâ perſonâ*, for he cannot plead by attorney without leave of the Court firſt had, which leave acknowledges the juriſdiction; for the attorney is an officer of the Court; and if defendant puts in a plea by an officer of the Court, that plea muſt be ſuppoſed to be put in by leave of the Court (*b*).

Doe ex dim. Raſt v. Roe, 2 Burr. 1046. Raſt. 58. b. See too, in other caſes, Robins. Entr. 1. Chſt. 17. p. 44.]

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He muſt make but half defence, for if he makes full defence *quando et ubi curia conſideraverit*, &c. he ſubmits to the juriſdiction of the Court. Co. Litt. 127. Gilb. Hiſt. C. P. 188. See Ventr. 334.

Every plea to the juriſdiction, muſt ſtate another juriſdiction. Doctr. Pl. 234. Moſtyn v. Fabrigas, Cowp. 172. Earl of Derby v. Duke of Athol, 1 Vez. 203. 2 Vez. 357.

[A plea that the ſuit is of viſitatorial cognizance, muſt ſhew the extent of the viſitor's authority, and aver that he is able to do complete juſtice.] Attorney General v. Talbot, 1 Vez. 78. 3 Atk. 662. S. C. Green v. Rutherforth, 1 Vez. 474. and Rex v. Bland, B. R. M. 14 G. 2. there cited.

See tit. **Courts**, and their Juriſdiction in general.

(B) To the Perſon of the Plaintiff.

1. Of Outlawry.

OUTLAWRY in the plaintiff is a good plea in abatement, for he thereby loſes his *liberam legem*, and is out of the protection of the law; for not having been ameſnable to the law, he ought not to have any privilege or benefit from it. Gilb. Hiſt. C. P. 196, 197. Litt. ſect. 197. Co Litt. 12. But no man ſhall be ſaid to be outlawed till the return of the exigent. *Bro. Nonability*, 25. 28. *Aſſ.* 49. *Dyer*, 222. but for this, *vide* head of *Outlawry*.

But outlawry does not entirely abate the writ, but is only a temporary impediment that diſables the plaintiff from proceeding; for upon obtaining a charter of pardon, or reverſing the outlawry, he is reſtored to his law, and can oblige the defendant to plead to the ſame writ. Co. Litt. 128. Doctr. Plac. 397. Ord. in Ch. 97.

This diſability is only pleadable when the plaintiff ſues in his own right; for if he ſues *in auter droit*, as executor, adminiſtrator, or as mayor with his commonalty, outlawry ſhall not diſable him, becauſe the perſon whom he repreſents has the privilege of the law. Co. Litt. 128. Gilb. Hiſt. C. P. 197. 1 Vern. 184.

Nor when a man brings a writ of error to reverſe an outlawry, ſhall outlawry in that ſuit, or at any ſtranger's, diſable him; for if he were outlawed at ſeveral men's ſuits, and one ſhould be a bar to another, he could never reverſe any of them. Doctr. Plac. 396. for ſuch plea would amount to *exceptio ejuſdem rei cujus petitur diſſolutio*. *Co. Litt.* 128. Ord. in Ch. 97. [But lord Bacon thinks that the plea of another outlawry may be admitted in this caſe; for that the plaintiff in error may avoid the concluſion which it is ſuppoſed would follow from its admiſſion, by bringing a writ of error to reverſe that other outlawry, and replying the pendency of ſuch writ. Bac. Max. Reg. 2.] If there be an attaint brought, outlawry grounded on that verdict cannot be pleaded. 7 *H.* 4. 40. 7 H. 6. 44. Br. Nonabilitie, p. 17. Errour, p. 70.

But when outlawry is pleaded in abatement, the plaintiff ſhall not reply that the outlawry is erroneous, for it is good till reverſed. Lutw. 36. Ord. in Ch. 97.

Gilb. Hiſt. C. P. 198. Stamf. 103. Fitzh. Coron. 233. Co. Litt. 128. b. Lutw. 40. 2 Lutw. 1514. 2 Mod. 214.

As this is a dilatory plea, when it is pleaded in another court than where the outlawry iſſued, the defendant muſt bring it in immediately; for this being in delay, if the Court ſhould give time, and it ſhould not be brought in, the delay of juſtice would be from the Court; and ſince there is a way of having it immediately, by producing it under the great ſeal, no time ſhall be given to bring it *ſub pede ſigilli*; but otherwiſe when it is in the ſame court, for then the record is already in court.

Note; in pleading outlawry in another court in diſability, the ancient way was to have the record of the outlawry itſelf *ſub pede ſigilli* by *certiorari* and *mittimus*; but this being very expenſive, it is now ſufficient to plead the *capias utlagatum*, under the ſeal of the Court, from whence it iſſues; and if the plaintiff replies that there was no judgment on which the *capias utlagatum* was grounded, the Court will give the defendant a day to bring in the record. *Co. Litt.* 128. *Thomp.* 8, 9. Clift. 14. p. 32. Mitf. Eq. pl. 185. If the defendant has a day given him to bring in the record, and in the *interim* the plaintiff removes it by writ of error, and reverſes it; this ſhall not be preremptory on the defendant, but he ſhall have leave to plead a new plea.

3 Lev. 29. Com. 307.

[Outlawry cannot be pleaded without concluding *prout patet per recordum*.

Draycote v. Curzon. Lutw. 40. Atkins v. Bayles, 2 Mod. 267.

An expreſs averment that the plaintiff and perſon outlawed are the ſame perſon is not neceſſary: it is ſufficient if the identity be apparent on the face of the plea.]

Gilb. Hiſt. C. P. 200. Fitzh. Coron. 233.

Outlawry in a county palatine cannot be pleaded in any of the courts of *Weſtminſter*, for the party is only ouſted of his law within that juriſdiction.

12 *Ed.* 4. 16. But it ſeems that outlawry in the county palatine of *Lancaſter* may be pleaded in the courts of *Weſtminſter*; becauſe that county was erected by act of parliament. *Br. Utlag.* 52. 1 *Vent.* 157. Where outlawry may be pleaded in bar, or in abatement, vide tit. Outlawry, D. 3. and infra, L.

Outlawry in a perſonal action goes only to perſonal actions, in reſpect of the perſon; but outlawry in felony goes to actions generally. *Doct. pl.* 397. cites 33 *H.* 6. 19.

See further tit. Outlawry.

2. Excommunication.

Gilb. Hiſt. C. P. 202. Litt. ſect. 201. 8 *Co.* 68. Pr. Reg. in Ch. 277. Where it cannot be pleaded after

When excommunication is pleaded, the biſhop's letter under his ſeal, witneſſing the excommunication, muſt be ſhewn; and though the plaintiff cannot deny the plea, yet the writ ſhall not abate, but the defendant *eat inde ſine die*; becauſe the plaintiff, upon producing his letters of abſolution, may have a re-ſummons or re-attachment.

a general imparlance, though it may after a ſpecial imparlance, *vide* tit. *Imparlance. Plac. Gen.* 10. 9 *E.* 4. 36. *Lutw.* 19. *Latch.* 179. [So in equity, he may, in ſuch caſe, ſue out freſh proceſs, and compel the defendant to anſwer the bill. Mitf. Eq. pl. 187.]

Gilb. Hiſt. C. P. 202, 203. Co. Litt. 134. 42 E. 3. 13. b. Br. Excom. p. 4.

Excommengement is (*a*) a good plea to an executor or adminiſtrator, though they ſue *in auter droit*; for an excommunicate perſon is excluded from the body of the church, and is incapable to lay out the goods of the deceaſed to pious uſes.

Theol. p. 20. (*a*) But in an action brought by the bailiffs and commonalty, the defendant cannot

cannot plead excommengement in the bailiffs, becauſe they ſue as a corporation, and a corporation cannot be excluded from the communion of the viſible church. Gilb. Hiſt. C. P. 204. Theol. p. 20. Excommunication is no plea on a *qui tam*, becauſe it is for example; and the ſtatute having given the informer an ability to ſue, and not excepted excommunicated perſons from the liberty of informing, he is enabled to ſue by the ſtatute, notwithſtanding the cenſures of the church. 12 Co. 61. Gilb. Hiſt. C. P. 203. [Excommunication is no plea to the next friend of an infant. Pr. Reg. Ch. 278.]

When excommunication is pleaded in the plaintiff, he ſhall not reply that he has appealed from the ſentence, for the ſentence is in force until it is repealed; and whilſt it is in force, he cannot appear in any of the courts of juſtice; but he may reply that he is abſolved, for then his diſability is taken away: [But the abſolution muſt be by the ſame biſhop who excommunicated, or by the archbiſhop upon appeal.] Bro. Excom. 3. 3 Bulſt. 72. 20 H. 6. 25. Gilb. Hiſt. C. P. 204. Moor, 775.

When a prohibition is brought againſt a biſhop, and he pleads excommunication againſt the plaintiff, and in the ſentence there is no cauſe of ſuch excommunication ſhewn; this is no good plea, for in ſuch caſe it will be intended that the excommunication was for endeavouring to hinder the biſhop's proceeding by application to the temporal court; and if ſuch excommunication were allowed, it would deſtroy all prohibitions; and the plea of excommunication is in this caſe *exceptio ejuſdem rei cujus petitur diſſolutio.* Theol. 19, 20. 28 E. 3. 97. Ro. Abr. 883. Where the ſentence of excommunication is a nullity; as where the ordinary excommunicates for a temporal offence, the court will write to the biſhop to abſoil him. Bro. Excom. 17.

The court will not (*a*) receive the certificate of excommunication of one biſhop from another, becauſe they muſt have the certificate from the biſhop whoſe proper ſubject the perſon excommunicated was; and he might have been abſoiled by his own ordinary after the firſt certificate to the biſhop. 8 Co. 68. Co. Lit. 134. Roll. Abr. 884. Gilb. Hiſt. C. P. 204.

(*a*) Nor will they receive a certificate of a biſhop deceaſed, becauſe the party may ſtand abſoiled by the preſent ordinary. Br. Excom. 21. Fitz. Excom. 27. It cannot be certified by the biſhop's commiſſary or official, becauſe the court cannot write to them to abſoil him; but it may be certified by the vicar general, when the biſhop is in parts remote; or by one that hath ordinary juriſdiction, and is immediate officer of the king's courts, as the archdeacon of *Richmond*; or by the guardian of the ſpiritualities during the vacancy of the biſhopric. Co. Lit. 134. 8 Co. 68. R. Abr. 884. In times of popery excommengement certified by the pope, or delegates commiſſioned by him, did not diſable the plaintiff; becauſe the court had no perſons to whom they could write to have him abſoiled. R. Abr. 883. [Where the excommunication is by delegates, a certificate of it under their ſeal muſt be produced. Lutw. 17. An excommunication may be certified *per literas teſtamentarias ſub ſigillo*, as well as by direct certificate. 1 Ventr. 222. Mitf. Eq. pl. 186. And in both theſe caſes the certificate muſt be pleaded *ſub ſigillo*, as well in equity as at law. Mitf. Eq. pl. 186.]

[The plea of excommunication muſt ſtate the preciſe time when the party was excommunicated.] Baker v. Gough, Cro. Ja. 82.

3. Alienage.

An alien enemy, or one whoſe king is at enmity with our's, cannot bring any (*b*) action either real, perſonal, or mixt. Co. Lit. 128.

[(*b*) That is, *proprio jure*; for, it ſeems, he may ſue *en autre droit* as executor; nor is it any exception that the teſtator was an alien enemy, unleſs it be ſhewn that he was ſo at the time of his death. And if he be reſident here when he died, the court will intend that he was ſo with the king's licence. Villa v. Dimock, Skin. 370. Lutw. 35.

[And as he cannot ſue directly in his own name, ſo neither can he ſue indirectly in the name of a truſtee. Brandon v. Neſbitt, 6 Term Rep. 23.

Wells v. Williams, Ld. Raym. 282. Salk. 46. Lutw. 34.

But if he comes here under letters of ſafe conduct, or reſides here by the king's licence, he is to be deemed an alien friend in effect, and is entitled to the ſame privileges.]

Co. Lit. 129. b. Yelv. 198. 1 Bulſt. 134.

An alien in league may maintain perſonal actions, otherwiſe he would not be able to merchandize and trade amongſt us; but he ſhall not maintain real or mixed actions, becauſe there is no neceſſity that he ſhould ſettle among us.

Openheimer v. Levy, 2 Str. 1082. Burk v. Brown, 2 Atk. 397.

[It is neceſſary, therefore, in pleading alienage to a perſonal action to aver, that the plaintiff is an alien enemy: when ſo pleaded, the plaintiff, if he has a protection, muſt ſtate (*a*) it in his replication, whether it be general or ſpecial, and ſhould conclude (*b*) with an averment.

(*a*) Fort. 221. 7 Mod. 150. (*b*) Wells v. Williams, Lutw. 34. Ld. Raym. 282.

Salk. 46. 2 Atk. 51.

The old notion that Turks and infidels were perpetually to be conſidered as alien enemies, hath been long exploded; and ſuch aliens may ſue in equity, as well as at law, for a perſonal demand.]

See further, tit. Aliens, (D).

4. Premunire.

Gilb. Hiſt. C. P. 205. Doctr. pl. 10. Co. Lit. 129.

Perſons attainted of a premunire are incapable of bringing any action, for they are out of the protection of the law.

Vid. tit. *Premunire.*

5. Popiſh Recuſancy.

Gilb. Hiſt. C. P. 207. Ld. Raym. 243. 3 Lev. 208. 8 Mod. 43. Lev. Entr. 19.

This diſability of popiſh recuſancy convict, is by virtue of the ſtatute 3 Ja. c. 5. which diſables to all intents, &c. except where he ſues for lands, tenements, leaſes, annuities, rents, and hereditaments, or the iſſues or profits thereof, which are not to be ſeiſed into the hands of the king, his heirs or ſucceſſors.

See the head of *Popiſh Recuſancy*, and 18 G. 3. c. 60.

(C) Of Pleas in Abatement with reſpect to the Perſon of the Defendant; and herein of privileged Perſons.

THE officers of each court enjoy the privilege of being ſued only in thoſe courts to which they reſpectively belong; the reaſon whereof is, becauſe of the duty they are under of attending thoſe courts, and leſt their clients cauſes ſhould ſuffer if they were drawn to anſwer to actions in other courts. 2 Mod. 297. Vaugh. 155. 2 H. 7. 2. 2 Roll. Abr. 272. Lut. 44. 639. 2 Inſt. 551.

4 Inſt. 71, 72. Crom. Jur. Courts, 11. Gilb. Hiſt. C. P. 209. 212. What perſons are privileged, *vide* head of *Privilege*, and for precedents of pleas of privilege, *vide* Thomp. 4. Rob. Ent. 199. Raſt. Ent. 106. 178. 472. Brownl. 161. 167, 168. Hern. 3. 3 Inſt. Clericalis, 32 to 35. Where they are not obliged to put in ſpecial bail; and where bail muſt be put in when they ſue, *vide* head of *Bail* in civil cauſes.

[Whenever therefore an attorney is ſued out of his own court, he may ſay that he is attorney, &c. of another court, and conclude with *unde non intendit quod cur', &c. hic placit' prædict. verſus eum cognoſcere velit aut debeat, &c.* But the plaintiff may reply that he is a huſbandman, &c. in the country, and traverſe his being an attorney. Lutw. 44. 639. Br. Traverſe, 27.

This privilege is not the privilege of the officers, but of the ſuitors, and attendance is the ground and foundation of it; it muſt therefore be alleged that the officers are actually attendant in their reſpective courts, otherwiſe the plea will be diſallowed.] 2 Wilſ. 42. 228. 1 Str. 546. 4 Bur. 2109. Andr. 45.

But the plaintiff muſt have the ſame remedy againſt the officer in his own court, as in that where he ſues him; for if money be attached by foreign attachment in the ſheriff's court of *London*, he ſhall not have his privilege; becauſe in that caſe the plaintiff would be remedileſs. Sand. 67, 68. Turvill's caſe. Gilb. Hiſt. C. P. 209, 210. Sid. 362. 2 Keb. 346. pl. 24. 2 Leon. 156. pl. 190.

So if a writ of entry, or other real action, be brought againſt an attorney of the *King's Bench*, he cannot plead his privilege; becauſe if this ſhould be allowed, the plaintiff would have a right without a remedy; for the *King's Bench* hath not cognizance of real actions. Sand. 67. Gilb. Hiſt. C. P. 210. So if an attorney of the Common Pleas be ſued

in an appeal, he ſhall not have his privilege; for his own court hath no cognizance of this action; nor if ſued as *bail*. Rep. and Caſ. Pract. C. P. 64. Gilb. Hiſt. C. P. 110.

[The juriſdiction of the court of conſcience for *Weſtminſter* extends to attornies; but not that of the county-court of *Middleſex*: and a defendant who reſides within the juriſdiction of this laſt court is not entitled to the benefit of the ſtatute of 25 G. 2. c. 33., if the plaintiff is an attorney.] Gardner v. Jeſſop, 2 Wilſ. 42. Wiltſhire v. Lloyd, Dougl. 381. Huſſey v. Jordan, *ibid.* *Vid. contr.* Silk v. Kennet, 3 Burr. 1583. and 382. notes.

Hob. 177. Gage's caſe. Gilb. Hiſt. C. P. 211. 2 Roll. Abr. 275. pl. 23. Noy, 68.

The privilege which the court indulge their officers with, is reſtrained to thoſe ſuits only which they bring, or which are brought againſt them in their own right; for if they ſue or are ſued as executors or adminiſtrators, they then repreſent common perſons, and are to have no privilege.

17 Vin. Abr. 517. pl. 2. Vent. 299. Godb. 10. pl. 13. Dy. 377. pl. 30. Latch. 199. Brownl. 37. 47. 12 Mod. 316. Ld. Raym. 533. Salk. 2. pl. 4. 7. pl. 18. 2 Sid. 157. Dy. 24. 150. in marg. Sav. 20. pl. 49.

Gilb. Hiſt. C. P. 211. Godb. 81. pl. 95. Brownl. 37. 2 Bl. Rep. 1325.

So if an officer of one court ſue an officer of another court, the defendant ſhall not have his privilege; for the attendance of the plaintiff is as neceſſary in his court, as that of the defendant in his; and therefore the cauſe is legally attached in the court where the plaintiff is an officer (*a*).

[(*a*) If privilege be pleaded to privilege, the court will not determine it on motion to ſet aſide the plea, but oblige the party to demur. 2 Str. 837. 1 Bl. Rep. 34.]

Gilb. Hiſt. 212. Dyer, 377. p. 30. Godb. 10. 2 Roll. Abr. 275. 2 Lev. 129. Vent. 298, 9.

So if a privileged perſon bring a joint action, or if an action be brought againſt him and others, he ſhall not have his privilege: but this is to be underſtood where the action is joint, and cannot be ſevered; for if the action can be ſevered, without doing any injury, the officer ſhall have his privilege. Q.

Mitf. Eq. pl. 183. Vin. Abr. tit. *Univerſity*, (K.) p. 3. (*b*) Hutton, 59.

[So in equity, if a ſuit be inſtituted againſt different perſons, ſome of whom have privilege, and ſome not, (*b*) or if one defendant be not ameſnable to the particular juriſdiction, the plea of privilege will not be allowed.]

Forteſc. 342. Bro. Superſed. 1. 2 Roll. Abr. 274. Gilb. Hiſt. C. P. 208.

An officer ſhall not have his privilege againſt the (*c*) king; for as the executive power is lodged in the king, it would be unreaſonable that his court, which gives relief to private perſons, ſhould protect any ſubject from being brought to juſtice for offending againſt the laws, which concern the whole commonwealth.

(*c*) But in an action, *qui tam*, at the ſuit of an informer, he ſhall have his privilege. Lil. Reg. 7. 3 Lev. 398. Lutw. 193.

(*d*) But if he be *in cuſtodiâ mareſchal.* at the ſuit of *A.*, and *B.* declares againſt him in *cuſtodiâ mareſchal.* if he has waved his privilege as to *A.*, he cannot take advantage of it againſt *B.* For this *vide* 2 Roll. Abr. 275. pl. 7. Salk. 1. pl. 3. 5 Mod. 310. 3 Lev. 343. Ld. Raym. 135.

If an attorney of the *Common Pleas* be *in cuſtodiâ mareſch.* for want of bail, at the ſuit of *A.*, he may (*d*) plead his privilege.

Bro. Priv. 25. 22 H. 6. 7. Sid. 29. Hard. 365. Lutw. 46. Salk. 1. Str. 522.

After a general imparlance, an officer cannot plead his privilege, becauſe by imparling he affirms the juriſdiction of the court; but by the better opinion it ſeems, that after a ſpecial imparlance (*e*) he may plead his privilege.

[(*e*) By a ſpecial imparlance, in this caſe, muſt be underſtood a general ſpecial imparlance. *Vide ſupra*, (A), notes. Plea of privilege without affidavit ſet aſide. 2 Str. 738. It muſt be pleaded; it cannot be allowed on motion. 2 Salk. 544. 1 Wilſ. 306.]

2 Bl. Rep. 1085. Croſley v. Shaw.

[An attorney who is arreſted by capias on a ſpecial original out of the ſame court, is not entitled to his diſcharge on ſerving the ſheriff with a writ of privilege, but muſt plead the privilege in abatement.

He

He may plead it as well to an action on a bill of exchange, as to any other perſonal action. Comerford v. Price, Dougl. 312.

An attorney has not any privilege to be ſued in Middleſex only; it is enough that he be ſued in his own court.] Forteſc. 343, 344. 4 Burr. 2027.

In an action againſt *B.* he pleaded *quod ipſe eſt unus attornat. cur. domini regis de B.* without ſaying *fuit tempore impetrationis brevis*; and a *reſpondeat ouſter* was awarded. Salk. 1. pl. 2. Peaſe v. Parſons.—Privilege ſhould be pleaded—*prout patet per recordum.* Ibid.

See further tit. **Attorney** and **Privilege.**

(D) Of Miſnomer, and want of Addition.

MISNOMER is a good plea in *abatement*; for ſince names are the only marks and *indicia* of things which human kind can underſtand each other by, if the name be omitted or miſtaken, there is a complaint againſt nobody (*a*). [(*a*) It is pleadable only in abatement. 2 Bl. Rep. 1120.]

But though a defendant may, by pleading in *abatement*, take advantage of a *miſnomer* when there is a miſtake in the writ or declaration, as to the name of baptiſm or ſurname; yet in ſuch a plea he muſt ſet forth his right name, ſo as to give the plaintiff a better writ (*b*). Finch. 363. 9 H. 5. 1. pl. 3. Where his appearing by that name, or not taking advantage of it, ſuch miſtake will be aided, *vide* tit. *Error*. *Vide Yelv.* 112. Muſt, in ſetting forth his name, ſay, that by ſuch name he was known at the time of the writ purchaſed. *Skin.* 620. *pl.* 17. *Vide Salk.* 7. *pl.* 17. *Gouldſ.* 86. [(*b*) So if he plead a miſtake in the addition, he muſt ſet forth his right addition. 2 *Str.* 816. 10 *Mod.* 208. 2 *Ld. Raym.* 1178. 1541.]

One defendant cannot plead *miſnomer* of his companion; for the other defendant may admit himſelf to be the perſon in the writ. Lutw. 36.

The defendant, though his name be miſtaken, is not obliged to take advantage of it; and therefore if he be empleaded by a wrong name, and afterwards empleaded by his right name, he may plead in bar the former judgment, and aver that he is *una & eadem perſona.* 2 Str. 1218. J. Villars, who pretended himſelf to be earl of Buckingham, was arreſted by the name of *J. Villars, armiger*; and on motion, the Court gave him leave to put in bail, without joining in the recognizance, and thereby not eſtop himſelf. *Vide Salk.* 3. *pl.* 7. *Ld. Raym.* 64. 249. 7 *Mod.* 38. *Str.* 205. 2 *Str.* 811.

In caſe of felony at common law, if a perſon were indicted by a wrong name, he could not plead *miſnomer*, but was obliged to plead to the felony; for the fact being ſworn againſt the party preſent, it was thought that there could be no injury by the *miſnomer*, as there might be, where the party appeared by attorney; and felons generally go by no certain name, nor have they any fixed habitation. *Vide Cro. Car.* 104. 21 *E.* 4. 72. 2 *Inſt.* 670. *Sid.* 40. *Lit. Rep.* 8. *Vide* head of *Miſnomer*, and *Addition*, and 2 *Hawk. P. C.* 186, 7. that the party accuſed may take advantage of *miſnomer*, or *the want of addition*, but yet muſt plead over to the felony; but though ſuch plea be found for him, he is not to be diſcharged, but muſt be indicted over again; neither ſhall ſuch plea, if found againſt him, be peremptory, but he ſhall be tried on his plea in chief.

But

But it is now neceſſary to ſet forth the ſtate, place of abode and dignity of the perſon empleaded, leſt an innocent perſon, by having the ſame name with the real defendant, ſhould ſuffer; therefore the 1 *H.* 5. *c.* 5. enacts, That in all perſonal actions, appeals, and indictments, there ſhall be added to the names of the defendants their eſtates, degrees, myſtery, and place of abode.

(*a*) Miſtakes in ſuch additions are good objections in abatement

Additions (*a*), which are inducements to the action, muſt be made uſe of; as if one is liable as heir, he muſt be named heir; ſo if as executor, he muſt be named ſuch.

both at law and in equity. Raſt. 324. 11 H. 7. 11. Mitf. Eq. pl. 192. Pr. Reg. 278.

See further tit. Miſnomer and Addition, E. F.

(E) Of Abatement by the Demiſe of the King.

Proceedings on an information, in nature of a *quo warranto*, are not abated by the demiſe of the crown. 2 Stra. 782. Where the king brings a writ of error in *quare impedit*, it abates by his death.

AT common law all patents of juſtices, commiſſions civil and military, were determined by the death of the king; and all ſuits depending in the king's courts were diſcontinued, ſo that the plaintiffs were obliged to commence new actions, or to have reſummons or attachment on the former proceſſes, to bring the defendants in; but to prevent the inconvenience, expence, and delay, which this occaſioned, were the ſtatutes of 1 *E.* 6. *cap.* 7. 7 & 8 *W.* 3. *cap.* 27. *ſ.* 21. and 1 *Ann. ſt.* 1. *cap.* 8. *ſect.* 5. made, which *vide* under title Courts, and their Juriſdiction in general, C.

2 *Str.* 837. *Fort.* 213. *Fitzgib.* 35, 36.

Scire facias to repeal a grant of a market, is an original writ, and within the general words of the ſtatute 1 *E.* 6. *c.* 7. and 1 *Ann. c.* 8. and does not abate. *Stra.* 43.

(F) Of Abatement by the Death of Parties.

HERE the general rule (*a*) to be obſerved is, that wherever the death of any party happens pending the writ, and yet the plea is in the ſame condition as if ſuch party were living, there ſuch death makes no alteration; for where the death of the parties makes no change of proceedings, it would be unreaſonable that the ſurviving parties ſhould make any alteration in the writ; for if ſuch writ and proceſs were changed, it would ſet rights but in the ſame condition they were in at the death of the parties; and it would be abſurd that what made no alteration ſhould change the writ and the proceſs: and on this rule all the diverſities turn.

3 Mod. 244. 2 Vent. 196.

[(*a*) The rule in a court of equity in this reſpect, is ſimilar to that which is here ſtated to prevail at law. If the intereſt of a party dying ſo determines that it can no longer affect the ſuit, and no perſon becomes entitled thereupon to the ſame intereſt, the ſuit does not abate. Or if the intereſt of a party dying ſurvives to another party; as, if a bill is filed by or againſt truſtees or executors, and one dies; or by and againſt huſband and wife in right of the wife, and the huſband dies, the proceedings do not abate. So if a ſurviving party can ſuſtain the ſuit, as in the caſe of ſeveral creditors plaintiffs on behalf of themſelves and other creditors. For the perſons remaining before the Court in all theſe caſes, either have in them the whole intereſt in the matter in litigation, or at leaſt are competent to call upon the Court for its decree. Mitf. Eq. pl. 56. 3 Ch. Rep. 40. 2 Vern. 249. 3 Atk. 726.]

The firſt difference is in real actions, where there are ſeveral plaintiffs, and there is ſummons and ſeverance, as there is in moſt real actions, *there* the death of one of the parties abates the writ; but in perſonal and mixt actions, (where one entire thing is to be recovered,) *there* the death of the parties does not abate the writ; and the reaſon of the difference is, that where there are two joint tenants, and the one goes on to recover his moiety, and the other will not proceed, there is no reaſon that he who is willing ſhould not recover his right, ſince ſuch tenant has a diſtinct moiety, and therefore ſhould have an action to recover. But no ſummons or ſeverance lies in perſonal actions, as if treſpaſs be committed on ſuch joint tenants, they muſt both join in the action; for as one may releaſe the whole, ſo the other may refuſe to go on, and his companion cannot recover his part of the damage without him: ſo in debt on an obligation to two there can be no ſummons and ſeverance, becauſe one of the joint obligees may releaſe the bond: but if a man appoints two his executors, there ſhall be ſummons and ſeverance, becauſe one of the executors may releaſe; yet ſuch a releaſe is a *devaſtavit* in him; but if he will not proceed at law, it is no *devaſtavit*; and therefore both executors being only truſtees for the perſon deceaſed, they ſhall not be compelled to go on together: but if one refuſes, the other may bring his action in the name of both, and have ſummons and ſeverance; for otherwiſe each executor might by colluſion with the debtor, and not proceeding, keep the other from recovering the aſſets, and yet not create a *devaſtavit* in himſelf. But after ſuch ſummons and ſeverance he does not proceed for the moieties as in real actions, but he proceeds as the ſole repreſentative of the teſtator, and is entitled to the whole the teſtator was in his lifetime.

Cro. Eliz. 982. Co. Lit. 139. Cro. Jac. 117. 10 Co. 134. Jon. 452. 6 Co. 26.

From

Co. Lit. 139. From theſe premiſes it follows, that if there be two jointenants or copartners, and they bring a real action, and one be ſummoned and ſevered, the other ſhall proceed for his moiety; and if the perſon ſevered die, the writ abates, becauſe he goes for the whole, in caſe of the death of the jointenant, or of the copartner without iſſue; and it would be improper to do it on that writ, where by the ſummons and ſeverance he went only for a moiety before; and the writ cannot have a double effect, for a moiety in caſe of ſummons and ſeverance, and for the whole in caſe of ſurvivorſhip; and therefore ſince the nature of things is changed by the death of one of the parties, there muſt be another writ: and it is the ſame law, if ſuch jointenants proceed without ſummons or ſeverance; for ſince both by the writ might by poſſibility recover their moieties, they ſhall not go on for the whole in caſe of ſurvivorſhip; becauſe the words and effect of the writ at the time of its firſt purchaſing were, that each might recover his moiety, and therefore a new writ muſt be purchaſed to enable one to proceed for the whole: but in perſonal and mixed actions, where there is ſummons and ſeverance, and yet after ſuch ſummons and ſeverance the plaintiff goes on for the whole, *there*, if one of them die, the writ ſhall not abate, becauſe he goes on for the whole after ſummons and ſeverance; and if he were to have a new writ, it would only give the Court authority to go on for the whole.

Cro. Eliz. 652. Leon. 44. Therefore if there be two executors, and they bring an action of debt, and one of them is ſummoned and ſevered, or not, and ſuch ſevered perſon dies, yet the writ ſhall not abate.

Co. Lit. 139. So if two jointenants bring a writ of ward, and they are ſummoned and ſevered, and the ſevered perſon die, the writ ſhall not abate; becauſe after ſuch ſeverance he went on for the whole, and ſo he does after the death.

Dyer, 279. So in a *quare impedit* by two jointenants, and one ſummoned and ſevered; if the ſevered perſon die, the writ ſhall not abate; becauſe the advowſon is an entire thing, and the ſurvivor proceeded for the whole after the ſeverance, and ſo he may after the death.

20 Co. 134. Co. Lit. 139. In (*a*) judicial writs the ſuit ſhall not abate by death, if the perſon ſurviving be entitled to the whole; as if a fine be levied by two coparceners, and one of them die without iſſue, proceedings ſhall go on for the other, becauſe he is entitled to the whole by ſurvivorſhip; but if the other coparcener have iſſue, then the writ ſhall abate, for the ſurvivor is only entitled to a moiety: for there is no ſummons and ſeverance in judicial writs.

(*a*) But ſhall abate in a *ſci. fa.* being an original writ. Brownl. 64. but not upon a writ of inquiry. Leon. 263.

20 H. 6. 30. 18 E. 4. 1. 2 H. 7. 16. Brownl. 3, 4. Clift. Ent. 6. Raſt. Ent. 126. But if there be ſeveral perſons named as plaintiffs in the writ, and one of them was dead at the time of purchaſing the writ, this may be pleaded in abatement; becauſe it falſifies the writ, and becauſe the right was in the ſurvivors at the time of ſuing the writ, and the writ not accommodated, as the caſe then was.

But

But if an erroneous judgment be given againſt two, either of them may bring a writ of error, and he may ſummon and ſever the other; for it would be unreaſonable that the one ſhould not diſcharge himſelf of an erroneous judgment becauſe the other will not intermeddle; and default of one in a perſonal action ſhall not prejudice the other. 26 Aſſ. p. 25. Br. Summ. & Sev. 19.

If there be ſeveral defendants in the original action, and one die, the writ does not abate, becauſe there being a joint demand, it ſurvives againſt the reſidue; but if one happen to die pending the writ, there muſt be a ſuggeſtion on the roll, becauſe it would be error to give judgment againſt a dead perſon. Cro. Car. 426. Jon. 367. Sid. 299. Hard. 151. 161. 1 Show. 186.

In a writ of error, if there be ſeveral plaintiffs, and one die, the writ ſhall abate; becauſe the writ of error is to ſet perſons *in ſtatu quo* before the erroneous judgment was given; and the plaintiffs in error are diſtinct ſufferers in the judgment, ſince there might be different executions iſſued thereupon, and different liens were made by ſuch judgment on the lands of each of them; and by conſequence the ſurvivor cannot proſecute the writ of error for the whole, leſt by colluſive perſuaſion, or by negligence, he ſhould hurt the repreſentative of the deceaſed. Yelv. 208. 212. 213. Ventr. 34. Contr. Sid. 419. [But ſee Penoyer v. Brace, Ld. Raym. 244. where the doctrine advanced in the text is admitted by the Court.]

But if any of the defendants in error die, yet all things ſhall proceed; becauſe the benefit of ſuch judgment is to go to the ſurvivor, and he only is to defend it. Sid. 419. Ld. Raym. 244.

In an audita querela by two, the death of one ſhall not abate the writ; for the ſurvivor is not to be reſtored to any thing that he has loſt, but only to diſcharge himſelf of the execution; and thereupon notwithſtanding the death of the other, he may proceed for a diſcharge in toto for himſelf. Theol. 139. 3 H. 7. 1. 3 Mod. 249.

[Upon the ſame principle it was holden, that a prohibition by huſband and wife to a ſuit in the ſpiritual court did not abate by the death of the huſband. Middleton and Wife v. Crofts, Andr. 57. Caſ. Temp. Hardw. 395.

The death of the leſſor of the plaintiff in ejectment (though only tenant for life) is no abatement. 2 Str. 1056.

A fieri facias doth not abate by the death of the plaintiff *after* the ſeizure of the goods, for by the ſeizure the property is changed. But if the goods ſeized are not ſufficient to ſatisfy the debt, a ſecond fieri facias cannot iſſue without a revivor of the judgment. (*a*) An extent abates where the death happens *before* the *liberate*; for until that is awarded, the execution is incomplete. So a ſequeſtration to compel performance of a decree, when the party dies before order for ſale of the goods. Clerk v. Withers, 2 Ld. Raym. 1072. 1 Salk. 322. S. C. 6 Mod. 290. S. C. (*a*) Wharam v. Broughton, 1 Vez. 180.

A ſuit for partition of lands is not abated by the death of one of the tenants. Nor is a ſuit on the ſtatute of hue and cry, commenced in the name of the clerk of the peace, abated by his death or removal. 8 & 9 W. 3. c. 31. ſ. 3. 27 Eliz. c. 13. ſ. 3.

If the plaintiff or defendant die whilſt the Court are conſidering of their judgment, they will permit the judgment to be entered 1 Burr. 147. 219. 4 Burr. 2277. Bates

v. Lockwood, 1 Term. Rep. 637.

tered up as of the term in which it *regularly* might have been; ſo perhaps, if there be any frivolous delay by the other party; but where the proceedings are in the common courſe of law, they cannot interfere.

Sir Thomas Waller v. Manger, 2 Bulſtr. 261. Morby v. Urlin, Hardr. 161.

An information does not abate by the death of the attorney-general; nor by the death of a relator who proſecutes for the king; (*a*) nor, it ſeems, by the death of an informer, qui tam, &c. for in ſuch caſe the attorney-general may proceed for the king's moiety.

(*a*) Hammon v. Gryffith, Cro. El. 583. Anon. Moor. 541.

Mitf. Eq. pl. 91. Pr. Ch. 13. 2 Eq. Caſ. Abr. 1. 1 Vez. 71. 2 Vez. 327.

The proceedings upon an information in equity can only *abate* by the death or determination of intereſt of the defendant. But if there are ſeveral relators, the death of any of them, while there ſurvives one, will not in any degree affect the ſuit: but if all the relators die, or if there is but one, and that relator dies, the Court will not permit any further proceeding till an order has been obtained for liberty to inſert the name of a new relator, and ſuch name is inſerted accordingly; otherwiſe there would be no perſon liable to pay the coſts of the ſuit, in caſe the information ſhould be deemed improper, or for any other reaſon ſhould be diſmiſſed.

Eq. Caſ. Abr. 2. p. 7.

The benefit of a decree in equity may be had, notwithſtanding the death of ſome of the parties, provided that nothing be requirable of their repreſentatives.

1 Vern. 351.

After a cauſe has been heard on a bill of interpleader, and a trial at law has been directed to ſettle the right between the defendants, the death of the plaintiff does not abate it, for his intereſt is at an end.]

Continued by 30 Car. 2. c. 6. and made perpetual by 1 Ja. 2. c. 17. ſ. 5.

By the 17 Car. 2. c. 8. it is enacted, "That in all actions perſonal, "real, or mixt, the death of either of the parties (*b*) between "verdict and judgment ſhall not be alleged for error, ſo as ſuch "judgment be (*c*) entered within two terms after ſuch verdict."

(*b*) If either of the parties die at any time before the aſſizes, it is out of the ſtatute; but if after the aſſizes begin, though before trial, it is no error; for the aſſizes are but one day in law. [And in the former caſe the Court ſaid that it was in their diſcretion whether they would arreſt the judgment. Salk. 8. p. 21. But in Lord Raym. 1415. it was holden not aſſignable for error, it being ſtated on the record that the defendant appeared *per attornatum ſuum.*] (*c*) If after verdict, and before the day in Bank, the plaintiff dies, and the defendant ſigns judgment the ſecond term after the verdict, this is within the ſtatute, and the ſame as if he had actually entered judgment on the roll. Sid. 385. [Judgment entered according to this ſtatute, after the plaintiff's death, ſhall relate in all reſpects to his life. 1 Lev. 278. Raym. 210. Where the jury found a ſpecial verdict, and the plaintiff died in the term in which it was to be argued, the judgment was by conſent entered up as of the firſt day of that term. Pond v. King, 1 Wilſ. 124. Where the plaintiff dies between the verdict and the entry of the judgment, his repreſentative cannot take out execution without a *ſcire facias.* Earl v. Brown, 1 Wilſ. 302.]

Attorney General v. Buckley, Parker, 264.

[An information for a penalty under the French act was adjudged not to be within this ſtatute, but to abate by the death of the defendant between the verdict and the judgment; for, in the firſt place, it is not an action real, perſonal, or mixt; ſecondly, the king cannot be properly ſaid to be a party; thirdly, it is not a duty, or in lieu of cuſtoms, or any revenue of the crown; and laſtly, actions do not comprehend informations between party and party,

party, or include the king. A ſuggeſtion of the death upon the roll confeſſed by the attorney-general was thought ſufficient without a writ of error.

The rule laid down by the Lord Chief Baron Gilbert in the preceding part of this chapter reſpecting the non-abatement of a ſuit by the death of any of the plaintiffs or defendants, when ſuch death made no alteration in the proceedings, though founded in reaſon, was not uniformly ſupported by authorities, but the aid of the legiſlature was requiſite for the purpoſe of enforcing it; accordingly, it was enacted by the 8 & 9 W. 3. c. 11. ſ. 7. 'That if there be two or more plaintiffs or defendants, and one 'or more of them ſhould die, if the cauſe of action ſurvived to 'the ſurviving plaintiff or plaintiffs, or againſt the ſurviving de-'fendant or defendants, the writ or action ſhould not be thereby 'abated; but ſuch death being ſuggeſted on the record, the action 'ſhould proceed at the ſuit of ſuch ſurviving plaintiff or plaintiffs 'againſt ſuch ſurviving defendant or defendants.

The formal ſuggeſtion of the death need be only on the plea-roll; nothing more is neceſſary on the niſi prius roll than merely to point out to the judge what he is to try, and between whom. Farr v. Denn, 1 Burr. 362.

Although the ſtatute make mention only of *actions at law*, yet it hath been conſtrued to prevent the abatement of a ſuit in equity, provided that the ſubject matter of the ſuit be not affected by it.] Brown v. Higden, 1 Atk. 291.

'By the laſt mentioned ſtatute, ſ. 6. it is enacted, That if any 'plaintiff happen to die after an interlocutory judgment, and be-'fore a final judgment obtained therein, the ſaid action ſhall not 'abate by reaſon thereof, if ſuch action might originally be proſe-'cuted or maintained by the executors or adminiſtrators of ſuch 'plaintiff; and if the defendant die after ſuch interlocutory judg-'ment, and before final judgment therein obtained, the ſaid ac-'tion ſhall not abate, if ſuch action might originally be proſecuted 'or maintained againſt the executors or adminiſtrators of ſuch de-'fendant; and the plaintiff, or if he be dead after ſuch interlocu-'tory judgment, his executors or adminiſtrators, ſhall and may 'have a *ſcire facias* againſt the defendant, if living after ſuch in-'terlocutory judgment; or if he died after, then againſt his exe-'cutors or adminiſtrators, to ſhew cauſe why damages in ſuch ac-'tion ſhould not be aſſeſſed and recovered by him or them; and 'if ſuch defendant, his executors or adminiſtrators, ſhall appear 'at the return of ſuch writ, and not ſhew or allege any matter 'ſufficient to arreſt the final judgment; or being returned 'warned, or upon two writs of *ſcire facias* it be returned, that the 'defendant, his executors or adminiſtrators, had nothing where-'by to be ſummoned, or could not be found in the county, ſhall 'make default, that thereupon a writ of inquiry of damage 'ſhall be awarded, which being executed and returned, judg-'ment final ſhall be given for the ſaid plaintiff, his executors or 'adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias*, 'againſt ſuch defendant, his executors or adminiſtrators reſpec-'tively.'

[Where a defendant died before the expiration of the time to plead under a judge's order, it was holden that the plaintiff could not, under this act, ſign judgment, and ſue out a ſcire facias thereon. 1 Wilſ. 315. Wallop v. Irwin.]

Turner v. Cowper, Barnes, 210.

[Where plaintiff died after a rule by conſent to refer to prothonotary, and before the report, the Court allowed his executor to be made a party to the rule, and directed the prothonotary to proceed without the defendant's conſent.]

(G) By Reaſon of Coverture.

Doct. Pl. 3. Sid. 410. Leon. 168, 169. Vide tit. Baron and Feme. In an action againſt baron and feme, the baron died, and the feme married again *pendente placito*; and the Court inclined to think the writ abated, becauſe her name was changed. *Stile*, 138. [But 2 *Ld. Raym.* 1525. 2 *Str.* 811. *Barnard. K. B.* 70. are all expreſs, that coverture in the defendant after action brought cannot abate plaintiff's writ. See too, to the ſame effect, 2 Rolle's Rep. 53.] (*a*) Vide infra.

COVERTURE is a good plea in *abatement*, which may be either before the writ ſued, or pending the writ. By the firſt the writ is abated *de facto*, but the ſecond only proves the writ abateable; both are to be pleaded, with this difference, that coverture pending the writ muſt be pleaded *poſt ultimam continuationem*; whereas coverture before the writ brought may be pleaded at any time, (*a*) becauſe the writ is *de facto* abated; but if a feme ſole takes out a writ, and after marries, the defendant was legally attached on ſuch ſuit; and therefore may plead in chief to it any defence he has.

Fitz. Brief, 476.

If a writ be brought by *A.* and *B.* as baron and feme, whereas they were not married until the ſuit depended, the defendant may plead this in *abatement*; for though they cannot have a writ in any other form, yet the writ ſhall abate, becauſe it was falſe when ſued out.

Latch, 24. Stile, 254. 280. 2 Rol. Rep. 53. [The plea of coverture, whether in plaintiff or defendant, can only be in abatement, Milner v. Milnes, 3 Ter. Rep. 627. See tit. Baron and Feme.]

If a writ be brought againſt a feme covert as ſole, ſhe may plead her coverture; but if ſhe neglect to do it, and there be a recovery againſt her as a feme ſole, the huſband may avoid it by writ of *error*, and may come in at any time and plead it.

Salk. 8. pl. 20. Hetherington v. Reynolds. Gilb. Hiſt. C. P. 245. [(*b*) But the plea of coverture in this caſe hath been diſallowed. Haddock v. Howard, Barnes, 355.]

If an action be brought in an inferior court againſt a feme ſole, and pending the ſuit ſhe intermarry, and afterwards remove the cauſe by *habeas corpus*, and the plaintiff declare againſt her as a feme ſole, ſhe may plead coverture (*b*) at the time of ſuing the *habeas corpus*, becauſe the proceedings here are *de novo*, and the Court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the Court will grant a *procedendo*; for though this be a writ of right, yet where it is to abate a rightful ſuit, the Court may refuſe it; and the plaintiff had bail below to this ſuit, which by this contrivance he is ouſted of, and poſſibly by the ſame means of the debt.

Cro. Car. 132. 1 Bulſt. 5.

If a feme ſole plaintiff, after the verdict, and before the day in Bank, takes huſband, ſhe ſhall have judgment, and the defendant cannot plead this coverture, for he has no day to plead it at.

1 Vez. 182.

[In equity, a ſuit does not abate by the marriage of a female defendant, but the plaintiff may proceed, only entering the name of the huſband and wife in the ſubſequent proceedings.

Though a ſuit in equity regularly become abated by the marriage of a female plaintiff, yet if ſhe afterwards proceed in the ſuit as a feme ſole, the mere want of a bill of revivor is not error upon which a decree can be reverſed upon a bill of review by the defendant (*a*). And if the huſband die before revivor, ſhe may proceed without it, for then her incapacity to proſecute the ſuit is removed; but the ſubſequent proceedings are in the name and deſcription ſhe has acquired by the marriage.]

Lady Cramborne v. Dalmahoy, 1 Ch. Rep. 231.

(*a*) Godkin v. Earl Ferrers, 1772, cited in Mitf. Eq. Pl. 57.

(H) By a Defect in the Writ.

THE foregoing objections, ſuch as want of juriſdiction, diſability in the plaintiff, or privilege in the defendant, *&c.* being matters *dehors*, muſt be ſhewn to the Court, and muſt be pleaded in proper time and manner; but for defects in the writ itſelf the Court may *ex officio* abate it.

And herein we muſt obſerve, that the law hath been very ſtrict in obliging men to keep to the legal forms it preſcribes; and therefore in the writ, which is the foundation of the whole proceeding, requires ſuch certainty and exactneſs, as that no perſon be arreſted or attached by his goods, unleſs there appear ſufficient grounds to warrant ſuch proceedings; ſo that if the writ vary materially from that in the regiſter, or be defective in ſubſtance, the party may take advantage of it.

9 H. 7. 16. 10 E. 3. 1. pl. 2. 2 Inſt. 662. Hob. 1. 51, 52. 84. Carth. 172. Cro. Jac. 576-7.

But though the writ vary from the regiſter, yet if it be warranted by the modern precedents, this ſhall not abate it.

Hob. 84.

(I) By the Writ's not agreeing with the Count.

IF the count or declaration varies in form, the defendant may plead it in abatement (*b*), for the plaintiff has abated his own writ by proſecuting it in a different manner; but if it varies in ſubſtance, the defendant may move it in arreſt of judgment, becauſe the Court has no authority to proceed, a different matter being proſecuted from that which the writ has given authority to the Court to take cogniſance of.

Cro. Eliz. 722. Cro. Jac. 651. Jon. 304.

[(*b*) The defendant cannot plead a variance between the writ and count, without praying oyer of the writ, and ſhewing it to the Court. 2 Wilſ. 85. 395.]

The declaration varying from the writ (*c*), as by laying the cauſe of action in the reign of a preſent king, where the writ ſuppoſed it to have been in the reign of a former king, or by giving the defendant a name different from that in the writ (*d*); as where the writ calls him *A. B.* of *London*, alderman, and the plaintiff declares againſt him, as *A. B.* of *London*, Eſq.; or where the declaration is otherwiſe defective in not purſuing the writ, or not ſetting forth the cauſe of action with that certainty the law requires, or in (*e*) laying the offence in a different county from that in which the writ was brought; in all ſuch caſes the defendant may plead in abatement.

(*c*) Fitz. *Brief*, 219. 231.

(*d*) Yelv. 120. Finch of Law, 357. Latch. 173.

(*e*) Allen, 17, 18.

Doct. Pl. 84. & *plus* under the division of the declaration's agreeing with the writ. Tit. Pleader.

But the writ may in ſome caſes be general, and the declaration ſpecial; as where a ſtatute gives an action, but does not preſcribe any form of the writ, the writ framed by the common law will ſerve, and the ſpecial matter may be ſet forth in the declaration.

14H. 6. 14. 2 And. 97.

If a feme ſole be diſſeiſed, and afterwards marry, and ſhe and her huſband bring an aſſize; the diſſeiſin muſt be alleged to be done to the wife: but if a feme diſſeiſoreſs marry, in an aſſiſe againſt them, the diſſeiſin ſhall be alleged to be done by them both, becauſe there is no other form of writ.

(K) Where the Writ is abated *de facto*, or is only abateable.

2 H. 6. 4. Doct. Pl. 3. (*a*) But ſee Milner v. Milnes, ſupra, (G).

HERE the general rule to be obſerved is, that where the writ is *de facto* a nullity and deſtroyed, ſo that judgment thereupon would be erroneous, there the writ is *de facto* abated; as if an action be brought againſt a feme covert as ſole, this makes another man's property liable without giving him an opportunity of defending himſelf; which would be contrary to common juſtice, and therefore the writ is *de facto* abated (*a*).

Carth. 172. But in this caſe the Court gave leave to amend. 2 Lev. 197.

So if the return of a *pluries mandamus* be laid to be after the beginning of a term, and the *memorandum* of the bill be entered generally of that term, this makes the writ a perfect nullity; for by the plaintiff's own ſhewing he had no cauſe of action at the time when the action was brought.

Br. Office, &c. p. 16. 22 E. 4. 23. (*b*) 10 E. 4. b. (*c*) 3 Burr. 1592. 4 Term Rep. 495.

[So if the matter in queſtion appear to be *excluſively* of eccleſiaſtical cognizance; (*b*) or if an appeal of death be brought by a woman of the death of any one elſe than her huſband; (*c*) or the debt be laid to be under forty ſhillings.

Jennet v. Biſhopp, 1 Vern. 184.

So in equity, if a bill of appeal and review be brought of a decree in the court of a county palatine.

Hob. 280. 3 Co. 85.

And as in theſe caſes a fatal objection to the proceeding appears upon the very face of the record, the Court may, and ought *ex officio* to abate the ſuit at any time, and in any ſtage of it. For the Court, who are to judge according to law, are not concluded by the admiſſion of the parties of any thing that judicially appears to be contrary to it.

Pacoſta v. Jones, Cowp. 729. Brown v. Leeſon, 2 H. Bl. Rep. 43.

Regard to publick decorum and their own dignity ſometimes call upon the Court to interfere in this manner; as, where the queſtion propoſed on the record is idle in itſelf, and involves no civil right or injury, and would introduce in its diſcuſſion indecent or improper evidence.

Steane v. Holmes, 2 Bl. Rep. 754. Kennard v. Jones, 4 Term

The Courts having a general and neceſſary control for the purpoſes of juſtice over all cauſes depending before them, will occaſionally interpoſe on the *motion* of a defendant, and ſtay the proceedings. Thus, though upon the face of the record the demand exceed the ſum of forty ſhillings, yet, if upon affidavits on the

part of the defendant, uncontradicted by the plaintiff, it be ſhewn that in fact it do not amount to that ſum, the cauſe will not be permitted to proceed any farther in the ſuperior court. (*a*) So if in an action for bribery on the ſtatute of 2 Geo. 2. c. 24. it appear that the plaintiff was guilty of *wilful* delay in the proſecution of his ſuit, which fact the defendant could not introduce either on the record, or at the trial, the Court will ſtay the proceedings; for *wilful* delay is expreſsly prohibited by the ſtatute.

Rep. 495. Wellington v. Arten, 5 Term Rep. 62.

(*a*) Petrie v. White, 3 Term Rep. 5.

(*b*) So where they find that actions have been brought againſt ſeveral upon a penal ſtatute which makes only one offence; they will ſtay the proceedings upon payment of one penalty.]

(*b*) Peſhall v. Layton, 2 Term Rep. 712.

Where the writ is only abateable, it muſt be abated by pleading in time; for matters (*c*) in and (*d*) before the writ, cannot be taken advantage of in *error*.

(*c*) Salk. 2. pl. 5. See 2 Ld. Raym. 853. *Show.* 169. *Rol. Abr.* 783. That a man ſhall not aſſign that for *error* which he might have pleaded in *abatement*. *Carth.* 124. There is a difference between original and judicial writs; for in the former, matter of form abates them as well as ſubſtance; *aliter* in the latter; for if the ſubſtance be good, the want of form will be aided. 41 E. 3. 13, 14. (*d*) Otherwiſe of faults in the proceedings after the writ. *Bro. Faux Latin*, 9. 48. For this *vide* tit. *Error*.

Therefore if a feme covert bring an action in her own name *per attornatum*, and the defendant plead in bar to the action, he ſhall never afterwards aſſign the coverture for error.

Carth. 124. per Holt. 3 Ter. Rep. K. B. 627. Cro. El. 554.

So though it be a good plea for a defendant to ſay that a ſtranger is tenant in common with the plaintiff, yet if he does not plead it in *abatement*, he ſhall not have advantage of it in arreſt of judgment.

Skin. 12. pl. 12. Salk. 4. pl. 10.

So if an action be brought againſt one executor, where there are more, if that one executor do not plead this in abatement, but plead to the action, he ſhall never have advantage of this plea afterwards.

Carth. 261.

So where treſpaſs is brought by one jointenant, or by one tenant in common, and the defendant pleads to the action, and the jury find ſpecially, that another (not named) is jointenant or tenant in common with the plaintiff; yet he ſhall have judgment, notwithſtanding the writ at firſt was abateable.

Carth. 261.

So where an action of debt is brought on a joint bond againſt one of the obligors, and upon *non eſt factum* pleaded, the jury find that *J. S.* (then living) was jointly bound with the defendant, yet the plaintiff ſhall have judgment.

Cro. Eliz. 554. Sand. 291. Moor, 466. 3 Mod. 323. Mod. 102. Skin. 280.

Tenant in common of lands brought an action of trover in his own name alone, for cutting down trees and carrying them away; the defendant pleaded to iſſue; and in a ſpecial verdict it was found, that the plaintiff was tenant in common with *J. S.* not named; yet the plaintiff had judgment, becauſe this was a matter pleadable in abatement.

Trin. 24 Car. 2. Rot. 1216. in *B. R.* between *Blackburn* v. *Grove*.

[If one only be ſued on a joint note, it muſt be pleaded in abatement; it will not be error. So in actions againſt partners. But where an action is brought by a joint-covenantee, advantage may be taken of it by demurring generally.

Rees v. Abbott, Cowp. 832. Abbot v. Smith, 2 Bl. Rep. 947. Rice v. Shute, 5 Burr. 2611. 1 Bl. Rep. 695. S. C. Cabel v. Vaughan, 1 Saund. 291. 1 Sid. 420. S. C. 1 Ventr. 34. S. C. B. N. P. 158. 5 Co. 119.

Sayer v. Chaytor, 1 Lutw. 696. 1 Saund. 291. Horner v. Moor, M. 2 G. 2. cited in 5 Burr. 2614. 11 H. 7. 6.

In such a plea to an action on a bond, it must be stated that the other obligor executed the deed, and that he is still alive. It is not sufficient to say that another, not named, was jointly bound. But if it appear on the face of the declaration that both obligors have sealed, and both are living, the objection is good in arrest of judgment.

But in trespass it is no plea in abatement, that there is another joint-trespassor not named.]

Cro. Jac. 651. Bulst. 4, 5. 2 Brownl. 229. Palm. 306. 311. 2 Rol. Rep. 239. Dy. 76.

If a *quare impedit* be brought against the bishop and incumbent, only, without naming the patron, though this might have been pleaded in *abatement*, yet if the defendant plead in bar, &c. it cannot after, upon a writ of *error*, be assigned for error; for though the want of the patron's being made a defendant might make the writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for error concerning the writ, but what actually abates it.

Roll. Abr. 781. 791. 869. Roll. Rep. 450. S. C.

If an action be brought against sir *Francis Fortescue militem & baronettum*, and he appears and pleads to issue, and a verdict and judgment is given for the plaintiff, the defendant in a writ of *error* shall not assign for error that he was a *knight of the bath*, and ought to be so named; for he has lost this advantage by appearing to the other name, and thereby concluded himself.

Palm. 270, 271. But as to this, the difference is, that if the declaration varies in form, the defendant must plead it in *abatement*; but if it varies in substance, the defendant may move it in arrest of judgment, or take advantage of it in error; because the Court has no authority to proceed, having prosecuted a different matter from that which the writ has given the Court authority to take cognizance of. *Jones*, 304. *Cro. Eliz.* 722. *Cro. Jac.* 654. For this vide tit. *Error*.

If a writ be brought to the damage of 40*l.* and the plaintiff declare *ad damnum* 200*l.* and the verdict give 30*l.* this is no error after verdict, for the writ is not abated *de facto*, but only abateable by plea.

Anon. 2 Atk. 15. Gwinn v. Poole, 4 Br. P. C. 122. Fawkes v. Pratt, 1 P. Wms. 593. Mitf. Eq. Pl. 221.

[A bill in equity is not dismissed for want of parties; but stands over for amendment on paying the costs of the day. The want of parties may be pleaded in abatement; but upon allowing the plea, the Court will give the plaintiff leave to amend.]

(L) Where the Writ shall abate in toto, or in Part.

22 E. 4. 4. Hob. 199. 217. 245. Bulst. 1.

WHATEVER proves the writ (*a*) false at the time of suing it out, shall abate the writ entirely; as if it appears by the plaintiff's own shewing that he had no cause of action for part; therefore if an action of trespass be brought against two defendants, and the one pleads that the other was dead *die impetrationis brevis*, or that there is none such *in rerum natura*, the whole writ shall abate; for it is the plaintiff's fault, to use the authority of the Court, to call in a man that was dead; and it was no less an abuse of the process to issue it against a feigned person.

(*a*) But this falsification of the writ must be in a material point; for in a *precipe quod reddat* against two, if one pleads non-tenure, and the other takes the whole tenancy on himself, the writ shall not abate in the whole, but stand good against him that hath accepted the tenancy, because there is a proper defendant

fendant to the action; and the non-tenure of the one does in no ways prejudice the other defendant. *Raſt. Ent.* 365. *Doct. Pl.* 7.

But if one of the defendants die pending the writ, this ſhall not abate the action againſt the other defendant; for this is the act of God, and no default in the plaintiff. See the 8 & 9 W. 3. c. 11. ſ. 7. ſupra (E). Doct. Pl. 7.

[The bankruptcy of the plaintiff or defendant happening in any ſtage of a ſuit either at law or in equity is no abatement. Nor is the diſcharge of the plaintiff after action brought under an inſolvent act, and an aſſignment of his property for the benefit of his creditors.] Hewitt v. Bibbins, 2 Wilſ. 374. Kretchman v. Beyer, 1 Term Rep. 463.

Waugh v. Auſten, 3 Term Rep. 437. Anon. 1 Atk. 263. Butler v. Davidſon, Exchequer, Eaſt. 33 Geo. 3. But contr. per Lord Thurlow, where it happens before decree or judgment. Sellas v. Dawſon, in Chancery, Dec. 8th, 1790. Co. Bpt. Laws, 622. 3d edit. Hedley v. Brown, Barnes, 389.

If there be two executors, and one who is named of *D.* ſay he is of *C.* the writ ſhall abate againſt both, becauſe they are both repreſentatives of one perſon, and muſt both be legally ſummoned; and as they are both but one perſon in the eye of the law, the plaintiff cannot (*a*) proceed againſt the one without the other; but in this caſe, the other defendant will be obliged to plead, though the defendant's plea in *abatement* ſhall be firſt determined; and if it be found for him, ſhall abate the writ *in toto*. Co. Lit. 285. a. Doct. Pl. 7. 21 H. 6. 4. (*a*) The diſability of one plaintiff ſhall ſtop the others from proceeding; for the writ, when abated for want of form, is abated *quoad* all, though they have pleaded to iſſue. 8 *Co.* 159. *Cartb.* 96. But if two executors ſue, and ſet forth themſelves to be executors, and that they proved the will; but upon the probate ſet forth, it appears that one only proved the will; and the defendant pleads this in *abatement*, a *reſpondeas ouſter* will be awarded; for both have a right; and he that did not prove may come in when he pleaſes. *Salk.* 3. *pl.* 6. The ſetting forth that they had proved the will, amounted only to ſurpluſage: the method is, to declare as executors, generally, and make a profert of the letters teſtamentary, whereby it appears they are executors. *Vide* head of *Executors and Adminiſtrators*.

At common law, non-tenure of parcel of the lands abated the whole writ; for this falſified the writ which alleged the defendant to be tenant of the whole; but it was thought very hard, that a writ which was good in part, ſhould be totally deſtroyed by this plea; and therefore 25 *E.* 3. *cap.* 16. enacts, that the writ ſhall only abate for that part of which non-tenure is alleged. Booth, 29. Br. Nontenure, 33. 40. 50. From this ſtatute aroſe the diſtinction in our books, that the plaintiff cannot deſtroy, but may abridge his demand.

At common law, if the tenant plead *non-tenure and diſclaimer*, the plaintiff could not aver his writ, and ſay he was tenant; for in real actions anciently there were no damages given; and the plaintiff by this plea has the effect of his writ, which is to be put into poſſeſſion of the lands; but if *non-tenure* be pleaded, without *diſclaimer*, the plaintiff may aver his writ, and ſhew that the tenant has the reverſion in fee in him as well as the freehold, or take judgment at his election. Co. Litt. 362, 3. Raſt. Ent. 224. 5. 276. 3 Lev. 330. Lutw. 963.

If the demandant enters into any of the lands, pending the writ, this ſhall abate the writ *in toto*. 4 E. 4. 32. Doct. Pl. 5.

The plaintiff declared for arrears of a rent-charge, and demanded a larger ſum than was due to him, upon his own ſhewing, by 7*l.* 10*s.* The defendant pleaded a bad plea, and the plaintiff had judgment for his whole demand; but perceiving his Saund. 182. Duppa and Mayo.

miſtake on the entry of the judgment, he releaſed the 7*l.* 10*s.* and it was held a good releaſe; and that it was not a falſification of his writ, but rather an affirmance; but if the defendant had taken advantage of it in due time, it would have abated the writ.

Co. Lit. 285. a. If an action is well begun, and part of the action determines by act in law, and yet the like action is given for the reſidue, the writ ſhall not abate, but the plaintiff may proceed for the reſidue; but where, by the determination of part, the like action does not remain for the reſidue, there the action, though well commenced, ſhall abate.

Co. Lit. 285. a. As if an action of waſte be brought againſt tenant *per auter vie*, and, pending the writ, *ceſty que vie* die, this ſhall not abate the writ *in toto*; but the plaintiff may proceed to recover damages on this writ, for the leſſor might have an action for the damages, though *ceſty que vie* had died before any action of waſte brought.

Co. Lit. 285. a. [(*a*) So if the leſſor of the plaintiff die. 2 Str. 1056.] So if an ejectment be brought, and the term determine pending the writ, yet the action ſhall proceed for damages only (*a*).

Co. Lit. 285. a. But if tenant *pur auter vie* had brought an aſſiſe, and pending the writ, *ceſty que vie* died, although the action was well commenced, yet the writ ſhall abate, becauſe no aſſiſe lies for damages only.

Co. Lit. 285. a. So if an action of waſte were brought by baron and feme, in remainder, in eſpecial tail, and pending the writ the wife die without iſſue, the writ would abate, becauſe all actions of waſte muſt be *ad exhæreditationem*.

Co. Lit. 285. a. So if a writ of *annuity* be brought, and pending the writ the annuity determine, the writ faileth for ever, becauſe the like action cannot be maintained for the arrearages only.

11 Co. 45. Godfrey's caſe. Saund. 285. Caſ. Temp. Hardw. 273. S. P. When a writ is brought for two things, and it appears the plaintiff cannot have any other action for the one of them, the writ ſhall ſtand for the part that is good; but where it appears he can have another writ in another form for one, there the whole writ ſhall abate; becauſe, when there can be no better writ brought for the parcel, it ought to continue; but if another writ could be brought for that parcel, it is bad, and ought to abate *in toto*.

(M) Where it ſhall abate by reaſon of another Action brought for the ſame Thing.

9 H. 6. 12. Mo. 418. 539. 5 Co. 61. Doct. Pl. 10. 67. Where a prior writ of appeal may be pleaded in abatement to a ſecond

THE law abhors multiplicity of actions; and therefore whenever it appears on record, that the plaintiff has ſued out two writs againſt the ſame defendant for the ſame thing, the ſecond writ ſhall abate; for if it were allowed that a man ſhould be twice arreſted, or twice attached by his goods for the ſame thing, by the ſame reaſon he might ſuffer *in infinitum*; and it is not neceſſary that both ſhould be pending at the time of the defendant's pleading in *abatement*; for if there was a writ in being at the time

time of ſuing out the ſecond, it is plain the ſecond was vexatious and ill *ab initio*.

appeal. 2 *Hawk. P. C.* 275.

Where a prior ſuit depending, may be pleaded to an information. 2 *Hawk. P. C.* 275. But it is no good plea in *abatement* of an indictment, as it is of an appeal or an information, (*a*) that there is another indictment againſt the defendant for the ſame offence; but in ſuch a caſe the Court, in diſcretion, will quaſh the firſt indictment. 2 *Hawk. P. C.* 367. [Foſt. Cr. Law, 104. Dougl. 227. (*a*) Q. Whether it be ſo in any informations but informations *qui tam*?]

But then it muſt appear plainly to be for the ſame thing; for an aſſiſe of lands in one county ſhall not abate an aſſiſe in another county, for theſe cannot be the ſame lands.

4 *H.* 6. 24. Doct. Pl. 10.

In general writs, as *treſpaſs*, *aſſiſe*, *covenant*, where the ſpecial matter is not alleged, and the plaintiff is nonſuited before he counts, though the ſecond writ be ſued pending the other; yet the former ſhall not be pleaded in *abatement*, becauſe it does not appear to the Court that it was for the ſame thing; for the firſt writ being general, the plaintiff might have declared for a diſtinct thing from what he demanded by the ſecond writ: but when the firſt is a ſpecial writ, and ſets forth the particular demand, as in a *præcipe quod reddat*, &c. there the Court can readily ſee that it is for the ſame thing; and therefore, though the plaintiff be nonſuited before he counts, yet the firſt ſhall abate the ſecond writ, it being apparently brought for the ſame thing*.

5 Co. 61. Doct. Pl. 11, 12. Theol. l. 11. c. 39. ſ. 14. [Upon an indebitatus aſſumpſit, the defendant pleaded in abatement another action depending for the ſame matter in the Exchequer, and did not allege that the plaintiff had declared in it; and by the Court, this is bad, becauſe it cannot be traverſed, whether it be for the ſame matter or not. 7 W. B. R. Lill. Prac. Reg. 8. Mitchell and King, 2 Barnard. K. B. 143. S. P.]

* This muſt mean where the plaintiff ſues a ſecond writ, before the plaintiff is nonſuited on the firſt, becauſe, in ſuch caſe, the firſt writ was pending when the ſecond writ iſſued.

An action depending in an inferior court cannot be pleaded to an action brought in one of the courts at *Weſtminſter* for the ſame thing.

5 Co. 62. Sparry's caſe. Dyer, 92, 93.

[The plaintiff counted upon ſeveral promiſes for work and labour in the pariſh of Saint Mary Le Bow, London; the defendant pleaded in abatement, that before this action brought the plaintiff had libelled in the Admiralty for the ſame cauſe of action. Upon demurrer it was inſiſted for the plaintiff, that this was within the rule in Sparry's caſe, and the whole Court gave judgment againſt the defendant, *quod reſpondeat ouſter*. Fitzgib. 313. 5 Geo. 2. C. B. Dudfield v. Warden.]

The law will not allow two *quare impedits* to be brought for the ſame preſentation, *viz.* a ſecond by the defendant againſt the plaintiff, when there is one pending in court by the plaintiff againſt the defendant, *et ſic in brevi de partitione*, becauſe the defendant can have the ſame remedy on the firſt writ as he could on a ſecond.

The law is ſo watchful againſt all vexatious ſuits, that it will neither ſuffer two actions of the ſame nature to be pending for the ſame demand, nor even two actions of (*b*) a different nature.

(*b*) Therefore it is a good plea in *treſpaſs*, that the plaintiff has brought a replevin for the ſame thing, becauſe in both caſes damages are to be given for that caption. 8 *H.* 6. 27. *Doct. Pl.* 10. *Sed qu.* And ſee *Comb.* 229. and *Skin.* 388. [A replevin depending in the ſheriff's court, it ſeems, cannot be pleaded to treſpaſs for taking cattle. 2 Will. 87. White v. Willis.] So in an aſſiſe of *darrein* preſentment, a *quare impedit* depending for the ſame preſentation is a good plea. *Hob.* 184. And a quare impedit is ſaid to be depending when it is returned. 3 E. 4. 11.

Hob. 137. (a) That where an action of treſpaſs is brought, and afterwards replevin for the ſame thing, there muſt not be more defendants in the replevin than there were in the action of treſpaſs, becauſe it cannot ſquare with the averment; and that it is *una eademque captio. Doct. Pl.* 10. *Sed qu.* If the other action might not be pleaded in *abatement*, averring the *fact* to be the ſame. In treſpaſs againſt two defendants, they both pleaded in *abatement* another bill of treſpaſs pending againſt one of them; and three judges againſt *Holt*, who doubted, held the plea good as to both. *Carth.* 96, 97.

In a *quare impedit*, brought by the earl of *Bedford* againſt the biſhop of *Exeter* and others, the defendants pleaded that the plaintiff had brought another *quare impedit* for the ſame preſentation, which is ſtill depending and undetermined, with an averment that it was the ſame plaint, avoidance, and diſturbance; the earl replies, that ſince his former writ purchaſed, the ſame church being ſtill void, he preſented *Henry Curtis* to the biſhop, who refuſed him, which is the diſturbance he now complains of, and traverſes that it is the ſame diſturbance on which both actions were brought; the defendant demurs; and ruled the writ ſhould abate; for though there muſt be a diſturbance naturally to maintain the action, yet the principal effect of the ſuit is to recover the preſentation; and the nature of a *quare impedit* is to be final on nonſuit, or diſcontinuance, which this would defeat; for by this rule the plaintiff might bring a new one, without leaving the former ſuit. And though in this caſe there was (a) a new defendant, yet the writ abated, becauſe there were two *quare impedits* againſt the ſame man; and therefore a freſh defendant could no more enable him to bring a ſecond *quare impedit*, than a new diſturbance could. But againſt ſeveral perſons it is ſaid a man may have as many *quare impedits* as he will.

Mayor, &c. of London v. B. Freem. 401.

[If two actions be brought at the ſame time for the ſame thing, with ſome trifling variation, they may be pleaded each in abatement of the other, averring that the cauſe of action in both is the ſame.]

Allen, 34. Gilb. Hiſt. C. P. 260.

If a ſecond writ be brought teſted the ſame day the former is abated, it ſhall be deemed to be ſued out after the *abatement* of the firſt.

Dyer, 227. Carth. 453. 517. Lord Raym. 347. 6 Mod. 122.

If an action, pending in the ſame court, be pleaded to a ſecond action brought for the ſame thing, the plaintiff may pray that the record may be inſpected by the Court, or demand *oyer* of it, which, if not given him in convenient time, he may ſign his judgment.

Cremer v. Wickett, Ld. Raym. 550. Carth. 517. S. C.

So to an action of battery and falſe impriſonment brought in K. B. the defendant pleaded in abatement another action depending for the ſame matter in the ſame court; the plaintiff replied, nul tiel record, and prayed an inſpection of the record, without giving the defendant leave to rejoin; upon a demurrer to this replication, the plaintiff had judgment, becauſe this being a record of the ſame court in which it was pleaded, the plaintiff might (a) have prayed that it might be inſpected by the Court, if any ſuch there was. The Court held too, that upon this plea the plaintiff might have prayed oyer of the record pleaded, and for want of oyer might have ſigned judgment, which is the quickeſt method of proceeding.

(a) Dyer, 227.

Comb v. Pitt, 3 Burr. 1423.

[To defeat an informer by a plea of this kind of his right of ſuing, a defendant muſt ſhew a prior right attached in ſomebody elſe, and there-

therefore if the pendency of another action by another perſon for the ſame offence, brought in the ſame term, be pleaded in abatement, it muſt be ſhewn on what particular day ſuch other action was commenced, that its priority may be aſcertained. So if both actions were commenced on the ſame day, the defendant, it ſeems, may ſhew that the action which he ſtates was prior in point of time on that day, notwithſtanding it was formerly holden that in that caſe the right was attached in neither, and the Court could give no judgment.] 1 Bl. Rep. 437. S. C. Hutchinſon v. Thomas, 2 Lev. 141. Jackſon v. Gilling, 2 Str. 1269.

(N) Where a Defendant may plead either in Abatement, or in Bar.

WHATEVER deſtroys the plaintiff's action, and diſables him for ever from recovering, may be pleaded in bar; but the defendant in ſuch caſe is not always obliged to plead in bar, but may plead in abatement; as, in replevin for goods, the defendant may plead property in himſelf, or in a ſtranger, either in bar or in abatement; for if the plaintiff cannot prove property in himſelf he fails of his action for ever, and it is of no avail to him who has the property, if he has it not. Ventr. 249. 2 Lev. 92. Salk. 5. 2 Ld. Raym. 984. 12 Mod. 182. 6 Mod. 81. 103. Bull. Niſi Pri. 54.

Outlawry may be pleaded always in abatement, but not in bar, unleſs the cauſe of action be forfeited. Co. Litt. 128. b. Doct. Pl. 395.

In perſonal actions where the damages are uncertain, outlawry cannot be pleaded in bar; but in actions on the caſe, where the debt, to avoid the law-wager, is turned into damages, outlawry may be pleaded in bar; for it was veſted in the king by the forfeiture, as a debt certain and due to the outlaw; and the turning it into damages, whereby it becomes uncertain, ſhall not diveſt the king of what he once lawfully poſſeſſed. 2 Lutw. 1604. 3 Lev. 29. 2 Ventr. 282. 3 Leon. 197. Cro. El. 204. Owen, 22.

Outlawry may be pleaded in bar, after it has been pleaded in abatement, becauſe the thing is forfeited, and the plaintiff has no right to recover. 10 H. 7. 11. 2 Lutw. 1604.

Alienage may be pleaded either in bar or abatement; but with this difference (*a*), that alienage can be only pleaded in abatement to an alien in league, but may be pleaded in bar to an alien enemy, becauſe the cauſe of action is forfeited to the king, as a reprisal for the damages committed by the dominion in enmity. Bro. Denizen, 10. Co. Litt. 129. b. [(*a*) But qu. of this difference; for in either caſe the ground of the plea is the incapacity of an alien to take, or at leaſt to hold, that which is the object of the ſuit.]

[The pendency of a prior action may be pleaded either in bar, or in abatement; though it is ſaid in the caſe of Baines v. Blackbourne (*b*) to be pleadable only in bar.] Combe v. Pitt, 3 Burr. 1423. (*b*) Sayer's Rep. 216.

In an action of debt on a judgment obtained, the defendant cannot plead a writ of error brought and pending, either in bar or in abatement; but in (*c*) one place it is ſaid, it may be pleaded in abatement, though not in bar*. Carth. 136. (*c*) Carth. 1, 2. [But Q. & *vide* 10 Mod. 17. Ld. Raym.

47.] * But the Court, on motion, will ſtay proceedings.

A man

10 Mod. 112. A man may plead in bar or abatement to a *ſci. fa.* as well as to other actions.

6 Mod. 103. —— *Priſel in auter lieu* muſt be pleaded in In replevin, if the defendant will take advantage of a variance in the place where the taking is laid, from that in which it really was, he muſt plead it in abatement.

abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 244. Show. 98. [But in Barnes, 353. it is ſaid that it is conſidered as a plea in bar, and not in abatement, it not being neceſſary to file any affidavit with it, or to plead it within four days after the delivery of the declaration.]

Comb. 483. *Owen* v. *Bulkley*, Ld. Raym. 345. In debt on a bond the defendant pleads the condition for the payment of three ſeveral ſums at three ſeveral days, and that he hath paid two of them at the days limited, and the third is not yet come, and concludes in abatement; and it was argued, that this ought to be pleaded in bar, and not in abatement; for in every plea in abatement the defendant ought to ſhew the plaintiff how to bring a better writ, and here he ſhews that he ought to have none at all, the day of payment of the third ſum not being yet come; as in an action for an attorney's fees, if the defendant pleads that the plaintiff delivered no bill of them to him, he ought to conclude in bar; and of this opinion were the Court.

Comb. 375. *Sally* v. *Arundel.* The plaintiff in bar to an avowry pleaded a diſtreſs for the ſame duty in other lands chargeable: and *Holt* ſaid the plea was naught; for it ſhould have been pleaded in abatement of the avowry, that a former replevin was depending (if the truth was ſo), or if determined, then levied by diſtreſs, & *iſſint riens arere.*

(O) Dilatory Pleas, how reſtrained.

AS theſe pleas enter not into the merits of the cauſe, but merely tend to delay, the following reſtrictions have been laid upon them.

[(*a*) An affidavit required to a plea in By the ſtatute 4 & 5 Ann. c. 16. for amendment of the law, no dilatory plea is to be received, unleſs on oath, (*a*) or probable cauſe ſhewn to the Court.

abatement that the writ was never returned, though in giving oyer plaintiff had not ſet it out. Sherman v. Alverez, 1 Str. 639. Ld. Raym. 1409. S. C. So to a dilatory plea in the Crown Office to an indictment. Rex v. Grainger, 3 Burr. 1617. but not if pleaded at bar. Foſt. 16. Want of addition requires none. Pr. R. 5. Affidavit to the truth of it by the attorney ſufficient. Lumley v. Foſter, Barnes, 344. Where the affidavit and plea were wrong entitled, the plea was ſet aſide. Clixby v. Dines, Barnes, 348. So where the affidavit to an information in the Crown-Office was without any title. Rex v. Jones, 2 Str. 1161. The affidavit muſt be poſitive as to the truth of every matter of fact contained in the plea: it muſt leave nothing to be collected by inference; for per Denniſon J. the words *probable cauſe* in the ſtatute only extend to a matter of record, or to ſome other collateral matter, as to the truth of which there cannot be a poſitive affidavit. Pearce v. Davis. Say. Rep. 293. For the form of the affidavit, ſee Lill. Entr.]

Hetly, 126. 2 Saund. 41. [But it was No plea in abatement ſhall be received after a *reſpondeat ouſter*, elſe they would be pleaded *in infinitum.*

formerly holden that more dilatories than one might be pleaded. Thel. D. 163. a. p. 6. Bract. 400. b. Finch. L. 363.]

Yelv. 112. Lutw. 24. 1 Str. 520. They are to be pleaded before imparlance.

Caſ. Tem. Hardw. 135. [They cannot be pleaded at the ſame time with a plea in bar.]

When

When iſſue is joined on them, if found againſt the defendant, it ſhall be preremptory. 2 Show. 42. 2 Wilſ. 367.

Nothing ſhall be pleaded in abatement of a *ſcire facias* upon a judgment that was pleadable in the original action; for it would be unreaſonable that the defendant ſhould diſable the plaintiff from having his execution, after he has admitted him able to have his udgment. Salk. 2. p. 5.

Though a plea in bar, being certain to a common intent, is good; yet every dilatory plea muſt be certain to every intent. Cro. Jac. 82. 3 Term Rep. 185.

[A dilatory plea muſt be pleaded within four days (the firſt and laſt both incluſive) (*a*) after the declaration is delivered, if it be in term time; but if in vacation, or within leſs than four days from the end of the term, it may be pleaded (there being a ſpecial imparlance) within the firſt four days incluſive of the next term, *as of the preceding term*; and within that time it muſt be *filed*, (for it is not ſufficient that it be *delivered only*,) whether a rule to plead be given or not (*b*). Sunday is reckoned as one of the four days, though it happen to be the laſt, in which caſe the plea muſt be filed on the Saturday (*c*). Imp. K. B. 239. C. P. 319. (*a*) Jennings v. Webb, 1 Term Rep. 1. (*b*) Doughty v. Laſcelles, 4 Term Rep. 277. (*b*) Brandon v. Payne, Ibid. 689. (*c*) Harbord v. Perigal, 5 Term Rep. 210. but contra Lee v. Carlton, 3 Term Rep. 642.

It is inadmiſſible after the rule for pleading is expired, (*d*) or after forfeiture of a bail-bond. Humphreys v. Ward, Barnes, 331. (*d*) 2 Salk. 519.

It is not an iſſuable plea within an order for time to plead upon the uſual terms. Kilwick v. Maidman, 1 Burr. 59.

But whilſt a too eaſy admiſſion of theſe pleas is thus anxiouſly guarded againſt, the Court on the other hand are bound *ex debito juſtitiæ*, to compel the plaintiff to entitle his declaration of the true day on which it was filed, in order to give the defendant an opportunity to avail himſelf of them.] Wilkes v. Earl of Halifax, 2 Wilſ. 256.

(P) Of the Manner of pleading in Abatement, and the Proceedings and Judgment on ſuch Plea.

THE defendant cannot plead two outlawries, or two excommunications in abatement, duplicity being a fault in abatement as well as in bar. Carth. 8, 9.

In pleas of abatement which relate to the perſon, there is no neceſſity of laying a venue, for all ſuch pleas are to be tried where the action is laid. Salk. 4. Carth. 363. 12 Mod. 125. 195.

If a defendant plead matter in abatement and conclude in bar, this ſhall be eſteemed a plea in bar, and the Court will give final judgment thereupon; becauſe by pleading to the action the writ is admitted to be good, and he puts the whole matter upon his plea *. 2 Roll. Rep. 64. Lev. 312. Mod. 214. 2 Saund. 128.

* In the caſe of *Medina* and *Stoughton*, 1 Ld. Raym. 593. *Holt* ſaid, that if a man plead matter which goes in bar, but *begin and conclude* his plea in abatement, it will be a plea in abatement; for it is the beginning and concluſion that make the plea. See 1 Sid. 189, 190. But if he begin in bar, though he conclude in abatement, or conclude in bar, though he begin in abatement, it will be a plea in bar. *Vide* alſo 1 Ld. Raym. 694.

So

6 Mod. 103. Lutw. 34. 36. 10 H. 7. 11. * See *infra.*

So if a man plead in bar, and conclude in abatement, this ſhall be eſteemed a plea in bar; becauſe he could have no writ, if he could have no action; and where there could be no action, the diſpute about the writ would be inſignificant *.

Mod. 214. 10 H. 7. 11.

A plea in abatement may be good, though it contains matter in bar; but this is to be underſtood of ſuch pleas as may be pleaded either in diſability or in bar; as alienage, outlawry, &c.

Salk. 177. 10 Mod. 112. Carth. 107. Salk. 218. Gilb. Hiſt. C. P. 259. See 2 Ventr. 179.

If a matter, which may be pleaded either in abatement or bar, be pleaded in abatement only, if the plaintiff reply or demur in bar, this will be a diſcontinuance (*a*); becauſe the plaintiff does not maintain his writ, and the defendant may have other matter in bar, of which he would hereby be excluded.

(*a*) But it is aided by verdict. Salk. 218. [So the Court will give leave to amend. 1 Wilſ. 302.]

Vent. 136. Lutw. 36. 3 Mod. 281. [(*b*) 2. If in this caſe the plea be not imperfect, and then, though

But if the defendant begin ſuch plea in bar, and conclude in abatement, or plead in abatement, and conclude in bar, there the plaintiff may reply or demur to it, either as a plea in abatement or in bar; and if he demur, or plead to it as a plea in bar, then the judgment is final (*b*); for he has cloſed with the defendant to put the plea to the judgment of the Court, as a bar to the action.

the plaintiff have diſcontinued, he is entitled to judgment of *reſpondeat ouſter*. Bonner v. Hall, Ld. Raym. 339. Lug v. Godwin, Ibid. 393. Marſhal v. Charleton, 1 Barnard. K. B. 468.]

3 Lev. 120. 6 Mod. 103. [Theſe caſes do not warrant the doctrine in the text.]

But if he demur, or reply in abatement, as he may, then the judgment is *quod defendens reſpondeat ouſter*; for then only the writ is put in judgment before the Court; and the plaintiff, by putting the writ in judgment only to the Court, has waved the benefit of putting that matter in judgment to the Court as a plea to the action; and if the judgment were not in abatement, it would not be purſuant to the defendant's prayer.

3 Mod. 132. ſaid *arguendo.* [(*c*) All pleas to the juriſdiction conclude to

Every plea in abatement is either to the writ or count; if the action is brought by original, then the plea is *petit judicium de brevi*, and it muſt conclude in the ſame words; if it is to the declaration, then it muſt be *petit judicium de billa & narratione*, for *billa* and *narratio* are the ſame (*c*).

the cognizance of the Court, praying "judgment whether the Court will have further cognizance of the ſuit:" pleas to the diſability conclude to the perſon, by praying "judgment if the ſaid A., the plaintiff, ought to be anſwered:" and pleas in abatement (when the ſuit is by original), conclude to the writ or declaration, by praying "judgment of the writ or declaration, and that the ſame may be quaſhed," *caſſetur*, made void, or abated; but if the action be by bill, the plea muſt pray "judgment of the bill," and not of the declaration, the bill being here the original, and the declaration only a copy of the bill. 3 Bl. Comm. 303.]

10 Mod. 112. Show. 4. [(*d*) After a plea that another ought to be a co-defendant, concluding *ſi actionem verſus eum ſolummodo*, there ſhall be only a *reſpondeat ouſter*. 1 Ventr. 135.]

It is ſaid to be the concluſion of a plea, and not the matter of it, that makes a plea in abatement; ſo that ſhould a man plead a plea that for the matter of it might have been pleaded in bar, and conclude *petit quod breve caſſetur*, it would be but a plea in abatement, and the judgment would be no other than a *reſpondeat ouſter*; ſo *vice verſa* a (*d*) plea in abatement, pleaded in form of a plea in bar, would be a plea in bar, though an ill one.

6 Mod. 236. *per* Holt.

If a dilatory plea be pleaded, and the plaintiff take iſſue upon it, he may conclude with a *petit judicium & damna*, becauſe then

final judgment ſhall be; but if a dilatory plea be pleaded, which the plaintiff does not deny, but confeſs and avoid, he muſt conclude in maintenance of his writ; as if the defendant plead an attainder in diſability of the plaintiff, and he plead a pardon, he muſt not conclude with a *petit judicium* & (*a*) *damna*, but in maintenance of his writ.

(*a*) 3 Mod. 281. S. P.

If there are four defendants, and after ſeveral continuances three of them plead the death of one of them in abatement, *viz. petunt judicium de breve et quod breve illud caſſetur*; this is ill in its concluſion, and ſhould have been *petunt judicium ſi curia ulterius procedere velit.*

3 Lev. 120.

If the defendant demur in *abatement*, the Court will give final judgment, becauſe there can be no demurrer in *abatement*; for if the matter of *abatement* be *dehors*, it muſt be pleaded; if intrinſick, the Court will take notice of it themſelves.

Salk. 220. pl. 9. 6 Mod. 195. 198. [In Wimbiſh v. Willough-

by, Pl. Comm. 73. there is an inſtance of a demurrer in abatement of a writ for an inſufficiency appearing on it, which authority is countenanced by Theol. Dig. l. 15. c. 9. ſ. 1. Dy. 341. Lutw. 1644. This precedent from Plowden was cited by Eyre J. when the judgment in the text was given. The judgment upon the demurrer, if againſt the defendant, will be final. 3 Lev. 222.] But a demurrer in *abatement* to an indictment for a capital offence, or appeal of death, ſhall not conclude the party, but he ſhall have leave to anſwer over to the offence. 2 *Hawk. P. C.* 334.

If there be two defendants, and they plead two ſeveral pleas in *abatement*, and there be iſſue to one, and demurrer to the other, if the iſſue be found for the defendant, the Court will not proceed on the demurrer, *& ſic vice verſâ*; for in both caſes the writ being once abated, it would be unneceſſary to judge whether it ought to abate on the other's plea.

Hob. 250.

Where the matter of *abatement* appears on the face of the record, the plea ſhould begin and end with a *petit judicium de brevi*; but where the matter is *dehors*, the defendant ſhould only end his plea with a *petit judicium*.

Moor, 30. Carth. 363. 5 Mod. 136. 145. Salk. 298.

On a plea in *abatement*, no advantage can be taken of the errors in the declaration (*b*); as nothing but the writ is then in queſtion, for nothing elſe is pleaded to.

Salk. 212. Lutw. 1592. Carth. 172.

(*b*) But it ſeems it may, if the matter of the plea in abatement be pleadable in bar. Lutw. 1604.

If on a plea in *abatement*, a *reſpondeat ouſter* is awarded, and afterwards the defendant pleads in chief, and there is a verdict for the plaintiff, yet if the plea in *abatement* does not appear to have been entered on the *niſi prius* record, judgment will be arreſted; for it being entered on the plea-roll, (which was in court,) it muſt be mentioned in the *niſi prius* roll, otherwiſe it does not appear that it was a verdict in the ſame cauſe.

Carth. 447. Lord Raym. 329. 5 Mod. 399. Carth. 499.

The judgment for the defendant on a plea in abatement is *quod breve* or *narratio caſſetur*, and for the plaintiff, a *reſpondeat ouſter*; but if iſſue be joined on a plea in abatement, and it be found for the plaintiff, it ſhall be peremptory (*c*) againſt the defendant; and the judgment ſhall be *quod recuperet*, becauſe the defendant chooſing to put the whole weight of his cauſe on this iſſue, when he might have had a plea in chief, it is an admiſſion that he had no other defence (*d*).

Yelv. 112. 2 Show. 42. Str. 532. Carth. 138. 1 Wilſ. 302.

(*c*) Though the tenant or demandant, who joins iſſue, be an infant.

Lev. 163. But not ſo on indictments for capital offences. 2 Hawk. P. C. 334. [(*d*) In an action that

that ſounds in damages, the jury who try this iſſue muſt aſſeſs the damages: their omiſſion to do ſo cannot be ſupplied by a writ of inquiry, but a *venire facias de novo* muſt be awarded. Eichorn v. Le Maitre, 2 Wilſ. 368.]

Theol. Dig. l. 16. c. 11. ſ. 12. 1 Lev. 263.

[But on a demurrer to a plea in abatement, the judgment againſt the defendant ſhall only be *to anſwer over*, becauſe, though iſſues in fact are within the conuſance of the party, iſſues in law are not.

Putt v. Noſworthy, 1 Ventr. 135. But ſee Lutw. 197.

And the ſame judgment ſhall be given, though the defendant join in demurrer to it, as to a plea in bar, becauſe the fault originates with the plaintiff.

1643. 1665. But ſee above, whether this be not a diſcontinuance?

Oſborne v. Haddock, Barnes, 257.

In a plea in abatement in C. P. the plaintiff may enter a *nil capiat per breve*, without leave of the Court.]

Salk. 4. p. 11.

Where upon a *reſpondeat ouſter* the defendant pleads the general iſſue, the plaintiff ſhall ſign judgment, if the defendant's attorney on delivering back a copy of the iſſue will not pay for it: and it ſeems that the old courſe was to deliver in a copy of the whole record, viz. the declaration, plea in abatement, &c. and iſſue; but the Court made a rule that for the future a copy of the declaration and iſſue ſhould only be paid for.

Salk. 7. p. 18.

Upon a *reſpondeat ouſter*, no notice need be given of it, for the defendant is ſuppoſed to be attending his cauſe in the paper to maintain his plea.

(Q) Of the Writ by Journies Accompts.

Spencer's caſe, 6 Co. 10.

[WHEN an abatement of a ſuit happens without any fault imputable to the plaintiff, he is permitted to ſue out a freſh writ by journies accompts; which is *quaſi* a continuance of the firſt writ, and placeth him in the ſituation in which he would be ſuppoſing that he were ſtill proceeding on that writ; for the defendant can avail himſelf of no matter which ariſeth ſubſequent to the time of the firſt writ, and could not have been pleaded to it.

6 Co. 11. a. 1 Salk. 393. Cro. Car. 294.

But this ſecond writ is not ſuable at any diſtance of time after the abatement of the firſt, but muſt be proſecuted *per dietas computatas*, that is, recently, as ſoon after as reaſonably may be. What is a reaſonable time is a matter in the diſcretion of the Court.

6 Co. 10. b. Lutw. 296. 1 Salk. 393.

This writ being in a manner a continuance of the firſt, muſt of courſe be brought in the ſame court, and for the ſame matter. It ought regularly too to be between the ſame parties; but it may be ſued by another perſon than the original plaintiff, if there be a privity between them; as if the original plaintiff be executor until his ſon come of age, the ſon upon coming of age may take out this writ, but not ſo, if he be adminiſtrator *durante minore ætate* of the ſon; for in that caſe, as they derive their titles from different perſons, the one from the ordinary, the other from the teſtator, there can be no privity.

If

If the plaintiff in *quare impedit* die pending the writ, and after the ſix months have elapſed, his executors are not entitled to this writ. Br. Journ. Acc. p. 23. Qu. Imp. 160.

A judicial writ ſhall never be by journies accompts, becauſe it never abates for want of form.] 6 Co. 10. a

Accompt.

THE proceedings in this action being difficult, dilatory, and expenſive (*a*), it is now ſeldom uſed, eſpecially if the party have other remedy, as debt, covenant, caſe, or if the demand be of conſequence, and the matter of an intricate nature; for in ſuch caſe it is more adviſable to reſort to a court of equity, where matters of accompt are more commodiouſly adjuſted, and determined more advantageouſly for both parties; the plaintiff being entitled to a diſcovery of books, papers, and the defendant's oath; and on the other hand, the defendant being allowed to diſcount the ſums paid or expended by him; to diſcharge himſelf of ſums under forty ſhillings by his own oath; and if by anſwer or other writing he charges himſelf, by the ſame to diſcharge himſelf, which will be good, if there be no other evidence: farther, all reaſonable allowances are made to him; and if, after the accompt is ſtated, any thing be due to him upon the balance, he is entitled to a decree in his favour. Salk. 9. Carth. 89. Ch. Caſ. 249. Vern. 283. 470. 2 Vern. 176. Eq. Caſ. Abr. 10.

[(*a*) From the experiment made of this action in the caſe of Godfrey v. Saunders, 3 Wilſ. 94. its proceedings ſeem not to deſerve the character here given of them. A matter which had been fruitleſsly depending in Chancery upwards of twelve years, was thorougly examined, and finally determined in this form of action in the courſe of two years.]

We ſhall therefore, under this head, but briefly conſider,

(A) Againſt whom, either by the Common Law, or by Statute, this Action lies.

(B) Of the Manner of bringing Accompt, with reſpect to the Perſons againſt whom it is brought; and herein of charging one as Receiver when Bailiff, & *vice verſa*.

(C) The Nature of the Demands for which it may be brought.

(D) In what Caſes this is the proper Action, or ſome other may be brought.

(E) What ſhall be a good Bar to this Action.

(F) Of

(F) Of the Auditors, and what ſhall be a good Di charge before them.

(G) Of the Judgment, and ſubſequent Proceedings.

(A) Againſt whom, either by the Common Law or by Statute, this Action lies.

2 H. 4. 12. b. Co. Litt. 172. a. 90. b. F. N. B. 117. E. 2 Inſt. 404. 11 Co. 90. a. 2 R. Abr. 161 [(a) The

BY the common law, accompt lay only againſt a guardian in ſo cage (a), bailiff, or receiver, or by one in favour of trade an commerce, naming himſelf merchant, againſt another, namin him merchant, and for the executors of a merchant; for betwee theſe there was ſuch a privity, that the law preſumed them con ſant of each other's diſburſements, receipts, and acquittances (b

ſtatute of Marlebridge, 52 H. 3. cap. 17. is uſually recited in the writ, as if the writ were warranted that ſtatute only. Mayn. 487. F. N. B. 118. A. but accompt lay againſt the guardian in ſocage common law, and the ſtatute was merely in affirmance or declaration of it. Co. Litt. 89. Cro. C 229. (b) By the prerogative perſons could be charged as accomptants, notwithſtanding a want of p vity. 11 Co. 89. 2 Roll. Abr. 161.]

1 Leon. 219. Co. Litt. 89. b. (c) Before this laſt ſtatute, if one jointenant, or tenant in common, received all the profits,

The ſtatute of 13 Edw. 1. cap. 23. gives an action of accompt executors; the 25 Edw. 3. ſt. 5. cap. 5. to executors of executor the 31 Edw. 3. c. 11. to adminiſtrators; and by the ſtatute 4 Ann. c. 16. ſect. 27. (c) actions of accompt may be broug againſt the executors and adminiſtrators of every guardian, baili and receiver, and by one jointenant, tenant in common, his e cutors and adminiſtrators, againſt the other as bailiff (d) for receivi more than his ſhare, and againſt his executors and adminiſtrato

the other could not have this action, unleſs he actually appointed him bailiff or receiver. Co. L 172. a. 186. a. 200. b. So if there had been two executors, and one had received all the debts of teſtator; for between theſe there was not ſuch a privity as the law required. Br. tit. Accompt, 39 E. 3. 28. [But if two guardians were in common, and one took the entire profits to his own accompt lay, and the count was to be againſt him as receiver to their common uſe. So of co-partne but not ſo of tenants in common, for they might have an aſſiſe. F. N. B. 118. J. One joint leſſee years might have accompt againſt the other, if he took the iſſues and profits to his own uſe; for would otherwiſe be without remedy, as he could not bring an aſſize. 39 E. 3. 27. b. (d) But no receiver. Com. Rep. 272.]

Rol. Abr. 117. F. N. B. 118. Co. Lit. 172. S. P. Abr. Ca. Eq. 6. pl. 3.

Though an infant may be an executor, or may be charged trover, being a tort; yet if he be made factor, bailiff or receiv he ſhall not be accountable for what he does during his infanc either in law or equity, for the ſame reaſon that other acts of bind him not; therefore when ſuch a one is appointed factor, friends ſhould give ſecurity for his accounting.

F. N. B. 119. B. 4 Leon. 32. [Vide 1 Vern. 208. Potts v. Potts, where

If I make *J. S.* my bailiff or receiver, and he make a deputy, muſt have *accompt* againſt the bailiff or receiver himſelf, and n againſt the deputy, for the receipt of the deputy was to the uſe his maſter.

in Chancery, on exceptions to a maſter's report, it was holden ſufficient for a ſervant or apprentice anſwer to a bill for an account, to ſay in general, that whatever he received was by him received, laid out again by his maſter's orders. But he muſt diſcloſe this matter in his anſwer. Vern. 136.

re on a bill for an account, and discovery of money received by defendant on the behalf of one who ame a bankrupt, he pleaded that he received it only as a menial servant to the bankrupt, and had ac- nted for it to him already, and that the commissioners had examined him on interrogatories; the was over-ruled. Wagstaff v. Bedford, Vern. 95. 2 Ventr. 358. S. C. Eq. Cas. Abr. 6. p. 5. C. cited with a query, whether there were not circumstances of fraud in the case, or a combination ween the bankrupt and servant.]

An apprentice by the name of an apprentice, is not chargeable *accompt*. 11 Co. 89. b. Though he is not

rgeable for the ordinary receipts upon his master's trade, yet upon collateral receipts, which concern the ordinary trade of his master, he is chargeable as well as another. 3 *Leon.* 63. But then he ust be charged as bailiff or receiver. 2 Inst. 379, 380. [Chancery will decree an account against administrator of an apprentice employed as a factor. Eq. Cas. Abr. 6. p. 2.]

(B) Of the Manner of bringing Accompt, with respect to the Persons against whom it is brought; and herein of charging one as Bailiff when Receiver, & *vice versâ*.

IF the king appoints *J. S.* or he of his own head takes upon himself the charge and care of the estate of a lunatic, he is but in nature of a bailiff, and accountable to the lunatic, his executors r administrators. 4 Co. 127.

A man shall not be charged in *accompt*, as surveyor, comptroller, apprentice, reive, or heyward, nor shall a (*a*) disseisor, or ther wrong-doer, be so charged; for to maintain an action of *accompt*, there must be a privity either in law or by the provision of he parties. Co. Lit. 172. (*a*) So if a disseisor appoints J. S. to receive his rents, the disseisor

cannot have a writ of accompt against *J. S.* 3 *Leon.* 24. Dalt. 99. S. P.

At common law, if a man were disseised, and his entry taken way, he could never recover, by any action, the mesne profits; ut if the disseisor made a feoffment in fee, by the statute of *Glouester*, the disseisee in an (*b*) assise might have recovered damages or the mesne profits, being a continuation of the first wrong. 2 Rol. Abr. 550. (*b*) But whether he could have an action of trespass,

ems to have been much controverted; for which *vide Roll's Abr.* 554. 11 Co. 51. *Ab.* 352. ob. 98. *Roll's Rep.* 101. *Godb.* 388. *Vide* tit. Ejectment.

But the Chancery interposed, and at last carried the remedy farher than had been admitted at common law; for though in the ase of *Owen* and *Aprice*, which was adjudged 4 *Car.* 1. the Court ft the plaintiff to his remedy at common law for the recovery of the esne profits, and would not assist by their decree (*c*); and though the case of *Eyre* and *Jackson*, 14 *Car.* 2. they refused to assess ny damages for a trespass, for that was a matter determinable at ommon law, and to be ascertained by a jury (*c*); yet afterwards they Chan. Rep. 32. 229. Vern. 295. 2 Vern. 724.

[(*c*) It is generally true, that a court of equity will not decree an account of mesne profits where the le is merely legal, or the plaintiff is out of possession. Tilly v. Bridges, Pre. Ch. 252. Norton v. ecker, 1 Atk. 524. Sayer v. Pierce, 1 Vez. 232. But from this rule must be excepted all those ses where the plaintiff is an infant, or has been prevented from asserting his title by trust, mistake, or aud and concealment on the part of the defendant. Duke of Bolton v. Deane, Pre. Ch. 516. Bentt v. Whitehead, 2 P. Wms. 643. Dormer v. Fortescue, 3 Atk. 130. And in such cases the ourt will direct the account to be taken from the time the plaintiff's title accrued, unless special cirmstances require that it should commence from the time of entry, or filing the bill. Ibid.]

began to make the perſon, who was the diſſeiſor of the meſne profits, accountant to him who had the right; and this was firſt begun where lands were ſettled for the payment of debts; there, ſuch truſtees, and the heir of the debtor, were accountants to the creditors for whom the profits were to be received; and this was very clear and plain, becauſe ſuch perſon came in and took the profits under the truſt; and this was ſettled in the caſe of *Gilpin* and *Smith*, 18 & 19 *Car.* 2. Afterwards they came to extend their notions; and the perſon that took the meſne profits by wrong, was taken as truſtee for, and accountant to, him that had the right; and this was ſettled in the great caſe of *Coventry* and *Hall*, which was in the years 33, 34, & 35 *Car.* 2. and was this: Sir *Thomas Thynn* having treated with the Lord Keeper *Coventry* for a marriage between his ſon and *Catharine* the daughter of the Lord Keeper, the ſaid Sir *Thomas* covenanted to ſettle lands on his ſon, but the conveyance was defective, becauſe it wanted the words, *that he ſhould ſtand ſeized:* the ſon recovered the lands by a decree in Chancery, notwithſtanding the defect in the conveyance, againſt the heir at law of Sir *Thomas*, the father, and afterwards came with his bill for the meſne profits; and though the heir at law was entitled to the meſne profits at law, becauſe the conveyance was defective, and the firſt decree, which ſet up the title under the ſettlement, had ordered no account for the meſne profits, yet the Court, on this bill, carried back the account againſt the heir at law for all the profits received by him; and though it was objected, there was no agreement, nor any truſt, that the heir ſhould receive the profits for the rightful proprietor, yet the Court reſolved that he ſhould account from the original juſtice, which entitled the proprietor to ſeek an *account* againſt that perſon who had taken the profits of the land, which in equity and juſtice belonged to him; and though the heir had the title in law, yet ſince, in equity and conſcience, the eſtate belonged to another, ſuch heir ought to account with him for the profits he had made of what was his. And from this time equity began to make all perſons account for the meſne profits they had received, to ſuch perſons as had the equitable title: but in a caſe where the huſband ſold lands for valuable conſideration, and the wife, after his death, recovered her dower againſt the purchaſor, and brought her bill in Chancery for the meſne profits from the time of the death of her huſband; the Lord Ch. *Cowper* would not relieve her; for he ſaid that he could not alter the law of dower, which gave no damages againſt a purchaſor under the huſband; and he ſaw no reaſon in equity to introduce a different rule (*a*).

Ch. Caſ. 80, 81.

2 Ch. Caſ. 71, 72. 134, 135. 2 Ch. Rep. 259. 261.

[(*a*) But equity will give relief in the caſe of dower beyond that which can be obtained at law, if the recovery of the demand be unconſcientiouſly obſtructed; and has in ſuch caſe decreed in favour of the widow's repreſentative, againſt the perſonal repreſentative and deviſee of the heir, an account of the meſne profits from the time of the death of the huſband. Curtis v. Curtis, 2 Br. Ch. Rep. 620. The ſame account has been directed in favour of the repreſentative where the widow has died before ſhe had eſtabliſhed her right to dower. Wakefield v. Child, cited in Fonblanque's Notes on Eq. Tr. p. 147. Wherever a widow reſorts to Chancery for her dower, as it ſeems ſhe may now do in all caſes, the general courſe of that court is to give her an account from the time her title accrued. The meſne profits are there conſidered, as, what they really are, the widow's ſubſiſtence, and not in the nature of vindictive damages. 2 Br. Ch. Rep. 620. Dormer v. Forteſcue, 3 Atk. 130, 1.]

Fonbl. Notes on Eq. Tr. 147.

[Courts of equity, when reſorted to for the purpoſe of an account of meſne profits, will in many caſes conſult the principle of conve-

convenience; and therefore Lord *Hardwicke* held in *Townſend* v. *Aſh*, 3 Atk. 386. That "though the party claiming a ſhare in the "*New River* water-works had not eſtabliſhed his right at law, yet, "as ſuch right appeared to the Court, he ought to have an ac- "count of the meſne profits; for though ſhares in water-works "are a legal eſtate and corporeal inheritance, yet no one pro- "prietor could receive the profits himſelf; but the company, or "their officers, are the common hand to receive the profits; and "that it would be abſurd to ſend the plaintiffs to law, for it would "be difficult to bring ejectment for a thirty-ſixth part, and bits of "land in ſeveral counties, and to bring actions of treſpaſs againſt "the terre-tenants would be very extraordinary; and therefore in "point of remedy there could not be a ſtronger caſe for an account "of meſne profits."

In caſes of hardſhip, as where an heir at law is diſinherited on a nice conſtruction of words, the Courts deem it inequitable to lend their aſſiſtance if there is no infant concerned, and leave the party to his remedy at law by entry and ejectment. Sympſon v. Hornſby, Pr. Ch. 453.

Nor will they interpoſe in favour of judgment creditors upon a bill to ſet aſide a fraudulent conveyance, and decree an account againſt the debtor and owner of the eſtate, of rents and profits received *pendente lite* from the filing of the bill; nor in favour of a mortgagee againſt a mortgagor, left in poſſeſſion, for any of the years back during that poſſeſſion. In the former caſe the plaintiffs have their legal remedy *by elegit*; and in the latter, where intereſt is not regularly paid, the mortgagee has a legal remedy to get poſſeſſion of the eſtate, which, if he does not avail himſelf of, it is imputable to his own laches. Higgins v. York Buildings Company, 2 Atk. 107.

But where the mortgagee enters, and takes poſſeſſion, he is ſubject to an account, being in the nature of a bailiff to the mortgagor. Gould v. Tancred, 2 Atk. 534.

The caſes decreeing an account of rents and profits where the legal title is not previouſly eſtabliſhed, proceed upon that reſpect, which, in juſtice, is due to the intereſts of perſons, who, by infancy, fraud, &c. have been prevented from purſuing their legal right; but it muſt not be inferred from the extreme anxiety of courts of equity to protect ſuch rights, that they will, at any period (*a*), or under any circumſtances, act upon ſuch indulgent diſpoſition; for if an infant neglect to enter within ſix years after he comes of age, he is as much bound by the ſtatute of limitations from bringing a bill for an account of meſne profits, as he is from an action of account at common law; or if there be a verdict at law againſt the infant's title, courts of equity will not direct an account of meſne profits, but will merely retain the bill, for the purpoſe of giving the infant an opportunity to eſtabliſh his title at law. Fonbl. 149. Lockey v. Lockey, Pre. Ch. 518. Earl of Newburgh v. Bickerſtaffe, 1 Vern. 295.

(*a*) But if plaintiff has been kept out of poſſeſſion by fraud, Q. Whether equity will not relieve at any diſtance of time, as no length of time will bar a fraud? Cottrell v. Purchaſe, Ca. Temp. Talbot, 63.

[It is very ſeldom, even in the moſt favoured caſes, that intereſt is allowed, in taking the account of rents and profits.] Ferrers v. Ferrers, Caſ. Tem. Talb. 2, 3. Robinſon v. Cumming, 2 Atk. 409.

Rol. Abr. 119.

A bailiff cannot be charged as receiver, becauſe if he be charged as (a) bailiff upon his account, he ſhall have allowance of his charges and expences, which he is not entitled to when he is charged as a receiver; alſo he is not allowed in an action brought againſt him as a receiver, to plead that he was before charged as receiver.

(a) By bailiff is underſtood a ſervant that hath adminiſtration and charge of lands, goods, and chattels, to make the beſt benefit for the owner, againſt whom an action of accompt doth lie for the profits which he hath raiſed or made, his reaſonable charges and expences deducted. Co. Lit. 172. a. A receiver is one who receiveth money, and is to render an account of it, but is not allowed any charges or expences but what is agreed on by the parties; and in this caſe the plaintiff is to declare by whoſe hands he received it. Co. Lit. 172. a. If a bailiff be charged as receiver, it ſeems the beſt way is to plead it ſpecially, for he cannot take advantage of it after judgment, *quod computet*. 2 Lev. 126. Freem. 378. Whether a perſon may not in the ſame action be charged as bailiff and receiver, *Quære*, and *vide* 1 Rol. Abr. 119. Cro. Car. 240. In ſome caſes in an action of account againſt one as *receptor denariorum*, he ſhall have allowance of his expences, and ſhall account for the profit he received, or might reaſonably receive. Co. Lit. 172. a.

(C) The Nature of the Demands for which it may be brought.

Bro. tit. Account, 35. 2 Brown. 76.

AN action of *accompt* lies not for a thing certain; as, if a man delivers 10*l.* to *B.* to merchandize with, he ſhall not have account of the 10*l.* but of the profits, which are uncertain.

Rol. Abr. 116.

No action of *accompt* lies for rent reſerved on a leaſe; ſo if a leſſee of goods waſte them, yet no action of *accompt* lies againſt him.

Rol. Abr. 116. Owen, 86.

If the bailee of goods to bail over waſte them, or refuſe to deliver them, no action of *accompt* lies, but an action of *detinue* or *trover* and *converſion*.

3 Leon. 24.

If *A.* hath a term for years in a rectory, and tithes being ſet forth and ſevered from the nine parts, *B.* without any pretence of title, carries them away and ſells them, yet *A.* ſhall not have a writ of *accompt* againſt *B.* for after ſeverance the tithes immediately veſted in *A.* and the taking by *B.* was merely wrongful, and therefore without privity.

(D) In what Caſes this is the proper Action, or ſome other may be brought.

Rol. Abr. 116. Dyer, 20. 118. Cro. El. 644.

IF a man, by obligation, acknowledges that he has received money *ad proficiendum & computandum*, the obligee may either ſue the bond, or have an action of *accompt* at his election.

Rol. Rep. 52. 2 Bulſt. 256.

So if *A.* acknowledges by deed, that he has received 100*l.* from *B.* to be adventured to the *Weſt Indies*, and thence to *England* back again, and covenants to render a true account thereof upon his return, though *B.* may have a writ of covenant upon this deed, yet he may alſo have a writ of *accompt* thereupon at his election.

Aſſumpſit, in which the plaintiff declared, that intending to go beyond ſea, he delivered a box full of goods to the defendant, which

which he promiſed to diſpoſe of, and to give the plaintiff an account thereof at his return; the defendant pleaded in *abatement*, that he was bailiff to the plaintiff, to merchandize the ſaid goods; and that he ought to bring an action of *accompt*, and not an action on the caſe; and upon demurrer it was adjudged, that here being an expreſs promiſe, on which the action is founded, *aſſumpſit* will lie as well as *accompt*; and that wherever one acts as bailiff, he promiſes to render an account. Salk. 9. pl. 1. Wilkins *v.* Wilkins, Carth. 89. S. C. where it was held, that the action would lie, by three judges againſt Holt, who doubted, and who told the plaintiff, that when it came to be tried, he would not ſuffer him to give all the account in evidence, or to enter into the particulars thereof; but that he ſhould direct his proof only as to the damages which he had ſuſtained for not accounting according to the promiſe, for he would not ravel into an account in ſuch actions. Comber, 149. S. C.

In *aſſumpſit* for money received *ad computandum*, and verdict for the plaintiff, it was moved in arreſt of judgment, that this action did not lie, but *accompt*; for if a man receives money to a ſpecial purpoſe, as to account, or to merchandize, it is not to be demanded of the party as a duty, till he has neglected or refuſed to apply it according to the truſt under which he received it; and the declaration muſt ſhew a miſapplication or a breach of truſt: but it was holden, that in this caſe the verdict had aided the declaration; for it muſt be intended there was proof to the jury that the defendant refuſed to account, or had done ſomewhat elſe that rendered him an abſolute debtor. Salk. 9. pl. 2. Poulter *v.* Cornwall. *Vide* 2 Show. Rep. 301.

(E) What ſhall be a good Bar to this Action.

IN accompt againſt one as bailiff, it is a good plea that he was never his bailiff. Rol. Abr. 121.

In accompt againſt a bailiff, it is a good plea that he was the plaintiff's ſervant to drive his plough, and keep his cattle for the drawing of his plough, *abſque hoc* that he was his bailiff in other manner, becauſe he is not accountable for this occupation. Bro. 29. Rol. Abr. 121.

[In accompt againſt one as bailiff, he cannot plead a judgment againſt him as receiver.] R. Abr. 119. 2 Lev. 126.

It is a good plea in bar to an action of *accompt*, that the plaintiff hath releaſed to him all actions. Rol. Abr. 123. So if the plaintiff had releaſed to him all the advantage and profit that he might have by the account. Rol. Abr. 123.

So it is a good plea in bar, that the plaintiff and defendant ſubmitted to the award of *J. S.* who awarded that the defendant ought to be acquited againſt the plaintiff. Cro. Car. 116. Hetl. 114.

So it is a good plea in bar, that after the receipt of the ſum of which the account is demanded, by the mediation of their friends, it was agreed between them, that the defendant ſhould make an obligation of 100*l.* for the 100*l.* received, and the profit thence to ariſe, which obligation of 100*l.* he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation deſtroys the duty, and the ſum in demand is thereby as ſtrongly releaſed as by a releaſe of all actions. Bro. 48. Rol. Abr. 123. But the bare acceptance of an obligation would not be ſufficient. *Vide* Yelv. 202. 1 Bulſtr. 103.

Rol. Abr. 123, 124. So if the defendant

It is no good plea in bar to the action, that the defendant hath made payment of the money which he hath received to account with, or that he hath made ſatisfaction for the ſame.

pleads that the plaintiff has given him an acquittance for the ſum received. Bro. tit. Account, 59. For theſe pleas, being matters which ſhew that he was once accountable, are only to be made uſe of before the auditors. *Vide* Dyer, 22, 145. 6 Co. Ferrer's caſe. 4 Leon. 61. Stile, 353. 410.

49 E. 3. 10. 41 E. 3. 3. 9. 45 E. 3. 14. Lutw. 58. 3 Wilſ. 113.

[Nonage is a good plea in bar of this action. So is *plene computavit*, and an account before the plaintiff would be ſufficient. *Plene computavit* and a releaſe are the only pleas which admit the plaintiff to be accountable that can be pleaded in bar to the action; and theſe are allowed, becauſe they are total extinctions of the right of action. This being a matter for the Court to judge of, they muſt be pleaded ſpecially, and cannot be given in evidence on *ne unque receivour*.

Southcot v. Rider, Raym. 57.

If the plaintiff charge the defendant as receiver for a particular time, he muſt anſwer that time preciſely.

St. 21 Ja. 1. c. 16. ſ. 3. *Vid.* Entr. 76. Pr. Ch. 518. Bul. Ni. Pri. 127. 4th edit.

The defendant may plead the ſtatute of limitations in this action; but if the plaintiff reply that it was an account between merchants, the plea will not avail him.

If the defendant plead that he has accounted before *R.* and *W.*, evidence that he accounted before *R.* only, will be ſufficient, for the accounting is the ſubſtance.]

(F) Of the Auditors, and what ſhall be a good Diſcharge before them.

Mod. 42. Brownl. 24. Co. Ent. 46. Lutw. 49. Raſt. 14. Lutw. 50.

IN an action of *accompt* there are two judgments; the firſt is *quod computet*, after which the Court aſſigns auditors, uſually two of the officers of the court, who are armed with authority to convene the parties before them *de die in diem*, at any day or place that they ſhall appoint, till the *account* is determined; the time by which the account is to be ſettled, is prefixed by the Court; but if the account be of a long and confuſed nature, the Court, on application, will enlarge the time. (*a*) If either of the parties think they do him injuſtice, he may apply to the Court; and if the defendant denies any article, or demurs to any demand, it is to be tried and determined in court.

Of auditors aſſigned by the parties themſelves, by virtue of the ſtatute W. 2. c. 11. Vide 2 Inſt. 380.

Brownl. 24.

[Where the auditors are not aſſigned by the Court, the remedy for not making ſuch allowances to the accountant as they ought to do, is by writ of *ex parte talis*, which is a commiſſion to the treaſurer and barons of the Exchequer to take the account. F. N. B. 129. 2 Inſt. 381. (*a*) All articles of account, though incurred ſince the writ, ſhall be included, and the whole brought down to the time when the auditors make an end of their account; *per* Ld. Mansfield. 2 Burr. 1086.]

Leon. 219. [3 Wilſ. 113. The reaſon is, to avoid trouble and charge to the parties. Cro. Car. 116. Taylor *v.* Page.

Whatever may be pleaded to the action, ſhall never be allowed of as a good diſcharge before the auditors; therefore, where in *accompt* the defendant pleaded *never his receiver*, &c. and this being found againſt him, he was adjudged to account; and before the auditors he pleaded a ſubmiſſion of all debts, accounts, &c. to *J. S.* who awarded that the defendant ſhould pay 10*l.* only, in diſcharge of all debts, accounts, &c. which he paid accordingly; this was holden no good plea, for this award, made before the action

tion brought, ought to have been pleaded in bar thereof; which being omitted, he hath loſt the advantage thereof, and ſhall not plead it before auditors. Hetl. 114. S. C.

[Nothing can be pleaded before auditors contrary to what has been pleaded to the action, and been found by verdict: where, therefore, a defendant charged as ſurviving bailiff of goods delivered to him and his co-bailiff to be merchandized, and to render an account, had gone to iſſue upon this fact, namely, whether upon his delivering over the goods to the deceaſed bailiff, all his (the defendant's) concern in the truſt, care, and management thereof ceaſed and was at an end; which iſſue was found againſt him; it was holden, that he could not plead afterwards before auditors that he delivered the goods over to the co-bailiff with the conſent of the plaintiff; for this matter might have been given in evidence upon the former iſſue; and the conſequence of admitting it to have been put in iſſue before auditors would have been, either two verdicts the ſame way, which would have been nugatory, or two contradictory verdicts, which would have entangled the Court ſo much that they would not have known what judgment to have given. Godfrey v. Saunders, 3 Wilſ. 114.

The defendant may plead payment to the plaintiff without ſhewing an acquittance.] 41 E. 3. 25.

It is a good diſcharge before auditors, for a factor to ſay, that in a tempeſt, becauſe the ſhip was ſurcharged, the goods were caſt over-board into the ſea. Rol. Abr. 124. Bro. tit. Account, 10.

So it is a good diſcharge before auditors, that he was robbed of the goods without his default or negligence *. Co. Lit. 89.

* Or that he put them in a warehouſe from whence they were taken by an enemy. Stra. 680.

It is a good diſcharge before auditors in *accompt*, as a receiver of 10*l.* if he tenders the 10*l.* (*a*) and ſwears that after the time that the money was delivered him, he found that he durſt not buy, for fear of loſs; for he is not obliged to run any hazard himſelf. Rol. Abr. 124.

(*a*) This muſt be underſtood of one who receives money to trade and merchandize therewith; for no other receiver is in any caſe obliged to buy or ſell. Rol. Abr. 124. *Quære*, Whether ſuch oath be neceſſary; and vide 2 Mod. 101. 1 Bulſt. 104. Equ. Ca. Abr. 369. 2 Vern. 638. 3 Wms. 185. 187. 279. 10 Mod. 144. 12 Mod. 514. 602. [It ſeems that the defendant may, in ſome caſes, purge himſelf by his own oath. The ſtatute of 4 Ann. c. 16. ſ. 27. gives the auditors a power in the caſes there provided for, of adminiſtering an oath, and examining the parties. Fitz. Abr. Accompt, p. 40. Br. Accompt, p. 66. 2 Mod. 101.]

If a bailiff of a manor receives the rents and profits of the tenants, and retains them two or three years, yet in a writ of *accompt* he is not to account for the profits thence ariſing in the mean time, for he had not any warrant to merchandize with the money, or to gain or loſe thereby. Rol. Abr. 125.

If in *accompt* the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*; and, notwithſtanding his care in keeping them, were worſe, and that they remained in his hands for want of buyers, and were in danger of growing worſe, and that therefore he ſold them upon credit to a man beyond ſea; this is no good plea, for a factor cannot ſell even *bona peritura* upon (*b*) credit, without a (*c*) particular commiſſion ſo to do. 2 Mod. 100. and the above authorities.

(*b*) Nor pawn. 2 Str. 1187.

(*c*) Factors now have uſually ſuch commiſſion.

Bul. Ni. Pri. 128. [The defendant cannot in an action of account pay money into court, as he may in an aſſumpſit.

1 Lutw. 63. If the plea of *plenè computavit* be found againſt the defendant, he ſhall account before the auditors for the whole money he is charged with, for this plea admits the receipt of the whole.]

[(G) Of the Judgment, and the ſubſequent Proceedings.

1 Brownl. 24. Cro. El. 806. 3 Bl. Com. 163. (*a*) Where final judgment was entered in the firſt inſtance, the Court ſet it aſide upon motion, as irregular. Hughes v. Burgeſs, B. R. H. 394. Andr. 19. S. C.

IN this action, as is above mentioned, there are two judgments; the firſt is *quod computet*; and afterwards, when the account is finiſhed, the ſecond judgment is, that the defendant pay the plaintiff ſomuch as he is found in arrear (*a*). Upon the firſt judgment a *capias ad computandum* lies, and if a *non eſt inventus* be returned upon it, an *exigent* iſſues. It is uſual to bail the defendant, if he be taken on the *capias*, though, by the rigour of the law, he is to account in priſon.

Cro. El. 806. 3 Wilſ. 117. Co. Lit. 139. b. 11 Co. 39. 27 E. 3. 87. 2 R. A. 131. p. 4. If the defendant make default after the interlocutory judgment, at the day aſſigned by the auditors, final judgment ſhall be entered for the ſum demanded by the plaintiff. So if there be judgment on demurrer to an inſufficient plea before the auditors.

Jenk. 288. 1 Rol. Abr. 575. 1 Leo. 302. 2 Leo. 118. 3 Wilſ. 117. It ſeems to be queſtionable, whether, in all caſes, damages are recoverable in account; but it is clear that if the defendant reſiſt the plaintiff's claim by pleading, or where an increaſe is received by a receiver *ad merchandizandum*, there ſhall be judgment for damages.

21 E. 3. 9. 32. 41 Aſſ. 11. (*b*) Vide Danv. 233. Lutw. 51. It hath been holden, that the firſt judgment is not ſuch as can be revived by *ſcire facias* upon the death of the plaintiff, before the account taken (*b*), or as a writ of error can be brought upon; and yet the plaintiff cannot be nonſuited after it.

After final judgment, the plaintiff ought to pray that the defendant's body may be taken in execution; or he may pray an *elegit*, if he refuſes the body. See the writ to the gaoler to receive the defendant after final judgment. Reg. 137.]

Accord and Satisfaction.

ACCORD is an agreement between two perſons at leaſt to give and accept ſomething in ſatisfaction of a treſpaſs, &c. done by one to the other. This agreement, when executed, may be pleaded in bar to an action for the treſpaſs; for in all perſonal injuries, the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cauſe of complaint, and therefore preſent ſatisfaction is a good plea: but if the wrong-doer only promiſe a future ſatisfaction, the injury continues till ſatisfaction is actually made, and conſequently there is a cauſe of complaint in being; and if the treſpaſs were barred by this plea, the plaintiff could have no remedy for the future ſatisfaction, for that ſuppoſes the injury to have continuance *.

5 E. 4. 7. Plow. 5. b. Rol. Abr. 129. Vide Raym. 450. 2 Keb. 332. 2 Jones, 158. 168. Vide head of Arbitrament and Award, That an award may be pleaded in bar to an action, though not executed; and how it differs from an *accord*.

* But if a defendant has promiſed to pay the plaintiff ſo much as a ſatisfaction, in caſe the plaintiff will not ſue for the treſpaſs, action of *aſſumpſit* will lie on that promiſe.

(A) What ſhall be deemed a good Accord and Satisfaction.

(B) To what Actions may Accord and Satisfaction be pleaded.

(C) Of the Form and Manner of pleading Accords.

(A) What ſhall be deemed a good Accord and Satisfaction.

AN *accord* muſt appear to be advantageous (*a*) to the party, otherwiſe it can be no ſatisfaction; therefore in an action of *treſpaſs* for taking the plaintiff's cattle, it is no good plea to ſay, that there was an *accord* that the plaintiff ſhould have his cattle again; for this is not any ſatisfaction.

9 E. 4. 19. Rol. Abr. 128.

[(*a*) Vide Perk. ſ. 749. Dy. 75.

In the caſe of Cumber v. Wane, Str. 426. it was ſaid by the Court, that the ſatisfaction muſt appear to them to be a reaſonable one; at leaſt, that the contrary muſt not appear; that, conſequently, payment of a leſs ſum could never be admitted as an accord and ſatisfaction for a greater. But the contrary hath been ſince adjudged; and upon this ground, that it may be a particular convenience to the creditor to receive money at a particular time. Hardcaſtle v. Howard, B. R. Hil. 26 G. 3. Where the thing given in ſatisfaction differed in quality from the thing demanded, the Courts never felt any difficulty to allow it to be a good ſatisfaction; as where a robe, or hawk, were pleaded to have been given in ſatisfaction of a pecuniary demand; becauſe the value of theſe things was in ſome meaſure arbitrary, and they might poſſibly be an equivalent to the plaintiff for his money: and the Court would *intend* that there was *ſome circumſtance* which ſtampt a value on them in the eye of the plaintiff beyond that which they might ſeem to bear.

bear. But they thought it too much for them to intend that a leſs ſum could be a ſatisfaction for a greater, a part for the whole, unleſs ſome circumſtance that might make it ſo were ſtated. Where indeed any circumſtance of that kind was ſtated, the plea was allowed; thus, payment of a *leſs ſum before the time*, or *at a different place* from that at which it was to be paid, was admitted as a ſatisfaction for a larger ſum; becauſe the accelerating the day, or varying the place of payment, might be a ſufficient reaſon with the plaintiff to abate ſo much of his demand. Pinnel's caſe, 5 Co. 117. Abbot v. Chapman, 2 Lev. 81.] But if it was to drive them to a certain place; ſo that it would be a charge to him to do it; this would make it a good *accord*. 2 Rol. Rep. 96. In covenant againſt the executor of tenant for life, &c. he pleads an *accord* that he ſhould quietly depart, and leave the poſſeſſion, &c. and holden good; though after the death of tenant for life he had no intereſt, but a licence in law only to carry away his goods. Yelv. 124. *per* three judges againſt one.

Rol. Abr. 128. Stile, 245. Lutw. 57.

An *accord* that each of them ſhould be quit of actions againſt the other, is not (*a*) good; becauſe it is not any ſatisfaction.

(*a*) But an *accord* that each ſhould give the other a quart of wine, in ſatisfaction of action, is good. Rol. Abr. 128.

9 E. 4. 19. Rol. Abr. 128. S. C. Cro. Eliz. 194. S. C. cited. Dyer, 356. S. C. cited.

In an action upon the ſtatute of 5 *Rich.* 2. *ſt.* 1. *c.* 8. if the defendant ſaith, that after the entry an *accord* was made between them, that the plaintiff ſhould re-enter into the land, and that the defendant ſhould deliver the evidences of the plaintiff to the plaintiff, this is not any bar of the action; for the delivery of the plaintiff's (*b*) own evidences can be no ſatisfaction of the tortious entry.

(*b*) But if he made title to the evidence, it would be a good bar. Rol. Abr. 128. That the delivery of the deed by the feoffee to *ceſtuy que uſe*, is a good *accord*, becauſe it belongs to the feoffee. Cro. Eliz. 357.

Rol. Abr. 128.

An *accord* that the defendant ſhould endeavour to make up and adjuſt differences between the plaintiff and *J. S.*; that he did endeavour, and at his own coſts make up ſuch differences, is a good plea.

Bro. Treſpaſs, 66.

In treſpaſs for trampling his graſs, the defendant pleads that he was amerced in the court-baron of the plaintiff for the ſame treſpaſs, which was aſſeared to two ſhillings, for which he hath agreed with the plaintiff; and holden a good plea by the acceptance thereof, though the amercement in the court-baron was extortion.

Rol. Abr. 128, 129. (*c*) Where the defendant pleaded that it was agreed the defendant ſhould conſeſs to the plaintiff he had done him wrong, and ſhould aſk forgiveneſs on his knees, whether this was a ſufficient conſideration or ſatisfaction. 2 Rol. Rep. 96. *dubitatur*. Vide Stile, 245. Salk. 71. pl. 5. and head of *Arbitrament* and *Award*.

In an action upon the caſe for ſcandalous words, the defendant pleads, that after the words ſpoken, the plaintiff ſued the defendant in the military court before the lord marſhal; where it was ordered by that Court, with the conſent of the plaintiff and defendant, in diſcharge of this ſuit, and all other differences between them, that the defendant ſhould make a ſubmiſſion in writing, in a place appointed, and before certain perſons, &c. and avers that he did ſo accordingly, &c. and on demurrer it was holden no good plea; for it being a point of honour only, (*c*) could be no diſcharge of the damages.

3 Lev. 55, 56. Lobly and Gildart. Hob. 68. Lovelace v. Cocket. A new obliga-

Debt upon an obligation, dated the twenty-third of *March* 24 *Car.* 2. upon condition to pay 10*l.* the defendant pleaded an *accord* the laſt of *April*, 31 *Car.* 2. whereby it was agreed that the defendant ſhould give the plaintiff a new ſecurity for this debt, and for another due to him by obligation likewiſe; and he being

the

the executor of the obligor, and the perſon with whom this *accord* was made, gave ſecurity, purſuant to the *accord*, by a bill ſealed by himſelf; the plaintiff demurred; and by the whole Court judgment was given for the plaintiff; for one obligation given in ſatisfaction for another is no diſcharge, whether grounded upon an *accord* or not; for the concord does not mend the matter; and yet here the new obligation binds him *de bonis propriis*, whereas the firſt obligation bound him only *de bonis teſtatoris*.

tion was given; and holden no ſatisfaction, becauſe it appeared that the firſt obligation was forfeited, and then the penalty was the debt; and therefore the ſecond being for leſs, could not be a ſatisfaction for a greater ſum. Lutw. 466. Vide 5 Co. 117. Cro. El. 727. 4 Mod. 88. 7 Mod. 17. [One ſimple contract debt cannot be pleaded in bar of another. Roades v. Barnes, Burr. 9. Bl. Rep. 65. If a debt is on deed or obligation without condition, the accord and ſatisfaction muſt be by deed, and ſo pleaded; if there appears a condition for payment of money, perhaps it may be pleaded without deed in ſatisfaction of the money or condition. 2 Wilſ. 86.]

[A releaſe of an equity of redemption is no ſatisfaction, becauſe of no value in the eye of the law.] Preſton v. Chriſtmas, 2 Wilſ. 86.

[Q. of this, and whether courts of law do not look at mortgages now with the ſame eyes as the reſt of the world?]

If an *accord* be to do two things, and the defendant do one and not the other, this is no bar of the action, becauſe the plaintiff hath not any remedy for that which is not performed. Rol. Abr. 129. That the accord muſt be executed, *vide ſupra*, and Plow. 5. 11. b. 9 Co. 79. b. 2 Jones, 158. 168. 2 Keb. 332. Salk. 76. T. Raym. 450. where it is ſaid, that an *accord* may be pleaded without execution, as well as an arbitrament; but *quære*, and ſee Allen v. Harris, Ld. Raym. 122. Lutw. 1537. S. C. James v. David, 5 Term Rep. B. R. 141.

But if an *accord* be that the defendant ſhall do a certain thing at a day to come, in ſatisfaction of an action; if he perform it at the day, this is a good bar of the action, though it was executory at the time of the accord made, inaſmuch as he hath accepted it in ſatisfaction. 6 H. 7. 11. b. Rol. Abr. 129.

If in *treſpaſs* the defendant pleads a concord between himſelf and the plaintiff, that he ſhould pay the plaintiff 3*l.* in hand, and ſhould undertake to pay the plaintiff's attorney's bill, and avers that he had paid 3*l.* and was always ready to pay the attorney's bill, but he never ſhewed him any; this is no good plea, becauſe the *accord* is not ſhewn to be fully executed. Raym. 203. Cock and Honeychurch. 2 Keb. 690. S. C.

[So performance of part, and tender of performance of the reſidue, is no good plea. Lewis v. Shepherd, Sir T. Jones, 6.

Where to debt upon bond the defendant pleaded payment of part before the day on which the bond became due, *and a promiſe to pay the reſt at a day to come*, to which the obligee had agreed; the Court held it no bar, it being executory. (*a*) For the ſame reaſon a plea to an action of trover that the plaintiff agreed to diſcharge the defendant of the trover in conſideration of his undertaking to pay a ſum of money, was holden bad. (*b*) So a plea that the plaintiff and defendant agreed to ſettle all matters in diſpute, and to bind themſelves in a penalty not to ſue each other. Balſton v. Baxter, Cro. El. 304. (*a*) Allen v. Harris, Ld. Raym. 122. Lutw. 1537. S. C. (*b*) James v. David, 5 Term Rep. 141.

So where a defendant pleaded that his ſeveral creditors, one of whom was the plaintiff, had come to an agreement to accept a compoſition in ſatisfaction of their reſpective debts to be paid within a reaſonable time, which he tendered and was ready to pay; it Heathcote v. Crookſhanks, 2 Term Rep. 24.

was

was holden that this was no plea to the action for the whole demand; for the agreement is unexecuted, and the promise a mere *nudum pactum* for want of a consideration. But per Buller J. if the defendant had assigned over all his effects to a trustee in order to make an equal distribution among all his creditors, and they had been bound by the agreement to forbear, it might have been a good plea.]

Raym. 450. 2 Jones, 158. S. C. between Case and Barber.

If in an *indebitatus assumpsit*, &c. the defendant pleads an agreement between the plaintiff and defendant, and *J. S.* the son of the defendant, that the plaintiff should deliver to the defendant certain clothes which the plaintiff then had in his custody; and that the plaintiff should accept the said son her debtor for 9*l.* to be paid so soon as he received certain pay from the king, due to him as lieutenant of a certain ship, in full satisfaction, &c. and that after, so soon as the son received his said pay, he was ready and offered to pay, &c. and that he yet is ready; this is no good plea, for it doth not appear that there was any good consideration why the son should pay, but (*a*) a bare agreement, without consideration; and admit the promise good, if not in writing, by 29 *Car.* 2. *cap.* 3. no action lies thereupon; and therefore it ought to have been shewn that it was in writing; for when such agreement is pleaded in bar, it must appear to the Court, that an action will lie thereupon; for the defendant shall not take away the plaintiff's present action, and not give him another upon agreement pleaded.

(*a*) Vide 2 Jones, 168. and tit. Agreement.

3 Lev. 189. Russell and Russell.

If in covenant to permit the plaintiff to receive 100*l. per ann.* rent, the defendant pleads a concord between the plaintiff and defendant, that each of them should deliver his part of the indenture into the hands of a third person, to be cancelled, and that each of them should be discharged of all actions upon the indenture, and avers that he had delivered his part to the third person; yet this is no good plea, because it does not appear to be executed on both parts. *Sed qu.* the default being the plaintiff's.

(B) To what Actions may Accord with Satisfaction be pleaded.

4 Co. 1. 9 Co. 79. b. (*b*) But in detinue, for

AN *accord* with satisfaction is no good plea to an action (*b*) real; for a right or title to a freehold cannot be barred by any collateral satisfaction.

charters concerning a freehold and inheritance, an *accord* is a good plea. 7 E. 4. 33. 9 Co. 78. So in *waste* against a lessee for years, though in the *tenet* an *accord* is a good plea, because a chattel only is to be recovered. N. Bendl. 35. Mo. 6. 9 Co. 78. But 6 Co. 44. *contr.* So in *ravishment de gard*, and *quare ejecit infra terminum.* 9 Co. 78. An *accord* with satisfaction is a good plea in an *ejectione firmæ*; for an ejectment includes a trespass, and they are so interwoven that they cannot be severed; and in all actions which suppose a wrong *vi & armis*, where a capias and exigent lay at common law, there an *accord* is a good plea. 9 Co. 77. Brownl. 134. S. C. 2 Brownl. 128. S. C. Godb. 149. In an appeal of *mayhem* an *accord* with satisfaction is a good plea, notwithstanding the writ be *felonice*. 6 Co. 44. 9 Co. 78. So in *attaint*, 13 E. 4. 1. 6 Co. 44. Cro. Eliz. 357. Dyer, 75. If an *accord* be a good plea in a *quare impedit*, *quære*; and *vide* 11 H. 7. 13. b. 6 Co. 44. a. 2 *Brownl.* 128, 129. Brownl. 134.

When

When a duty in certain accrues by the deed *tempore confectionis scripti*, as by covenant, bill, or obligation, to pay a certain ſum of money; this certain duty takes its eſſence originally and only by writing, and therefore ought to be avoided by matter of as high a nature, though the duty be merely in the perſonalty. 6 Co. 43. Lutw. 358. S. P. Cro. Jac. 254. S.P. 2 Roll. Rep. 187.

But if in covenant againſt an aſſignee a breach is aſſigned, in not repairing the houſe, the defendant may plead an *accord* between himſelf and the plaintiff, and execution thereof, *in ſatisfactione & exoneratione reparationum præd'*; for no certain duty accrued by the deed, but the action is founded upon a tort or default ſubſequent, together with the deed, and damages only to be recovered, which are in the perſonalty. Palm. 110. All. 39. Cro. Jac. 304. Co. Entr. 117. Yelv. 125. Noy, 110. Cro. Ja. 100. Wing. Max. 64. 9 Co. 79. b.

An *accord* with ſatisfaction generally is a good plea in all actions where damages only are to be recovered. 6 Co. 44. Dyer, 75.

(C) Of the Form and Manner of pleading Accords.

THE beſt and ſafeſt way to plead an *accord*, is to plead it by way of *ſatisfaction*, and not by way of *accord*; for if it is to be pleaded by way of *accord*, a preciſe execution thereof, in every part, muſt be pleaded; and if there be a failure in any part, the plea is inſufficient; but if it be pleaded by way of *ſatisfaction*, the defendant need plead no more, but that he paid the plaintiff 10*s.* in full ſatisfaction for the action, which he received. 9 Co. 80. Vide Roll. Abr. 129. Danv. Abr. 241. Stra. 573.

If in *covenant*, by the heir of the reverſioner againſt the executor of tenant for life, for not repairing, *&c.* the defendant pleads that the teſtator died 19 *March*, and that the 22 *March concordat' & agreat' fuit* between the plaintiff and defendant, that the defendant ſhould quietly depart and leave the poſſeſſion to the plaintiff, and that *in conſideratione inde* the plaintiff did agree to diſcharge him of the breach *in non reparando*, and ſhews that the 25 *March* he did depart, *&c.* this is no good plea, becauſe the concord is uncertain as to the time of his departure; and though he ſhews a departure within five days, yet he cannot help the original inſufficiency of the concord, which is the foundation of all. Yelv. 124, 125. Between Sanford and Cutcliff; adjudged by Yelv. and Croke: and Williams ſaid, the time being indefinite, the departure ought to have been immediately. Noy, 110. S. C. cited.

In an *aſſumpſit* for wares ſold and delivered, the defendant pleaded that he gave and delivered unto the plaintiff a *beaver hat* in ſatisfaction and diſcharge, *&c.* and that the plaintiff accepted the ſaid hat in full ſatisfaction and diſcharge of the promiſes, *&c.* The plaintiff replied *proteſtando* that the defendant never gave him any ſuch hat in ſatisfaction and diſcharge of the ſaid promiſes, *pro placito dicit*, that he never accepted a beaver hat in ſatisfaction and diſcharge, *&c.* On demurrer it was inſiſted firſt, that the iſſue ought to be upon the giving in ſatisfaction, and not upon the receiving in ſatisfaction, becauſe every gift or payment muſt be directed by him who gives or pays, and not by him who receives Young v. Rudd, Carth. 347. 5 Mod. 86. S. C. 2 Salk. 627. pl. 1. S. C. Lord Raym. 60. S. C.

it

(a) Str. 23. 1194.

it (a); but the Court held it well enough, and that the whole matter concerning the payment, as well as the acceptance in ſatisfaction, would be tried upon this iſſue; as to the objection of its being pleaded to be given in ſatisfaction and diſcharge of the promiſes, &c. when it ſhould be pleaded in ſatisfaction of the money mentioned in the promiſes, and not of the very promiſes, the Court held it of no weight.

Hawkſhaw v. Rawlings, Str. 23. Paine v. Maſters. Ibid. 573.

[It hath been ſince ſettled that this is the proper method of pleading; for there are two requiſites to a diſcharge, namely, payment, and acceptance; and a traverſe of the acceptance is an argumentative denial of the payment.]

Actions in general.

(b) *Actio nihil aliud eſt quam jus proſequendi in judicio quod ſibi debetur.* Co. Lit. 285. or otherwiſe a legal demand of one's right. Co. Lit. 285. 2 Inſt. 40. It implies a recovery of, or reſtitution to ſomething. Co. Lit. 289. and differs from a writ of *error*, which is no action, but only a commiſſion to the judges to examine the record, &c. Jenk. 25. 2 Inſt. 40. Yelv. 209. Yet, if by writ of *error* the plaintiff therein may recover, or be reſtored to any thing, it may be releaſed by the name of an action. Co. Lit. 288. b. *Vide* for this 2 Rol. Abr. 405. The ſuit till judgment is properly called an action, but not after; and therefore a releaſe of all actions is regularly no bar of an execution. Co. Lit. 289. a. Rol. Abr. 291.

THE deſign of entering into ſociety being the protection of our perſons and ſecurity of our property, men in civil ſociety have a right, and indeed are obliged to apply to the public for redreſs, when they are injured; for were they allowed to be their own carvers, or to make repriſals, which they might do in the ſtate of nature, ſuch permiſſion would introduce all that inconvenience which the ſtate of nature did endure, and which government was at firſt invented to prevent: hence therefore they are obliged to ſubmit to the public the meaſure of their damages, and to have recourſe to the law and the courts of juſtice, which are appointed to give them redreſs and eaſe in their affairs; and this application is what we call bringing an (b) *action*.

Under this head we ſhall briefly take notice,

(A) Of the different Kinds of Actions.

(B) In what Caſes an Action will lie, and for whom, and againſt whom.

(C) In what Caſes diſtinct Things may be laid in the ſame Action.

(A) Of

(A) Of the different Kinds of Actions.

ACTIONS are divided into criminal or civil; criminal are either to have judgment of death, as appeals of death, robbery, &c. or only to have judgment of damages to the party, fine to the king, and imprisonment; as appeals of *mayhem*, &c. Co. Lit. 284. 2 Inst. 40. 2 Wooddes. 487.

Civil actions are again divided into real, personal, or mixed; and here it may be proper to inquire a little into the nature of those real actions which were formerly in use, and how they came to be discontinued. Co. Lit. 284. 2 Inst. 40.

Actions real, or relating unto lands, are either *droitural*, that is, of the right of the ancestor; or possessory, which complain of the violation of a right of which they themselves were possessed. [This is not the true distinction between *droitural* and *possessory* actions. Whether the action be *droitural* or *possessory* depends not upon whether it complain of an injury to the demandant himself or to his ancestor, but, whether it seek to recover the *property* or the *possession*. If the former, the action is *droitural*; if the latter, it is *possessory*. *Finch* has stated this correctly. "Real actions," says he, "where a freehold shall be recovered, are "*possessory*, or *in the right*. *Possessory*, which are to recover a possession, as all assises, writs of ayel, be-"tayel, and cosenage. *In the right*, which are to recover a possession mixt with the right. And both "these may either be of a possession or right in himself, or descended from his ancestors, which we "call *ancestral*. Real actions in the right, are either founded on the right, or for the mere right." Finch's Law, 257 8. Note—The part referred to in the first Institute in support of the doctrine of the text, *viz.* 1 Inst. 164. is not at all referable to it, nor is the editor aware, that it is warranted by any passage in that book.]

The law always distinguished between a right of entry and a naked right to the land itself; and therefore there were different remedies; for to recover the naked right, the law only gave a writ of *right*; and in this action, the defendant at his election might put himself upon his country, or wage battle; but when the disseisee had a right of entry, it was presumed that the disseisin was fresh and recent; and therefore the trial was *coram paribus curtis*; but if the disseisee did not come till the heir was seated in the possession, and had paid relief to the lord, then the entry of the disseisee was taken away, and his title became doubtful; and then they appealed to Providence in such decisions; and if any freeman would, with his own body, defend the title of the possessor, the demandant was obliged to find a champion to enter the lists with him. Booth, 99. Co. Ent. 182. 1 H. 6. 7.

But to recover the right of possession, the ancient way was by writ of entry, where the process was by *summons*, *grand cape* before appearance, and *petit cape* afterwards, as in the writ of right, and the general issue was *disseisivit vel non disseisivit*; and this issue was tried by a jury, because when the disseisin was fresh, they did not put it upon the hazard of a battle, as they did in those cases where the long possession had made the right doubtful. Booth, 177. 179.

But in the writ of *entry* they recovered no damages; for that such writ only demanded the freehold, and was not mixed with the personalty; and therefore to recover the profits which are merely personal, they had an action of trespass, which was the proper remedy for the damages sustained. Booth, 175. 2 Inst. 289.

There were anciently only three sorts of writs of *entry*, one against the disseisor himself, the other, which was against his feoffee, which was called the *writ of entry in the per*; the third was after a second alienation, which was called a *writ of entry in the per and cui*; but the statute of *Marlb. cap.* 30. gave a writ of *entry* F.N.B. 191. Booth, 175. 2 Inst. 153. 3 Bl. Com. c. 10. 181.

in the *poſt*, which did not lie at common law againſt an alienee at a third hand.

F.N.B.191. 221. Booth, 175, 176. 200. 3 Bl. Com. 185.

And as a man might have brought ſuch writ of *entry* of his own diſſeiſin, ſo he might have brought it for the diſſeiſin of his father, or he might have brought it for a diſſeiſin done to his grandfather, which was called a writ of *ayel*, or a diſſeiſin done to his great grandfather, which was called a writ of *beſayel*, or any collateral couſins that were more remote than brothers and ſiſters, uncles and aunts, nephews or nieces; and this was called a writ of *coſinage*.

Glan. c. 7. f. 17. Fleta, 214, 215. *Vide* Aſſiſe.

But becauſe the proceſs in a writ of *entry* became tedious, when ſuch actions were removed out of the lord's court into that of the king, and thereby the proceſs which iſſued from three weeks to three weeks in the lord's court, was depending ſo many ſeveral terms in the king's court, therefore the aſſiſe was invented, which was in the nature of a commiſſion to put the diſſeiſee in poſſeſſion by trial at one aſſiſes; and this was ſo ſudden and immediate a remedy, that the writ of *entry* became obſolete; and therefore when the aſſiſe was the uſual remedy, the writ of *entry* began to be called a *writ of entry in the nature of an aſſiſe*.

So the writ of *quod ei deforceat*, which was given by a ſtatute paſſed in the ſame year with the ſtatute *de donis*, viz. 13 E. 1. c. 4. and occaſioned by it.

There were likewiſe other remedies, as the *formedon in remainder and reverter*, and a *formedon in deſcender*, which were given by the ſtatute *de donis*, which created eſtates-tail.

F.N.B. 220. *Vide* head of Ejectment, 3 Bl. Com. c. 11. 200.

But the proceedings on theſe real actions being dilatory and expenſive, and in many caſes concluding the party upon one trial, a more commodious method was contrived to diſpute the title to lands, which began in the reign of *Hen.* VII. in this manner; by forming a term for years, and then the leſſees bringing an ejectment to recover the term, and thereby to aſſert the title of the leſſor of the plaintiff: before this time, if a termor for years, who only claimed as a bailiff to the freeholder, had been ouſted of his poſſeſſion, he had only a remedy to recover damages in ejectment, and could not recover the term itſelf (*a*); but in the reign of *Hen.* VII. the courts of equity having obliged ſuch wrong-doer to a ſpecific reſtitution, the courts of law likewiſe gave an *habere facias poſſeſſionem* to recover the term *in ſpecie*.

Jenk. Cent. pa. 67. See the Record in Rait. 252. b.

(*a*) The term itſelf was recoverable only by covenant againſt the leſſor. Fitz. Eject. 2. P. 6 R. 2. F. N. B. 145. M. So early as the reign of E. 4. it was ſaid by Fairfax in argument, that the plaintiff in *ejectione firmæ* ſhould recover poſſeſſion of his term, as he would in a *quare ejecit infra terminum*. 7 E. 4. 6. b.

Perſonal actions are *ex contractu*, or thoſe founded on contract, as debt, which is to reſtore the thing *in numero*; or *detinue*, which is to reſtore the ſame in ſpecie, or damages, where it cannot be had; alſo actions of *account*, *covenant*, *aſſumpſit*, *quantum meruit*, *quantum valebat*, and *annuity*.

For which *vide* the ſeveral heads.

Or *ex delicto*, as treſpaſſes founded upon force, which are treſpaſſes *vi & armis*, or upon *fraud*, which are actions upon the caſe.

Vide heads Treſpaſs, Trover, and Converſion, and Actions on the Caſe.

Therefore if a man gets the goods or chattels of another by lawful means, as by bailment, borrowing, or pledging, he cannot have an action of *treſpaſs*, but muſt bring *detinue* or *trover*, becauſe the party had not violated his poſſeſſion.

Vide tit. Trover and Converſion.

So where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away

no *trover* lies, but an *assumpsit* for the money, because the property was changed by a lawful bargain.

If I borrow a horse to go to *Dover*, and go to other places, the owner may have an action on the case against me, for exceeding the purposes of the loan; for so far it is a secret and fallacious abuse of his property, but no general action of *trespass*, because it is not an open and violent invasion of it. Roll. Rep. 128.

Where the act is lawful, as the fixing a spout, and the consequence is injurious; the remedy is by case, and not trespass. 8 Mod. 272. 2 Ld. Raym. 1399. Forteſc. 212. 1 Sid. 634.

(B) In what Cases an Action will lie, and for whom, and against whom.

IT is clear, that for all injuries done to a man's person, reputation, or property, he shall have an action, and that for every right he is to have a remedy: for want of right and want of remedy are the same thing *.

It is also agreed, that where a person has several remedies, he may chuse which he pleases; but he cannot devise or lay hold on any but those prescribed by the laws of his country; for if this were allowed, it would be constituting as many actions as there are men, which would be highly inconvenient. Co. Lit. 145. Stile, 4.

But in this the great difficulty is, when a man shall be said to have suffered an injury, or to have such a right as will entitle him to an action; and here the rules established by that society, of which he is a member, must govern; and therefore, though a man has a right, yet if he be barred by the statute of limitations, he can have no remedy. Vide Limitation of Actions.

So if I promise by word only to convey lands, or to give goods, without delivering possession, or if I promise to (*a*) build a house without consideration, &c. though by the laws of nature these promises are binding, yet no action lies; for without deed duly sealed and executed, or without consideration, no property is altered; and every such promise is esteemed, in the eye of the law, to be *nudum pactum unde non oritur actio*. Yelv. 196. Cro. Car. 270. Brownl. 111. 6 Co. 13. Roll. Abr. 9.

(*a*) But if a carpenter undertakes to build a house for me, and does it ill, an *action on the case* lies against him. Keiw. 78. Roll. Abr. 9. So if a carpenter promises to repair my house before such a day, and does not do it, by which the house falls, *an action on the case* lies. Roll. Abr. 9. but for this *vide Assumpsit* and *Action on the Case*.

So in cases where there may be *damnum absque injuriâ*, the party can have no action; as if a school be set up in the same town where an ancient school has been time out of mind, by which the old school receives damage, yet no action lies. Roll. Abr. 107. 3 Mod. 69. Noy, 184.

So if I retain a master in my house to instruct my children, though this be to the damage of the common master, yet no action lies. 11 H. 4. 47. Roll. Abr. 107.

[If I throw out windows in my house which overlook my neighbour's house, and break in upon that privacy which he before enjoyed, yet no action lies. Norris v. Royle, Tr. 27 Geo. 3. C. P. The case of Cherrington v. Abney, 2 Vern. 646. was cited in the argument, but the Court thought it deserved no attention.

* (See *infra* as to *damnum sine injuriâ*.)

3 Bl. Comm. 28. Chorley v. Bolcot, 4 Term Rep. 317. 2 Atk. 332.

No action lies for the fees of a counſel, or phyſician; they being given as a mere gratuity.

Ruſſell v. the Men of Devon, 2 Term Rep. 667.

The parties to civil ſuits are, individuals, who muſt be particularly named; bodies corporate, and perſons *quaſi* incorporated, rendered liable to be ſued, and capable of ſuing by the proviſions of particular acts of parliament(*a*). The inhabitants of a county or diſtrict, unleſs ſo embodied, cannot be called upon to anſwer *civiliter* for an injury ſuſtained in conſequence of any breach of their public duty; for collectively, and *qua* inhabitants, they are not otherwiſe objects of civil juriſdiction.]

(*a*) Such are the ſtatutes of hue and cry, &c.

Co. Litt 128. Vide the ſeveral heads.

As the law grants redreſs for all injuries, and gives a remedy for every kind of right, ſo it is open to all kinds of perſons, and none are excluded from bringing an action, except on account of their crimes or their country; as men attainted of treaſon or felony, popiſh recuſants, perſons outlawed or excommunicated, convict in a *præmunire*, or alien enemies.

2 Bulſt. 311. Sid. 438. Mod. 30. 2 Sand. 47. 2 Keb. 588. Yelv. 44. Cro. Jac. 73. Dyer, 98, 99.

A man that hath a ſpecial and limited property in goods, as a carrier that hath goods delivered to him, a ſheriff who hath levied goods, a bailee who hath goods in his keeping, *&c.* ſhall have actions againſt ſtrangers who take them away, becauſe they are anſwerable in damages to the abſolute owner.

Sid. 438.

So a man who has cauſe of action againſt two, may bring it againſt which he pleaſes; as if *A.* takes the goods of *C.* and *B.* takes them from *A.* *C.* ſhall have his action againſt *A.* or *B.* at his election, becauſe both damnified *C.* in their taking.

Alleyn, 3. Newman and Zachary, Rol. Abr. 101. S. C.

So if two of the ſheep of *A.* have been loſt, and one of them is found again, and the ſhepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the feeding of it, and cauſes it to be ſhorn and marked with his own mark, and after the ſhepherd knowing this to be the ſheep of *A.* falſely and fraudulently affirms to the bailiff of the manor, to which waif and ſtray belongs, that the ſaid ſheep is a ſtray, whereupon the ſaid bailiff ſeizes it, *&c.* *A.* may have an action againſt his ſhepherd, for that by his falſe practice he hath created a trouble, diſgrace, and damage to him; and though he hath good cauſe of action againſt the bailiff, yet this will not excuſe the ſhepherd.

Alleyn, 3.

So if one ſlander my title, whereby I am wrongfully diſturbed in my poſſeſſion, though I have remedy againſt the treſpaſſor, yet I may have an action againſt him who cauſed the diſturbance.

Carth. 58. Baſon and Sandford, 2 Salk. 440. pl. 1. 3 Lev. 258. 3 Mod. 321. S. C. Show. 29. Vern. 297, 298. 465. 2 Vern. 643. 8 Mod. 89.

If there are ſeveral proprietors of a ſhip which hath uſually tranſported goods for hire, and a maſter placed therein by the part-owners, who hath 60*l.* wages for every voyage from *London* to *T.* and *J. S.* without making any contract with the part-owners, and none of them being preſent, delivers certain goods on board to the maſter, to be carried for hire from *London* to *T.* and the ſhip ſafely arrives there, but the goods are ſpoiled through the neglect of the maſter, an action lies againſt the part-owners; for though the maſter is chargeable in reſpect of his wages, ſo are the

the proprietors in reſpect of the freight, at the election of the plaintiff. 12 Mod. 446. Stra. 505. But Q. whether all the part-owners are not to be ſued; but clearly, if they are not, it muſt be pleaded in abatement. Stra. 553. 820. 2 Bl. Rep. 947. A perſon attainted is not to be charged with civil ſuits but by the leave of the Court, or of a judge. *Foſter*, 61.

(C) In what Caſes diſtinct Things may be laid in the ſame Action.

THE diſtinction herein, with reſpect to real actions, depends on the different kinds of writs; for all original writs are of two ſorts, *viz*, *breve nominatum & innominatum*; the firſt contains the time, place, and demand, very particularly; and therefore in ſuch writ ſeveral lands by ſeveral titles cannot be demanded in the ſame writ; the other contains only a general complaint, without expreſſing time, damages, *&c.* as the writ of treſpaſs, *quare clauſum fregit, &c.* and therefore ſeveral lands coming to the demandant by ſeveral titles, may be demanded in ſuch writ. 8 Co. 87. but for this vide F.N.B. 209. Owen, 11. Kelw. 105. Dyer, 145. 2 Brownl. 274.

As to perſonal actions, the difference ariſes from the abovementioned diviſion of perſonal actions, *viz.* ſuch as are *ex contractu*, and ſuch as are *ex delicto*, or founded on a *tort*; therefore debt on an obligation and on a *mutuatus* may be joined, becauſe the writ is general, and the declaration upon both will be warranted by the authority given by the general words of the writ; ſo debt and detinue may be joined in the ſame writ, becauſe there are writs in the regiſter, in which they are both compriſed in the ſame writ; ſo debt upon a leaſe and for clothes, they being in the words of the ſame writ; but debt and account, or debt and treſpaſs (*a*) cannot be joined. Cro. Car. 20. 316. Vent. 366. Keb. 847. Bro. Joinder in Action, 97. Regiſter, 95. 139.

(*a*) The true reaſon why actions may or may not be joined, is not the difference of the defendants pleas; for if that were the reaſon, debt upon an obligation, to which the plea is *non eſt factum*, and on a *mutuatus*, *nil debet* could not be joined; therefore the true reaſon ariſes from the difference of the proceſs, and the fines paid on taking out the original; for in debt the old proceſs was ſummons, attachment, and diſtreſs, and on taking out the original a fine was paid to the king, which was in proportion to the ſum demanded; but in treſpaſs the proceſs was a *capias*, becauſe the man that had committed a *tort* might be ſuppoſed to fly from juſtice; and in this action the Court ſet a fine on him in proportion to his offence, and levied it by a *capiatur*. Gilb. Hiſt. C. P. 6.

In perſonal actions ſeveral wrongs or treſpaſſes may be joined, becauſe they may be compriſed in the ſame writ, and ſo may ſeveral actions on the caſe, where the caſe is of the ſame kind; as an action for a fraud on the delivery of the goods, and on the warranty of the ſame goods, being both on the contract; ſo againſt a common carrier on the cuſtom of the realm, and *trover* may be joined, becauſe both on the *tort*, it being a violation of the cuſtom not to deliver the charge (*b*). 8 Co. 87. Jenk. 211. 3 Lev. 93. Raym. 233.

[(*b*) The difficulty as to what counts may be joined in the ſame declaration hath at length met with an eaſy ſolution: *any counts that admit of the ſame plea, and are followed by the ſame judgment, may be included in the ſame declaration*; but counts which require a *different* plea, or receive a *different* judgment, cannot be joined; and yet the cauſe of action comprized in ſuch counts may in both caſes be identically the ſame. Thus, a count againſt a carrier on the cuſtom of the realm and one in trover may be joined, becauſe the plea and the judgment proper to both are the ſame; but, inſtead of the count upon the cuſtom of the realm, ſubſtitute a count in aſſumpſit againſt the carrier, and trover cannot be joined with it; becauſe the plea to each is different. Brown v. Dixon, 1 Term Rep. 276. Beal v. Goodſon, 3 Wilſ. 354. Dickon v. Clifton, 2 Wilſ. 319.]

2 Lev. 101. 3 Keb. 59. 1 Sid. 244. 12 Mod. 73. See Ld. Raym. 58. Salk. 10. 3 Salk. 204.

But actions founded upon a *tort* and upon a contract cannot be joined, as *assumpsit* and trover against a carrier; for though these come under the general head of actions on the case, yet they are more distinct cases than debt and (*a*) account, which cannot be joined.

5 Mod. 85. Comb. 332. (*a*) Bro. Joinder in Action, 97.

3 Lev. 99. Bage and Bromwell.

If trover and *assumpsit* are joined in one action, and upon not guilty the jury *quoad* the trover find for the defendant, and *quoad* the *assumpsit* for the plaintiff, yet he shall not have judgment, for these cannot be joined in the same action, and the severance by the jury will not help it, the declaration being naught at first.

Alleyn, 9. Stile, 43. 202. Ld. Raym. 274. Str. 635.

One action will lie for entering the house of the plaintiff, breaking his chests, and carrying away his goods, and for beating his servant *per quod servitium amisit*.

Cro. Car. 20. White and Risden.

If in an action upon the case the plaintiff declares, that whereas *accommodasset* to the defendant a gelding *ad equitand' ab L. usque E. & ibidem salvo deliberand'* to the plaintiff, the defendant intending to deceive the plaintiff, rid upon the said gelding from *L.* to *E.* and *E.* unto *L.* again, and by that riding so much abused the said horse, that he became of little value; and though the plaintiff at *E.* demanded a re-delivery of the said gelding, yet the defendant refused, and yet doth refuse to deliver him, and hath converted the said gelding to his own use; this declaration is not (*b*) good, because it contains distinct matters, for part is founded upon the contract, and part upon the *tort*, which are several causes of action.

(*b*) But the plaintiff had judgment, being after verdict; but *per Hobart*, the defendant might have demurred for the doubleness of the declaration.

Vide head of *Amendment* and *Jeofail*.

Hob. 249. Brownl. 235. S. C. and *Winch* held the writ naught, but the damages being found severally, the plaintiff releasing those for the battery, and had judgment for the ejectment.

An ejectment and assault and battery were joined in one writ, and not guilty pleaded, and a verdict and entire damages given for the plaintiff; and it seems to have been aided after verdict.

Yelv. 63. Champernoon *v.* Hill. Brownl. 86. Cro. Jac. 68. Moor, 914. Noy, 3. S. C.

Where one hath a right to recover in the same kind of action, though he derives his right from different titles, yet being conjoined in him, he may recover in one action; as if in debt upon 2 & 3 *E.* 6. *c.* 13. for not setting forth tithes, though the plaintiff shews, that by prescription the rector of *A.* hath had two parts, and the vicar of *A.* the third part of the tithes there, and that the said rector and vicar, by several leases, did demise to the plaintiff, whereby he became *proprietarius* of the said tithes, and the defendant sowed, *&c.* this action is well brought, for though the vicar and parson could not join, because they claim severally by divided rights, yet when both titles are conjoined in one person, the matter of the title is also conjoined; and this being a personal action and founded upon a wrong, it is sufficient to shew generally, that the plaintiff is *firmarius* or *proprietarius* of the tithes, without saying by what title.

Poph. 24, 25. Haydock *v.*

If *A.* being seised of a third part of a messuage, *&c.* in fee, demises the same to *B.* for years, who assigns to *C.* and *A.* by bar-

gain and ſale enrolled conveys his reverſion to *D.* and his heirs, who was then ſeiſed of another third part in fee, and afterwards the ſaid *D.* leaſes his third part alſo to the ſaid *C.* for years, and dies; and his heir by bargain and ſale enrolled conveys the reverſion of the ſaid two third parts to *E.* and his heirs, after which waſte is done; *E.* (*a*) may bring one action of waſte upon theſe ſeveral leaſes, for that neither the intereſt of the terms nor of the inheritance were ſevered or divided to ſeveral, but were in one perſon at the time when the waſte was done.

Warnford. Cro. Eliz. 290. Owen, 11. S. C.

(*a*) And the rather becauſe the aſſignment of waſte is in one and the ſame thing. *Per Poph.* Ch. Juſt. *Vide* head of *Waſte.*

If in covenant the plaintiff ſhews that *A.* was ſeiſed in fee of one meſſuage, and poſſeſſed of another for a certain term of years yet enduring, and let both to the defendant for a leſs term of years, and that the defendant did covenant to repair, *&c.* and ſhews that *A.* by one deed did grant to the plaintiff the reverſion in fee, and by another the reverſion for years, *&c.* and that after the houſes were out of repair, *&c.* this action is well brought, for as upon ſeveral leaſes or upon ſeveral grants of a reverſion one action of waſte lies, ſo for the ſame reaſon one writ of covenant will lie.

Cro. Jac. 329. Pyot and Lady St. John. Lev. 110. S. C. cited.

But one cannot in the ſame action join a demand againſt one in his own right, and a demand on him as repreſentative of another; as if in *aſſumpſit* againſt an adminiſtrator, the plaintiff declares upon a ſale of goods to the inteſtate for 200*l.* and upon another ſale to the defendant herſelf for 27*l.* and that upon account the defendant was found indebted to the plaintiff in theſe ſums, and promiſed, *&c.* the declaration is naught, for the charge being in ſeveral manners, *viz.* in his own right and as adminiſtrator, it ought to have been by ſeveral actions.

Hob. 88. Harend and Palmer. And. 358. S. P. For this vide head of Executors and Adminiſtrators, and Cro. Eliz. 406.

Moor, 419. Hob. 184. Noy, 19. Vent. 268. 2 Lev. 110, 111. 228. 2 Keb. 814. 3 Lev. 74.

[Where the ſame perſons are aſſignees of two bankrupts under ſeparate commiſſions, they cannot join in the ſame action a joint debt due to both the bankrupts with ſeparate debts due to each.

Hancock and others, aſſignees, v Hayward, 3 Ter. Rep. 433

But where the ſame perſons were aſſignees of *A.* and *B.* and likewiſe aſſignees of *C.* and they declared as *ſuch* for a joint demand due to all the bankrupts, ſuch declaration was holden good upon a motion in arreſt of judgment.]

Streatfield and others, aſſignees, v. Halliday, 3 Ter. Rep. 779.

Several perſons may join in an action where their intereſt is joint; as if the ſeveral cattle of *A.* and *B.* are diſtrained, and *C.* in conſideration of 10*l.* to him paid by *A.* and *B.* aſſumes and promiſes to them to procure the cattle to be re-delivered to them, if they are not re-delivered accordingly, one joint action lies, for the conſideration is entire and cannot be divided.

For this vide head of Jointenants. Stile, 156. Roll. Abr. 31. S. C.

So if *A.* hath one mill and *B.* another in the ſame manor, which they have uſed to repair, and time out of mind all the grain which was ground and ſpent in the houſes of the tenants of the ſaid manor, and was not ground at one of the ſaid mills, hath always, and ought

2 Lev. 27. Litheley and Corytoa. 2 Keb. 631. 2 Sand. 115 Vent. 167.

S.C. agreed *per totam Curiam*; but because the ought to be ground at the other, and *C.* a tenant of the said manor, grinds at another mill, *&c.* *A.* and *B.* may join in one action against *C.* for the damage is entire to both their mills.

plaintiffs had declared that all the grain ought to be ground at those two mills, or one of them, which might be if all ought to be ground at one of the mills, and nothing at the other, for their expedition they prayed a *nil cap. per billam.*

3 Lev. 362. Ward & al' v. Brampston.

If within the parish of *A.* there is a custom for the parishioners yearly to elect two persons to be churchwardens there, and according to the said custom *B.* and *C.* are elected, but the surrogate of the bishop refuses to admit and swear them into the said office; upon which they bring a *mandamus*, and he falsely returns a custom for the vicar to chuse one churchwarden, and that therefore he cannot admit both the said parties, but is ready to admit one of them; they may join in an action for this false return, for the *mandamus* and whole prosecution thereof was joint, and this is no office of profit, nor action brought for that, but for the unjust return.

2 Lev. 363. *Vide* 12 Mod. 349. 371.

So if the register of the bishop refuses to register a licence of a chapel for a conventicle, according to 1 *W. & M. c.* 18. and upon a *mandamus* to do it makes a false return, several of the inhabitants may join in one action against him.

Dyer, 19. Gouldsb. 76. S. P. Cro. Car. 512.

But if one man calls two other men thieves, and shews in certain of what, *&c.* they shall not (*a*) join in one action against him; for the wrong done to one is no wrong to the other.

S. P. (*a*) So in false imprisonment. Dyer, 19. Nor will one action lie against two persons for words spoken by both. Style, 244. [2 Burr. 984. Action against husband and wife, for words spoken by wife; and action against husband *only* for words spoken by him, cannot be consolidated. Swithin v. Vincent, 2 Wilf. 227.]

Kelw. 55. Fitz. Joinder in Action, 17. Reg. 105. Owen, 106.

So in assault and battery; for the battery done to one cannot be the same as that done to the other; and one battery may hurt more than the other.

Dyer, 351. Q.

If a man holds several lands of several lords by heriot custom, and to defraud them of their heriots makes a fraudulent gift of all his beasts heriotable, all the lords may join in one action upon the 13 *Eliz. c.* 5.

Dyer, 370.

If two joint owners of a sum of money are robbed upon the highway, they may join in one action against the hundred in which, *&c.* otherwise if the sums are several, and several properties.

1 Bulst. 68. Hard. 321. S. P. and there said that they could not both join.

If *A.* delivers goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own use, either *A.* or *C.* may have an action against *B.* but both shall not have an action, but he who first begins his action shall go on with the same.

3 Lev. 209. Bidelsford and Onslow. 4 Burr. 2141. acc. Jesser v. Gifford.

If *A.* is seised in fee of the reversion of a close expectant upon a term for years, and *B.* is possessed of another close adjoining thereto, between which closes there runs a rivulet, and *B.* stops it, *per quod* the close of *A.* is surrounded, so that the timber trees, *&c.* become rotten; *A.* in respect of the prejudice to the reversion, may have one action, and the termor in respect of the possession

poſſeſſion, and of the ſhade, ſhelter, &c. may have another action, and a ſatisfaction given to the one is no bar to the other.

One action will not lie againſt ſeveral men for ſpeaking the ſame words; for the words of the one are not the words of the other, and can no more produce a joint action, than their words and tongues can be ſaid to be one. Palm. 313. Adjudged upon motion after a verdict for plaintiff.

Cro. Jac. 647. S. C. adjudged. Bulſt. 15. S. P. but there ſaid, that it was otherwiſe in the ſpiritual court, for that one libel may be againſt ſeveral perſons.

But if two men procure another to be indicted falſely for a common barretor, he may have an action upon the caſe againſt them both; though in ſtrictneſs the procurement of one is not the procurement of the other *. Latch. 262. So if two conſpire to maintain a ſuit, and one only gives money.

Bro. Joinder in Action, 47. Fitz. Error, 31. Fitz. Maintenance, 15. So in treſpaſs. Latch, 262. *Vide* head of *Treſpaſs*. So one *decies tantum* lies againſt all the jurors who take money, for they all give but one verdict, and are but one jury. Bro. Joinder in Action, 5. 47. 100. 108. Fitz. *Decies tantum*, 1. 4. 6. * It is in the nature of a *conſpiracy*. It is one *joint, entire* act.

[Where there are two or more bailiffs, &c. of a borough, a joint action will lie againſt them under the ſtat. of 3 *Geo.* 3. *c.* 15. for refuſing inſpection of the books and papers wherein is entered the admiſſion of freemen, though the words of the ſtatute are in the ſingular number, "mayor, or bailiff, &c." for the breach of truſt in one, is a breach of truſt in both, they being in law but one officer. Scholdam v. Bunniſs, Cowp. 192.

One action, it ſeems, will lie againſt all the coroners of a county for a falſe return to a *capias utlagatum*. Freem. 191.

Where two partners contract to pay a certain ſum of money *equally* out of *their private caſh*, to a third perſon, they muſt be jointly ſued upon this contract, for it is joint.] Byers v. Dobey, 1 H. Bl. 236.

A man cannot declare againſt one defendant for an aſſault and battery, and againſt the other for taking away his goods; becauſe the treſpaſſes are of ſeveral natures, and againſt ſeveral perſons †. Stile, 153. adjudged. † And are ſeveral diſtinct cauſes of action.

If *A.* leaſes for years to *B.* and *C.* rendering rent, and *C.* aſſigns his moiety to *D.* and after rent is arrear, *A.* may bring one action of debt for the rent againſt *B.* and *D.* for the reverſion remains entire. Palm. 283.

Actions Local and Tranſitory.

ORIGINALLY all actions were tried in the proper counties in which they aroſe, purſuant to the maxim, *vicini vicinorum facta præſumuntur ſcire*: this created no inconveniency, for all men being anciently *in decennâ* they were eaſily come at, the 7 Co. 1. Gilb. Hiſt. C. P. 89.

decenna being reſponſible for their appearance; but when the cuſtom of the *decennary* began to wear off, men uſed to fly from their creditors, and this begot the diſtinction between *local and tranſitory actions*; the firſt relating to lands, which muſt be tried where the lands lie; the other, a debt or duty adhering to the perſon wherever he fled: hence men omitted to date their contracts from any certain place, and began their obligations with a *noverint univerſi*: when this diſtinction was eſtabliſhed, the licence it gave was ſoon abuſed to a great degree; for plaintiffs would lay their actions far from the place where the fact was done; and the defendants, for fear of being outlawed, were neceſſitated to carry their witneſſes into that county, how far ſoever remote from the place where the cauſe of action aroſe. To remedy this,

2 Inſt. 130. Fitz. Brief, 18. 23. 44. 274. 649. 691. Raſt. 178. [In the following reign by ſtatute 4 H. 4. c. 18. it was particularly directed that attornies ſhould make no ſuit in a foreign county.]

"The 6 *R.* 2. *c.* 2. provides, That to the intent that writs of "debt and of account, and *all other ſuch actions*, be from hence- "forth taken in their counties, and directed to the ſheriff of the "county where the contracts of the ſame actions did ariſe; it is "ordained that from thenceforth on pleas on ſuch writs, when it "ſhall be declared that the contract thereof was made in another "county than is contained in the original writ, that then incon- "tinently the ſaid writ ſhall be abated."

Gilb. Hiſt. C. P. 89, 90.

This was intended to have confined all actions to their proper counties; but as it would have created greater miſchief than it was intended to prevent, if a creditor could not follow his debtor into another county; and as the ſtatute is ſo worded, that it only preſcribes that the declaration ſhall agree with the writ, as to the place, the judges conſtrued it ſo as to impower them to change the venue, and thereby oblige the plaintiff to give evidence of the fact within the county where the writ is brought; and this in effect tends to abate the writ according to the ſtatute; and here we ſhall conſider,

(A) What Actions are Local and Tranſitory.

(B) In what Caſes the Court will change the Venue.

(A) (*a*) What Actions are Local or Tranſitory.

(*a*) That all actions on penal ſtatutes muſt be laid in the proper county, *vide Actions Qui tam*, letter C. Co. Lit. 282. 6 Mod. 222. [(*b*) If not laid ſo, it is cauſe of demurrer. 2 Bl. Rep. 1070.]

ALL actions real or mixed, as *treſpaſſes*, *quare clauſum fregit*, *ejectment*, *waſte*, &c. muſt be laid in the county where the lands lie (*b*).

Cro. Car. 283. Jones 432. Thrale v. Cornwall, 1 Wilſ. 165.

So an action of debt for rent, againſt an aſſignee of a term, on the privity of eſtate, is local, and will lie no where but in that county where the lands are.

So

So where *A.* granted a rent-charge to *B.* and *C.* for their lives, and the lands out of which it iſſued came to the defendant after the death of *A.* and the plaintiff, as executor of the ſurvivor of the grantees, brought debt for arrears incurred in their life-time, and laid his action in the county where the lands lay; and on application of the defendants to have it tried elſewhere, ſuggeſting the plaintiff's power and intereſt in that county; it was holden a local action, and not triable elſewhere. Hob. 37. Pine *v.* Counteſs of Leiceſter.

A. as aſſignee of a reverſion, brought covenant againſt the aſſignee of the leſſee, on an expreſs covenant between the leſſor and the leſſee, for payment of rent reſerved out of lands which lay in *Ireland*, and which was made payable in *London*; on plea to the juriſdiction of the Court, it was held that though ſuch action may be maintained here by the (*a*) leſſor againſt the leſſee, yet that by the aſſignment the privity of contract was deſtroyed; and there being nothing but a privity of eſtate between the two aſſignees, it made the action local. Carth. 182. Damer and Barker. Salk. 80. pl. 1. 3 Mod. 336. Show. 191. S. C. 6 Mod. 194. S. C. cited, and admitted to be good law, there being no privity of contract remaining; and there is no difference between debt and covenant where the action is by *leſſor* againſt *leſſee*, &c. (*a*) The aſſignee of the reverſion may maintain debt or covenant upon the ſtatute 32 *H.* 8. *cap.* 34. againſt the leſſee; *per Holt* Ch. Juſt. 6 Mod. 194. for the privity of contract is transferred to the grantee, by the ſtatute. Carth. 183. Sand. 238. S. P. 240. S. P. 3 Lev. 154. 1 Will. 165.

But where the leſſor brought debt againſt the leſſee, and declared on a demiſe of lands which lay in *Jamaica*, on plea to the juriſdiction of the Court, and objection, that if the defendant had any good local plea, he was hereby deprived of it; the court held that this being on the privity of contract, was a (*b*) tranſitory action, and might be laid any where; and that if a foreign iſſue aroſe which was local, it might be tried where the action was laid; and for that purpoſe there may be a ſuggeſtion entered on the roll, that ſuch a place in ſuch a county is next (*c*) adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded, the laws of that country may be given in evidence. 6 Mod. 194. Way and Yally. 2 Salk. 651. p. 31. S. C. (*b*) 2 Stra. 776. S. P. 2 Vin. Ab. 82. pl. 19. (*c*) For this vide 6 Co. 48. 7 Co. 26. Vent. 59.

If a declaration contains matters lying in two counties that join, it ſhall be tried by both counties, on a *venire* directed to the ſheriffs of both counties, who are to ſummon ſix of each county. Cro. Eliz. 646. 741. Vide Trial *per Pais*, 103. And *ſect.* 3. that the trial may, by conſent of parties, be otherwiſe; and 16 & 17 *Car.* 2. *cap.* 8. after verdict, judgment ſhall not be ſtayed or reverſed, for that there was no right venue; ſo that the cauſe was tried by a jury of the proper county or place where the action is laid. *Vide* 4 *Ann. c.* 16. the act for *amendment of the law*. As to an aſſiſe in *confinio comitatûs*, ſee the ſtat. 7 R. 2. 10. Co. Lit. 154. a. F. N. B. 180. a. and 35 H. 6. 30. a.

An action of *debt* againſt the executor of a leſſee, in the *detinet* for arrears in the teſtator's life-time, may be brought any where; but where it is in the *debet* and *detinet* for rent accrued in the executor's time, it muſt be where the land lies. Latch. 262. 271. 3 Co. 24.

All perſonal actions, as *debt*, *detinue*, *aſſault*, *deceit*, *trover* and *converſion*, *account*, &c. may be brought in any county, and laid in any place; and the defendant cannot traverſe it, or be allowed to ſay, that the cauſe of action accrued in another county or different Co. Litt. 282. *debitum & contractus ſunt nullius loci.* 2 Inſt. 231. 7 Co. 3.

ferent place, except in the caſe of an officer of juſtice, who may plead a ſpecial juſtification.

Griffith v. Walker, 1 Wilſ. 336.

[An action againſt the ſheriff for a falſe return is tranſitory; for that which is falſe, is univerſally ſo.

Gregſon v. Heather, 2 Str. 727. Ld. Raym. 1455. S. C.

The aſſignee of a bail-bond may bring an action upon it, either in the county where it is taken, or in that where it is aſſigned.

Mayor of Berwick v. Ewart, 2Bl. Rep. 1068.

An action for breach of cuſtoms of a town is local; the averment of an immaterial fact will not in ſuch caſe warrant the laying the *venue* out of the proper county.]

Co. Litt. 261. Latch. 4. 6 Mod. 228. See 2 Lord Raym. 1043. 2Salk. 659. pl. 5. 10Mod. 255. 2 Ld Raym. 1212. 1214. 11 Mod. 51. pl. 21. 12 Mod. 568. Cowp. 177.

An action may be brought on a contract or matter which aroſe beyond ſea; as if *A.* enters into a bond to *B.* in any foreign country, and the bond bears date in no place, *B.* may bring his action where he pleaſes, and allege that the bond was made in any place in *England;* but if there be a place mentioned, as *Bourdeaux* in *France*, then ſhall he allege that the bond was made *in quodam loco vocat' Bourdeaux* in *France*, in *Iſlington* in the county of *Middleſex*, and from thence the jury ſhall come.

Dutch W. I. Company v. Moſes, 1 Str. 612. Ld. Raym. 1352. S. C.

[An action may be maintained in *England*, to recover money borrowed at *Amſterdam*, and covenanted to be paid in bank there.

Moſtyn v. Fabrigas, Cowp. 161.

Treſpaſs and falſe impriſonment will lie in this country for an injury of that nature, committed abroad in an *Engliſh* ſettlement.

Cowp. 180.

It was formerly thought that an action ariſing abroad, though in its nature local, as treſpaſs *quare clauſum fregit*, might be maintained in this country, *if the ſatisfaction ſought were merely perſonal and for damages, and there would be otherwiſe a failure of juſtice:* but that opinion hath been ſince over-ruled, being found to be inconſiſtent with the ſettled and acknowledged diſtinctions between actions local and tranſitory.]

Doulſon v. Matthews, 4 Term Rep. 503. See too, 1 Str. 646.

(B) In what Caſes the Court will change the Venue.

The practice of changing the *venue* began in the reign of James the firſt, Salk. 690. 2 Bl. Rep. 1042. It is *ex gratiâ curiæ*, and not *ex debito juſtitiæ*. Q. 2 Show. 176. Carth. 126.

THE defendant cannot by his plea oblige the plaintiff to lay his action in a different county from that in which he brought it, unleſs the matter pleaded be local (*a*); for in tranſitory actions he muſt move the Court on affidavit (*b*), that if the plaintiff hath any cauſe of action, ſuch cauſe accrued in the county of, *&c.* and not where the plaintiff hath laid it, *&c.* and ſuch motion muſt be made before iſſue joined (*c*), for by joining iſſue, he agrees with the plaintiff as to the manner of bringing the action; and though the Court ſeldom refuſe on ſuch affidavit to change the *venue*, yet if before or after the motion made, the plaintiff will enter into a rule to offer no (*d*) evidence but what ariſes in the county where he has laid his action, the cauſe will be tried there.

[The Courts will not change it to any of the four northern counties, previous to the ſpring circuit; becauſe there the

the aſſizes are holden only once a year, at the time of the ſummer circuit. 3 Bl. Comm. 294. 1 Wilſ. 138. But they will move it into ſome other county, when it appears from the circumſtances laid before them, that there is a probable ground to apprehend that a fair, impartial, or at leaſt a ſatisfactory trial cannot be had where it is laid. Str. 874. 3 Burr. 1564. 4 Burr. 2447. This power in the courts of common law is derived from the ſtatute of 6 R. 2. and is therefore limited to tranſitory actions, that ſtatute making mention only of *debt*, *account*, and *other ſuch* actions; for though in *local* actions the venue is occaſionally changed by the courts of law, yet that is only indirectly and by mutual conſent; it cannot be done directly and abſolutely in ſuch caſes without the aid of a court of equity. 3 Bl. Comm. 384. (*a*) Lutw. 1437. Co. Litt. 282. (*b*) The affidavit is neceſſary, becauſe the motion ſucceeded, and was equivalent to a plea in abatement. 2 Bl. Rep. 1033. It muſt ſtate *poſitively* that "the cauſe of action (if any) aroſe in A. (the county to which it is prayed to change the *venue*) and not in B. (the county where it is laid in the declaration) or elſewhere out of A." This is the eſtabliſhed form, with which the courts exact a ſtrict compliance. Cole v. Goring, Barnes, 477. Belſhaw v. Porter, Ibid. 478. 4 Burr. 2452. Allen v. Griffiths, 3 Term Rep. 495. It hath been queſtioned, though it is frequently done, whether the *venue* can properly be changed into Wales: certain it is, from the terms of the affidavit, that it cannot be directly changed into the next Engliſh county, though the proceſs may be afterwards awarded into it. 4 Burr. 2452. Dougl. 262. In the caſe of a libel diſperſed in ſeveral counties, the *venue* cannot be changed, becauſe the affidavit cannot be made in the preſcribed form, the publication of the libel being co-extenſive with its circulation. Pinkney v. Collins, 1 Term Rep. 571. Cliſſold v. Cliſſold, Ibid. 647. S. P. But if the printing and publiſhing were both in the ſame Engliſh county, or if the libel were written here, and ſent abroad, there is then only *one Engliſh county* in which the cauſe of action aroſe. Freeman v. Norris, 3 Term Rep. 306. Metcalfe v. Markham, Ibid. 652. One only of ſeveral defendants may make the affidavit. Box v. Reed. Barnes, 482. Where it appears on the face of the declaration that the cauſe of action is *local*, no affidavit is neceſſary. Mayor of Leiceſter v. Green, Ibid. 492. ſupra (A). (*c*) It may be made afterwards, 1 Term Rep. 781. So it may, after an order for time to plead, though upon the terms of pleading iſſuably; but not after an order for time to plead, upon the terms of pleading iſſuably, and taking ſhort notice of trial at the firſt ſittings in London or Middleſex, becauſe *there* a trial would be loſt. Petyt v. Berkley, Cowp. 510. Hunter v. Gray, Barnes, 493. S. P. Contr. Wightman v. Thompſon, 1 Wilſ. 245. A judge's order for an imparlance is no bar to it. Blackſtock v. Payne, Barnes, 487. Nor is the putting in a plea after a rule to ſhew cauſe any waver of it. Herbert v. Flower, Ibid. 492. (*d*) Or undertake to give *material* evidence in the county where laid. Sid. 404. 442. [But ſuch undertaking is indiſpenſable, the want of it cannot be ſupplied by an affidavit that the cauſe of action aroſe where laid. French v. Coppinger, 1 H. Bl. Rep. 216. The undertaking, however, is ſatisfied by very ſlight local evidence, or by proof that the cauſe of action aroſe abroad. Watkins v. Towers, 2 Term Rep. 275. Gerard v. De Roebeck, 1 H. Bl. Rep. 280. But evidence merely that the plaintiff's witneſſes reſide in the county where he has laid the action is not ſufficient. 1 Bl. Rep. 1031. If the plaintiff fail, it ſeems by the better opinion that he ſhall be nonſuited by analogy to the ſtatute of R. 2. Ibid. 1031. 1 H. Bl. Rep. 280. Cowp. 410. 2 Term Rep. 275. After the *venue* hath been changed, the Court have refuſed to bring it back upon an affidavit that the witneſſes live in Scotland, and will not come farther than Carliſle. Fogoe v. Gale, 1 Wilſ. 162.]

But though the Court, on application, ſeldom refuſe to change the *venue*, yet there are caſes in which the judges have refuſed; as where a peer of the realm brings an action of *ſcandalum magnatum*, the Court will not change the *venue*, becauſe a ſcandal raiſed on a peer reflects on him through the whole kingdom. 2 Mod. 215. Gilb. Hiſt. C. P. 90. See 2 Lord Raym. 954. 11 Mod. 9. 12 Mod. 121. 401. 420. Barnes, 343. 2 Stra. 807. 2 Ld. Raym. 1418. Andr. 198. Barnard. K. B. 60. 1 Lev. 56. S. P. For the king himſelf is party to the ſuit; but in my lord *Shaftſbury*'s caſe, who brought *ſcandalum magnatum*, and laid it in *London*, the venue was changed. Vent. 364. 2 Jones, 192. But *note*, that was by reaſon of the great influence he had in the city; and the eſtabliſhed doctrine is, that the venue cannot be changed in an action of *ſcandalum magnatum*. 2 Salk. 668. pl. 3. 1 Vern. 439. It was refuſed by *B. R.* in Lord *Sandwich* and *Miller*. *Eaſter Term* 1773.

A ſerjeant at law, barriſter, attorney, or other privileged perſon, whoſe attendance is neceſſary at *Weſtminſter-hall*, may lay his action in *Middleſex*, though the cauſe of action accrued in another county; and the Court, on the uſual affidavit, will not change the *venue*. Vide head of Privilege, 2 Salk. 668. pl. 1. 670. pl. 9. 2 Show. Rep. 176. pl. 172. 242. pl. 239. S. P. Though the plaintiff, who was a barriſter, had diſcontinued his practice for ſome time before. [But Q. of this? On motion by Mr. Spelman to re-change the venue to Middleſex on the ground of his being a barriſter, the Court obliged him to make affidavit that Mr. Spelman the plaintiff and Mr. Spelman the barriſter were the ſame perſon. 2 Bl. Rep. 1067. 1 Bl. Rep. 19. An attorney does not loſe his privilege to change or retain the venue by reſiding in the country. 2 Bl. Rep. 1065.]

But

Carth. 126. 2 Ld. Raym. 1053. Biſſe *v.* Harcourt.

But if a privileged perſon be ſued, and the action brought againſt him in the right county, his privilege will not entitle him to have it tried in *Middleſex*.

2 Salk. 668. pl. 1. Andr. 381. 4 Burr. 2027. 3 Term Rep. 573. Contr. 2 Str. 1049. *Dolben* J. remembered a cauſe where the venue was altered, though an attorney was plaintiff, becauſe the matter did ariſe, and all the witneſſes live in remote parts. Carth. 126. So where the plaintiff was an attorney, but had not declared in perſon, but by *N. C.* his attorney. Barnes 479. So where plaintiff ſued defendant by *capias*, and not by attachment of privilege. Pract. Reg. C. P. 419. Rep. & Caſ. Pract. C. P. 132. So where he ſued by original. Barnes, 484. Rep. & Caſ. Pract. C. P. 145. Pract. Reg. C. P. 420.

Vent. 47. Caſ. Temp. Holt, 712. pl. 5. (*a*) In order to prove the venue was not laid in *Middleſex*, a copy of the declaration was produced, by which it was ſaid, it appeared the venue was laid in *London*, but the Court ſaid an affidavit ought to be annexed, that it may appear to be a true copy, and that they did not require this affidavit but in the caſe of an attorney.

So if an attorney lays his action in *London*, the Court will change the venue on the uſual affidavit; for by not (*a*) laying it in *Middleſex*, he ſeems regardleſs of his privilege, and is to be conſidered as a perſon at large.

2 Salk. 669. pl. 4. Comb. 84. Lutw. 215. 7 Co. Bulwer's caſe. [The like law in penal actions. 2 Term Rep. 238.]

If material evidence may be given in two counties, the plaintiff may elect to bring his action in which he pleaſes; as, if *A.* draws a bill of exchange in *Briſtol*, payable in *London*, the action accrues by the refuſal to pay the money in *London*, and therefore the plaintiff not obliged to change the venue.

Vent. 344.

So where an *aſſumpſit* was brought for goods ſold and delivered, and the action laid in *London*, and a motion was made to change the venue upon affidavit that the ſale was in *Kent*; but it appearing that the delivery was in *London*, the Court held that where the matter conſiſts of two parts in ſeveral counties, the plaintiff ſhall have his election.

2 Salk. 670. pl. 8. Not the courſe to change the venue in an action of eſcape; per Holt Ch. J. Shirley v. Collis, 2 Bl. Rep. 940.

So an action againſt a lighterman for not delivering goods was laid in *London*, where they were to be carried to; it was moved to change the venue, becauſe the damages and neglect were in *Kent*; *ſed non allocatur*; for the neglect is tranſitory, and not material where it was; and the Court will never change a venue for a carrier, which is the ſame caſe.

[But where the cauſe of action ariſes in two counties, the Court will not change it to a third.]

2 Mod. 228. That the Court will not change the venue in an action of *covenant*. Ley. 307.

If the action be grounded on a ſpecialty, the Court will not change the venue; for not being dated at any particular place, it may be preſumed to be omitted, that it may charge the defendant at any place.

Dupleſſis v. Chalk, Str. 878. Fitzgib. 166.

[Nor will they change the venue in debt for rent on a parol demiſe of lands in one county, and the action laid in another.

Meritt's caſe, 1 Freem. 260.

But where an action of debt for rent by the leſſor againſt the original leſſee was brought in *London*, and the lands lay in *Glouceſterſhire*; on affidavit made that the defendant would plead a ſpecial plea, whereby the title of the eſtate would come in queſtion, the Court ordered the venue to be changed into *Glouceſterſhire*.

It

It is a pretty general rule not to change the venue in debt; yet it has been done upon certain terms impoſed upon the defendant, on a ſuggeſtion that both the plaintiff's and defendant's witneſſes reſided in the county to which it was prayed it might be changed; but ſeveral ſimilar applications have been rejected. Foſter v. Taylor, 1 Term Rep. 781.

The Court of Common Pleas refuſe to change the venue in an action on a bill of exchange, or promiſſory note (*a*), where the cauſe of action is confined to the bill or note only; but the practice of the Court of K. B. in this reſpect ſeems to be different. Barnes, 480. 483. 485. 487. 2 El. Rep. 993. 1 Wilſ. 41. Say. Rep. 7.

Andr. 65. (*a*) They conſider theſe in the nature of ſpecialties.

Though the plaintiff cannot regularly move to change the venue, yet he may do it in effect by moving to amend, and ſtriking out the name of the one county, and inſerting the other; and as he may make this motion at any time, therefore where the venue has been changed by the defendant, the Court will permit him at any time to bring it back on the uſual undertaking.] Stroud v. Tilly, Str. 1162. Hallet v. Hallet, 1 Wilſ. 173. Bruckſhaw v. Hopkins, Cowp. 409.

Actions Qui tam.

ACTIONS *qui tam* are (*b*) ſuch as are given by acts of parliament, which impoſe a penalty, and create a forfeiture for the neglect of ſome duty, or commiſſion of ſome crime, to be recovered by action or information, at the ſuit of him who proſecutes as well in the king's name as in his own. As moſt penal ſtatutes direct, that the penalty may be recovered by action or information, we will conſider both matters together, and therefore we ſhall ſhew 3 Bl. Comm. 160. (*b*) It is ſometimes called a popular action, when the penalty, or part of it, is given to any one who will ſue for the ſame. In theſe actions or informations, the party who proſecutes has, by commencing his ſuit, ſuch an intereſt in the penalty, that the king cannot diſcharge or ſuſpend the ſuit, as to the part he (the plaintiff) is entitled to. *Vide* 2 Hawk. P. C. 392. and head of *Prerogative*. Penal actions, though the judgment may in ſome caſes be followed by legal diſabilities, are conſidered as civil proceedings. They are founded upon the implied contract which every one is under by the fundamental conſtitution of government, to obey the directions of the legiſlature, and to pay the forfeiture incurred by his diſobedience to ſuch perſons as the law requires. 3 Bl. Comm. 159. Therefore the affirmation of a Quaker is admiſſible in them; Cowp. 382. the proceedings may be amended; 1 Str. 136. 2 Str. 1227. 1 Wilſ. 125. and a new trial may be had after a verdict for the defendant. Wilſon v. Raſtall, 4 Term Rep. 753.]

(A) In what Caſes they lie.

(B) What ought to be the Form of them.

(C) In what Courts they may be brought, and where laid.

(D) Of the Proceedings and Pleadings in ſuch Actions or Informations.

(E) Of

(E) Of the Judgment on ſuch Actions or Informations.

(F) In what Caſes there ſhall be Coſts.

(G) Whether the Penalty of a Penal Statute may be compounded or granted over.

Within what time the proſecution muſt be on a penal ſtatute, *vide* head of *Limitation of Actions*.

(A) In what Caſes they lie.

Co. Ent. 375. Lutw. 133. 138. Dyer, 95. 346. And. 139. (a) But without ſuch penalty be given, no perſon can ſue. 2 And. 127. 2 Jones, 234. 2 Hawk. P. C. 377. for the whole penalty goes to the king. [It hath been determined however, that where an informer, entitled to no part of the penalty, ſues for the king and himſelf, the information is not void, but the whole ſhall be adjudged to the king. Parker, 105. Hardr. 185. But an act which gives a remedy only to the party grieved, is not to be conſidered as a penal act. Caſ. Temp. Hardw. 412. Andr. 115. S. C. Vin. Abr. tit. Robbery, (U) pl. 2. S. C. 2 Term Rep. 148. for the king cannot diſcharge it, or proceed in it after the death of the party. Wood's Inſt. 535.]

WHEREVER a ſtatute prohibits a thing, as being an immediate offence againſt the public good in general, under a certain penalty, and the penalty, or part of it, is (a) given to him who will ſue for it, any perſon may bring ſuch action or information, and lay his demand *tam pro domino rege quam pro ſeipſo*.

Vide 2 Hawk. P. C. 377. 4 Co. 13.

So where a ſtatute prohibits or commands a thing, the doing or omiſſion whereof is both an immediate damage to the party, and alſo highly concerns the good of the public, the honour of the king, &c. the party grieved may, and, as ſome ſay, ought to bring his action on ſuch ſtatute *tam pro domino rege quam pro ſeipſo*, eſpecially if the king be entitled to a fine.

(B) What ought to be the Form of them.

5 H. 7. 17. b. 2 Roll. Abr. 79. Plow. 79. 4 Co. 48. Cro. Eliz. 336. Cro. Car. 229. Dyer, 155. 159. Moor, 468. 699. Show. 337. 2 Hawk. P. C. 349.

IT is agreed, that an action or information on a publick ſtatute need not recite the ſtatute on which it is grounded, whether the offence be ſuch only becauſe prohibited, or be an evil in its own nature, and whether it be prohibited by more than one ſtatute, or by one only; for the judges are bound *ex officio* to take notice of all public ſtatutes.

For this vide 2 Hawk. P. C. 349.

But if the proſecutor take upon him to recite the ſtatute, and materially vary from a ſubſtantial part thereof, this is fatal, becauſe it does not judicially appear to the Court that there is ſuch a foundation for the proſecution, as that whereon it is expreſsly grounded.

Cro. Jac. 104. 529. Sid. 368. 2 Keb. 366. Cro. El. 835.

But if an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome, and defective as to others, the informer may have judgment for what is well laid; as where the words of the

the ſtatute are fully purſued in the deſcription of ſome of the offences, and not of others; or where the time is in part certain, and in part uncertain.

Alſo an action or information *qui tam* need not conclude *contra pacem*, or *in contemptum domini regis*; as an indictment muſt. 2 Hawk. P. C. 378.

He who brings an action on a penal ſtatute, which gives one moiety of the forfeiture to the king, and the other to the informer, may either have a writ againſt the defendant *quod reddat domino regi & A. B. qui tam, &c. quas eis debet*, or *quod reddat A. B. qui tam, &c. quas ei debet*; and in either caſe the writ is well purſued by a declaration in the name of the plaintiff only. Jones, 261. Cro. Car. 256. Plow. 77. Dyer, 95. 3 Lev. 374. Dal. 66.

But it ſeems doubtful whether there be any neceſſity that either the writ or count, in any ſuch action, do expreſs, that it is brought by or for the king as well as the party *. *Quære.* Vide 2 Hawk. P. C. 379. N

* The uſual form of declaring is, that the party ſues as well for the king, as for himſelf. It is the ſafeſt method, and perhaps is neceſſary.

But it ſeems agreed, that every information muſt be in this form, *viz.* that the informer *tam pro domino rege quam pro ſeipſo ſequitur*, even where it is brought upon a ſtatute which gives one third of the penalty to a third perſon; but there is great variety in the form of ſuch informations in other reſpects; for ſometimes they ſay, that the action accrues to the informer, to demand the forfeiture for the king and himſelf; ſometimes that it accrues to the king and to the informer; ſometimes that it accrues to the king and to the informer and to *J. S. viz.* where it is divided into three parts; ſometimes they have no clauſe at all of this kind; ſometimes a proceſs is prayed to bring in the defendant to anſwer the informer; ſometimes to anſwer as well the king as the informer; and ſometimes to anſwer concerning the premiſes, without ſaying to whom. Vide Hawk. P. C. 379. and the other authorities there cited.

Such information may demand what is due to the informer, without mentioning what is due to the king; alſo, if the *quantum* depend on what ſhall be found by the jury, a blank † may be left for the ſum; but if it demand more or leſs for the party than his due (*a*), it is inſufficient as to him; but even in ſuch caſe, it may be ſufficient as to the king's ſhare. 2 Hawk. P. C. 379. † *Qu.* As to the blank if it would not be bad? (*a*) Hob. 245. Bull. *Ni. Pri.* 296.

If the action be popular, *i. e.* ſuch as any perſon may bring, it may conclude *ad grave damnum*, without adding, of the plaintiff; becauſe every offence, for which ſuch action is brought, is ſuppoſed to be a general grievance to every body. Bro. Action Popular, 2. 2 Hawk. P. C. 380.

It is ſaid that the fact is ſufficiently alleged after a *quod cum* in an action on a ſtatute, but not in an information ‡. Show. 337. ‡ *Qu.* If this rule will hold univerſally? and if it muſt not rather depend on the particular circumſtances of each caſe?

Where the penalty is given for continuing ſuch a practice for a certain time, or for not doing ſuch an act within ſuch a time, the information muſt be very particular in bringing the offence within the time preſcribed ‖. Lutw. 162. 2 Hawk. P. C. 379. ‖ The King *v.* Taylor,

Lent aſſizes for *Surry* 1776, before Mr. J. *Blackſtone*, an information againſt the defendant for following the buſineſs of a tanner, not having ſerved an apprenticeſhip. The evidence did not ſpecify the time, as laid in the information, the judge therefore directed the jury to acquit the defendant, and he was acquitted

quitted accordingly; and the profecutor having clofed his evidence, the judge very properly refufed to let him fupply the defect; it being a profecution that was not to be encouraged.

2 Hawk. P. C. 380. (*a*) Made perpetual by 27 El. c. 10. and 31 El. c. 5. [The later cafes fupport this doctrine. See Leigh v. Kent, 3 Term Rep. 365. n. a.]

By the (*a*) 18 *Eliz. cap.* 5. *None fhall purfue againft any perfon on a penal ftatute, but by way of information, or original action, except where the penalty is limited to a certain perfon*, &c. yet popular actions in the *King's Bench* or *Exchequer* feem not within the meaning of this ftatute; for it doth not reftrain the fuit to original writs, but only to original actions, and fuch actions by bill are properly original ones in the courts in which they are commenced; and therefore it feems a reafonable conftruction, that the meaning of the ftatute was only to reftrain fuits commenced in inferior courts, and afterwards removed into fuperior.

(C) In what Courts they may be brought, and where laid.

Vide 31 El. c. 5. to this purpofe, and the expofition thereof. 2 Hawk. P. C. 268, 269.

"BY the ftatute 21 *Jac.* 1. *cap.* 4. all offences againft penal ftatutes, for which any common informer may ground any popular action, bill, plaint, fuit, or information, before juftices of affife, or *nifi prius*, or of general gaol-delivery, or of *oyer*, &c. or of peace, &c. (except offences concerning recufancy or maintenance, or the king's cuftoms, or tranfporting gold, or filver, or munition, or wool, or leather, &c.) fhall be commenced, fued, tried, recovered and determined by action, plaint, bill, information, or indictment, before the juftices of affife, of *nifi prius*, of *oyer*, &c. or gaol-delivery, or before juftices of peace, of every county, city, borough or town corporate, or liberty, having power to inquire of, hear and determine the fame, and not elfewhere, fave only in the faid counties, or places ufual for thofe counties, or any of them; and the like proceſs in every popular action, bill, plaint, information, or fuit, fhall be as in actions of *treſpaſs vi & armis* at common law; and all informations, actions, bills, plaints, and fuits whatfoever, either by the attorney-general, or by any other officer whatfoever, in any of the courts of *Weſtminſter*, for or concerning any the offences aforefaid, fhall be void.

"And in all fuits on penal ftatutes, the offence fhall be laid in the proper county; and if, on the general iſſue, the offence be not proved in the fame county in which it is laid, the defendant fhall be found not guilty.

"And no officer fhall receive, file, or enter of record, any information, bill, plaint, count, or declaration, on the faid ftatutes, which by this act are appointed to be heard and determined in their proper counties, till the informer or relator hath taken an oath before a judge of the court, that the offence was not committed in any other county than where, by the information, &c. the fame is fuppofed to have been committed, &c. the fame oath to be there entered of record*."

* This fection of the ftatute feems now to be difregarded. See *infra*.

In

In the conſtruction of this ſtatute it hath been holden, that no action of *debt* or *information*, or other ſuit whatever, (*a*) can be brought on any penal ſtatute made before 21 *Jac.* 1. in any of the courts of *Weſtminſter-hall*, for an offence not excepted by the ſtatute, and for which the offender may be proſecuted in the country, (*b*) unleſs ſuch offence ſhall be committed in the ſame county in which ſuch court ſhall ſit; and as to the objection, that by this reſtraint of ſuits on penal ſtatutes, to the ſaid courts, the offence would become diſpuniſhable by the offender's removing from the county; it may be (*c*) anſwered, that he may be ſued to an outlawry in the ſame manner as in an action of treſpaſs.

2 Hawk. P. C. 384. (*a*) Salk. 372. pl. 13. Carth. 465. 5 Mod. 425. 2 Lev. 204. 3 Inſt. 192. adjudged *cont.* Vent. 8., Lev. 249. 3 Lev. 71. 2 Keb. 401. 447. Sid. 303. 400. and *vide* Vent. 304. 2 Lev. 204. Latch, 192. Sid. 359. Ld. Raym. 370. Str. 415. (*b*) Jon. 193. (*c*) Salk. 373. pl. 14. Salk. 372. pl. 13.

That where a ſubſequent ſtatute gives an action of debt, or any other remedy, for the recovery of a penalty in any court of record generally, it ſo far impliedly repeals the reſtraint of 21 *Jac.* 1. and conſequently leaves the informer at his liberty to ſue in the courts of *Weſtminſter-hall* (*d*).

But per Holt, it comes within the equity of the ſtatute. [(*d*) The King v. Gaul. 1 Salk. 372. Ld. Raym. 370. S. C. Hick's caſe. 1 Salk. 373. But this was merely the private opinion of Holt; and the caſes here referred to have been confirmed by a ſubſequent caſe of Harris v. Reyney, B. R. P. 1734, cited in Parker, 186; and the reaſon of the judgment, as there ſtated, is, that the preamble ſpeaks of offences againſt divers and ſundry penal laws and ſtatutes of the realm; and the enacting clauſe of or concerning offences committed or to be committed againſt any penal ſtatute, muſt relate to a ſtatute in being, for there can be no offence againſt a ſtatute which does not exiſt. However the offence muſt be laid within the proper county. 1 Salk. 373.]

That the ſtatute gives no juriſdiction to the courts thereinmentioned, over any offences, in relation to which they had none before; and therefore that ſuits for ſuch offences muſt be brought into the courts of *Weſtminſter* in the ſame manner as before (*e*).

Cro. Car. 119. Lit. Rep. 163. Hut. 98. Vent. 8. 2 Str. 1103. [(*e*) It is only where there is a concurrency of juriſdiction in the ſuperior and inferior courts, both as to *the ſubject matter, and as to the mode of proceeding*, that the ſtatute excludes the juriſdiction of the former. Therefore a ſuit may be maintained in the courts at Weſtminſter for the recovery of penalties incurred againſt the ſtat. of 1 Jac. 1. c. 22. notwithſtanding a ſubſequent clauſe of that ſtatute which authorizes juſtices of aſſize, of gaol delivery, and of the peace, to inquire of the premiſes, and to hear and determine the ſame; the mode of proceeding under that clauſe being merely by indictment or preſentment.]

That the ſaid ſtatute hinders not the removal of any cauſe into the *King's Bench* by *certiorari*, after which it may be either tried there or in the county by *niſi prius* (*f*).

Keb. 105. Jones, 193. 2 Hawk. P. C. 384. Rex v. Martel. Bull. *Ni. Pri.* 196. 4th ed. [(*f*) It is now ſettled, though formerly doubted, that an appeal lies from the King's Bench to the Exchequer Chamber in a *qui tam* action of debt. This queſtion was determined by the Exchequer Chamber, the courts of King's Bench and Chancery having previouſly refuſed to entertain it. Lloyd v. Skutt. Dougl. 353. n.]

Alſo where a ſtatute limits ſuits by an informer *qui tam* to other courts, yet any one may, by conſtruction of law, exhibit an information in the Exchequer for the whole penalty, for the uſe of the king.

2 And. 127. Cro. Jac. 178. 2 Hawk. P. C. 381. Parker, 182.

That on the laſt clauſe of the ſtatute it cannot be aſſigned for error, that an information, &c. was filed without ſuch previous

Cro. Car. 316. vide 4 Inſt. 272.

2 Inſt. 193. But Q. Whether for vious oath as the ſtatute requires, for it was only directory to the officer (*a*).

want of ſuch oath, the Court will not, on motion, ſet aſide the proceſs. *Salk.* 367. *pl.* 19. *Ld. Raym.* 426. Carth. 503. [(*a*) This oath is not neceſſary where the action is in the ſuperior courts, the ſtatute not extending to any actions which may be brought in thoſe courts. Leigh *qui tam* v. Kent, 3 Term Rep. 362. Balls *qui tam* v. Atwood, 1 H. Bl. Rep. 546.]

Show. 354. That no ſuit by a party grieved is within the reſtraint of the ſtatute.

Cates *qui tam* v. Knight, 3 Term Rep. 442. [Where an offence is created by a ſtatute under a penalty, the penalty may be ſued for in the ſuperior courts; for the juriſdiction of thoſe courts is not to be taken away but by expreſs words or neceſſary implication. But the ſtatute of 25 *G.* 3. *c.* 51. having impoſed penalties of 50 *l.* and of 10 *l.* and having enacted that the former ſhould be ſued for in any of the courts of *Weſtminſter*, but having provided that it ſhould be lawful for juſtices of the peace, *&c.* to hear and determine the latter, with a power to mitigate the penalties; it was holden, that ſuch proviſo ouſted the juriſdiction of the ſuperior courts as to the penalties of 10 *l.*]

(D) Of the Proceedings and Pleadings in ſuch Actions and Informations.

2 Hawk. P.C. 387, 8. [(*b*) Therefore an infant cannot be a

"BY the 18 *Eliz. cap.* 5. every informer on any penal ſtatute "ſhall exhibit his ſuit in proper perſon, and purſue the ſame "either by himſelf, or by his attorney in court, and ſhall not uſe "any deputy (*b*)."

common informer, for he muſt ſue by guardian. Maggs v. Ellis, M. 25 G. 2. Bull. *Ni. Pri.* 196. 4th ed. and he cannot be an attorney, becauſe he muſt be ſworn. March, 92.]

(*c*) Co. Lit. 139. Bro. Nonſuit, 68. (*d*) Bro. Nonſuit, 35. Vide Sid. 420. Salk. 221. pl. 11.

Any (*c*) informer *qui tam*, or (*d*) plaintiff in a popular action, may be nonſuit, and thereby determine the ſuit, as to himſelf at leaſt; and though the king cannot be nonſuit, the attorney general may enter a *nolle proſequi* to an information by the king only.

[Moulton *qui tam* v. Bingham. 2 Term Rep. 511. n. a. But the act of 14 G. 2. c. 17. for judgment as in caſe of a nonſuit, does not extend to an information *qui tam* for the king and party. Parker, 92.]

4 Term Rep. K. B. 224. 439.

[Where the moiety of a penalty is given by a ſtatute to the treaſurer of a county, riding, or *diviſion*, the word diviſion does not apply to any ſmall diſtricts, or to any arbitrary diviſions of the county made for the convenience of the magiſtrates, and to which ſeparate treaſurers are appointed, but muſt be taken in its legal ſenſe, and therefore an action cannot be ſupported in the name of the treaſurer of ſuch diſtricts, *&c.*]

"By the 29 *Eliz. cap.* 5. and 31 *Eliz. cap.* 10. if any natural-born "ſubject or denizen, ſhall be ſued on any penal law in the *Queen's* "*Bench*, *Common Pleas*, or the *Exchequer*, where he is bailable, "or by form of the court may appear by attorney, in every ſuch "caſe

"case he may, at the time contained in the first process, appear "by attorney, and not be urged to personal appearance, or to "put in bail."

If the defendant plead a special plea, he must take care to set it forth with all convenient certainty, and to answer the whole time laid in the information; and if he plead the general issue, he must depend upon it, for he cannot plead together with it a special plea, either to the whole, or to part of the charge (*a*). Rol. Rep. 49. 134. Bridg. 115. that he cannot wage his law, or take advantage of a protection. 2 Hawk. P. C. 390.

(*a*) [The stat. 4 Ann. c. 16. does not extend to penal actions; see sect. 7. 2 Str. 1044. 2 Wilf. 21. 4 Term Rep. K. B. 701. A *qui tam* information cannot be quashed upon motion. Str. 953.]

If the defendant plead *nil debet*, it is safest to say expressly that he owes nothing to the iuformer, nor to the king; for if he only plead that he owes nothing to the informer, it may be objected that the whole declaration is not answered. Co. Ent. 165. Hob. 327. Vent. 122. 3 Lev. 375. Vide Cro. Car. 10, 11.

If there be more than one defendant, they ought not to plead jointly, that they are not guilty, but severally, that neither they nor any of them are guilty, *&c.* 2 Hawk. P. C. 392.

[It seems that *nil debet*, or not guilty, are either of them good pleas.] Hob. 218. 1 Term Rep. 462.

If the suit be grounded on the breach of a statute appearing by matter of record, *nil debet* is no good plea. 2 Hawk. P. C. 392.

Wherever a suit on a penal statute may be said to be (*b*) depending, it may be pleaded in bar of a subsequent prosecution, being expressly averred to be for the same offence, as it may, though it be laid on a day different from that in the former; and it is said, that a mistake in such a plea of the day whereon such prior suit was commenced, will not be fatal on the issue of *nul tiel record*, if it appears in truth to have been prior, *&c.* and if two informations be exhibited on the same day. they may mutually abate one another, because there is no priority to attach the right of suit in one informer more than in the other. 21 Jac. 1. c. 14. Cro. Eliz. 261. Rol. Rep. 49. 134. Hob. 209. 138. (*b*) When the suit shall be said to be pending, vide 2 Hawk. P. C. 391.

and Q. Whether from the time of the purchase or return of the writ. Salk. 89. From the time of the purchase of the writ. [The day of suing it forth is the commencement of the suit. 3 *Bur.* 1423. *Combe* v. *Pitt*. The plea *must* aver the priority of the suit, and the very hour of its commencement may be shewn, if necessary. Jackson v. Gisling. Str. 1169. 3 Burr. 1423.]

[The record of a recovery in another action cannot be given in evidence on *nil debet*; for if it be pleaded, the plaintiff may reply *nul tiel record*, or that the recovery was by fraud to defeat a real prosecutor, which he cannot be prepared to shew upon the general issue. Breden *qui tam* v. Harman, 1 Str. 701. Bull. *Ni. Pri.* 197. 4th ed.

If the defendant plead a prior recovery, and the plaintiff reply *per fraudem*, and such recovery be found to be fraudulent, the defendant is liable to two years imprisonment by 4 H. 7. c. 20.]

If the defendant be within the *proviso* of a penal statute, he may take advantage of such *proviso* on the general issue, in a suit on such statute; but it hath been holden (even since the statute of 21 *Jac.* 1. *c.* 4.) that if he have matter in his discharge depending on a subsequent statute, he must plead it specially. 2 Rol. Abr. 683. Vide 2 Hawk. P. C. 393. that he may take advantage of it by virtue of the statute, without pleading it specially; but as to those matters to which the statute doth not extend,

extend, Q. [The defendant cannot avail himſelf under the general iſſue of any matter that goes to the juriſdiction of the Court. 4 Term Rep. 169.]

2 Hawk. P. C. 394.

As to replications to ſpecial pleas to informations *qui tam* in the courts of *Weſtminſter-hall*, they are properly made in the name of the attorney general only; and ſuch replications in ſuits at aſſizes are proper in the name of the clerk of aſſizes only; alſo replications to general iſſues, on ſuch informations in the *King's Bench* or *Exchequer*, may be in the name of the attorney general only; but generally the plaintiff only replies in actions *qui tam*; and a demurrer to a plea in bar to an information *qui tam* in the informer's name only has been received.

2 Hawk. P. C. 305. (*a*) Hawkins leaves it a *quære*, Whether he be bound to do it in this caſe; for there are precedents to the contrary. The uſual form in the plaintiff's replication is, "*and the plaintiff who ſues as aforeſaid*, doth ſo likewiſe, &c." where defendant offers iſſue. If the plaintiff, then, "*and of this the ſaid* A. *who ſues as aforeſaid, puts himſelf on the* "*country*, &c."

Wherever a plaintiff may declare *tam pro domino rege quam pro ſeipſo*, he may continue the ſame form of words both in the joining of iſſue and in the *venire*; but is not bound to do it unleſs the king be (*a*) intitled to part of the penalty.

2 Rol. Abr. 707. Lane 19. 59.

Where ſeveral perſons are jointly charged for an offence againſt a ſtatute, which in its own nature may be committed by a ſingle perſon, without the concurrence of any other, ſome of them may be acquitted and others found guilty; for though the words of the information be joint, yet in judgment of law the charge is ſeveral againſt each defendant; but if one only be informed againſt, as having offended oftener, or in a higher degree than is proved, as for having been abſent from church ten months, where he has been abſent but eight; or for having ingroſſed 1000 quarters of wheat, where he has ingroſſed but 100; he may be found guilty as to what is proved, and not guilty as to the reſidue, for ſuch offences are in the nature of treſpaſſes, which it is ſufficient to prove for any part; but if the offence conſiſt in making a contract contrary to the purview of a ſtatute, as in the caſe of uſury, it muſt be proved as it is laid.

Pex v. Clarke. Cowp. 610. Cro. Eliz. 480. Moor, 453. Noy, 62.

[Where an offence made penal by ſtatute is in its nature *ſingle*, and cannot be ſevered, there the penalty ſhall be only ſingle, though ſeveral perſons may join in committing the offence. But where the offence is in its nature *ſeveral*, there every offender is ſeparately liable to the penalty. Thus, impounding a diſtreſs in a wrong place, againſt the ſtatute of 1 & 2 *P.* & *M.* *c.* 12. though done by many, is but *one* act, and ſhall be ſatisfied by *one* forfeiture. So under the *ſtat.* 5 *Ann.* *c.* 14. killing a hare, though ſeveral be concerned in it, is but one offence. But the offence againſt the 8 *Geo.* 1. *c.* 18. *ſ.* 25. of obſtructing a cuſtom-houſe officer in the execution of his duty, is *ſeveral*; and every offender is *ſeparately* liable to the penalties which the act impoſes.]

(E) Of the Judgment on such Actions or Informations.

WHERE by statute the offender is to forfeit such a sum, to be divided into three parts, whereof one shall go to the king, one to the informer, and the other to the poor, and to be committed if he do not pay it within such a time, the judgment may be general, that the king and informer shall recover the whole, without mentioning how it shall be distributed, or that the party be committed for non-payment; but if it mention only that the informer only shall recover, without saying any thing of the king, it is erroneous; yet if on such information, as it is laid, the informer appear to have no right to any part, but the king ought to have the whole, and the judgment be, that the defendant forfeit the whole, and that the king shall have one part, and the informer another, &c. it is erroneous only as to such last clause, which distributes the forfeiture, but shall stand for the first clause, that the defendant shall forfeit the whole; (a) also if there be no clause at all concerning the forfeiture, in a conviction on a penal statute, but only a judgment *quod convictus*, it is sufficient, for the forfeiture is implied.

And. 139. Stile, 329. 2 Rol. Abr. 102. 2 Keb. 820. 2 And. 123. Parker, 105. Where a statute distributing one moiety of the penalty to the informer, and the other to the poor, directs that the informer shall recover, a judgment that the informer and the poor shall recover is good. 4 expresses the

Burr. 2018. (a) 2 Hawk. P. C. 397. Adjudged Mich. 3 G. 1. [Wherever the act amount of the penalty, or leaves it to the discretion of the magistrate, there must be a judgment of forfeiture as well as a conviction. Rex v. Hawks, Str. 858. Fitzgib. 124. Barnard. K. B. 212. But where the act, as 9 Ann. c. 14. says, "*That the offender shall forfeit five times the value, &c.*" all the judgment the Court can give is, *quod convictus est*, and a new action must be brought upon that judgment for the forfeiture. In recusancy there is no other judgment. Rex v. Luckup. Str. 1048.]

[A judgment in a popular action may be affirmed as to one part, and reversed as to the other; as where damages and costs were given on 9 *Ann.* c. 14., it was reversed as to the damages and costs, and affirmed as to the debt. 4 Burr. 2018. Frederick v. Lookup, *qui tam.*

If the jury find a general verdict with one penalty for the plaintiff, and he apply it to one count, he shall not be permitted afterwards to apply it to another count, though the former were bad in law, and the evidence would have warranted the application of it to any other count.] 3 Ter. Rep. 448.

(F) In what Cases there shall be Costs.

AN informer on a popular statute shall in no case whatsoever have his costs, unless they be expressly given him by such statute, for the common law gives costs in no cases; and the statute of *Gloucester* gives the demandant costs only in cases wherein he shall recover his damages, which supposes some damage to have been done to the demandant in particular, which cannot be said in any popular action. 3 Lev. 374. 2 Keb. 781. Rol. Abr. 574. Lutw. 200. Vent. 133. Salk. 206. pl. 4. *cont.* Moor, 65. 2 Inst. 288.

But wherever a statute gives a certain penalty to the party grieved, he is entitled to his costs by the statute of *Gloucester*, which 2 Hawk. P. C. 389. Vide the

authorities *ſupra.* 1 Term Rep. 71. gives the demandant his coſts in all caſes wherein he ſhall (*a*) recover his damages; for otherwiſe it would be in vain for him to ſue, ſince in many caſes the coſts would exceed the penalty.

(*a*) Alſo where a ſtatute, introductive of a new law, gives a remedy in a point not remediable at the common law, but no certain penalty, the jury may conſider the coſts, ſo as to give damages accordingly. 2 Hawk. P. C. 389.

(*b*) Extends only to a common informer, and not to a party grieved; yet if a party grieved brings his action, and ſuch action be for any offence or wrong perſonal, immediately ſuppoſed to be done to the plaintiff or plaintiffs, or whatſoever the nature of the action may be; if the plaintiff might have coſts in caſe judgment ſhould be given for him, he ſhall pay them on a nonſuit, or verdict againſt him, by virtue of 23 *H.* 8. *cap.* 15. and 4 *Jac.* 1. *cap.* 3. *Vide* 2 Hawk. P. C. 390. and the authorities there cited. [For this reaſon the coſts of a nonſuit were awarded to the defendant in an action by the party grieved, on the ſtatute of 9 Geo. 1. c. 22. Greetham v. the Inhabitants of the Hundred of Thrale, 3 Burr. 1723. That the plaintiff is in ſuch caſe entitled to coſts, ſee Witham v. Hill, 2 Wilſ. 91. and Jackſon v. the Inhabitants of Caleſworth, 1 Term Rep. 71. though denied by Aſton J. in giving judgment in the caſe of Wilkinſon *qui tam* v. Allott, Cowp. 366.] (*c*) And it is no objection againſt paying the coſts, that the Court had no juriſdiction of the cauſe, or that the ſtatute on which it is grounded is diſcontinued. 2 Keb. 106. *Vide* Hutt. 35.

By the 18 *Eliz. cap.* 5. made perpetual by 27 *Eliz. cap.* 10. "If (*b*) any informer or plaintiff, on a penal ſtatute, ſhall willingly delay his ſuit, or diſcontinue, or be nonſuit, or ſhall have the trial or matter paſſed againſt himſelf therein by verdict or judgment of law, he (*c*) ſhall pay to the defendant his coſts, charges, and damages, to be aſſigned by the court in which the ſuit ſhall be attempted, *&c.*"

2 Ld. Raym. 1333. Bull. *Ni. Pri.* 334.

[There is a *proviſo* in this act, that it ſhall not extend to any officers who are uſed to exhibit informations: but it muſt appear on record that they are ſuch officers, elſe they will be conſidered as common informers, and affidavits to the contrary will not be admitted.

Law *qui tam* v. Worrell, 1 Wilſ. 177.

If a proſecutor *qui tam* for killing game, does not reply, defendant ſhall have coſts, for this ſtatute extends to informers on all penal ſtatutes.

Caſ. Temp. Hardw. 159.

A proſecutor not going on to trial ſhall pay coſts. 3 Burr. 1304.

Elde *qui tam* v. Stephens, Ld. Raym. 1333.

In an action *qui tam* on the 5 *Eliz. c.* 4. the plaintiff ſhall pay coſts. Jeynes *qui tam* v. Stephenſon, Barnes, 124.

Parker *qui tam* v. Macfarlane, 3 Term Rep. 157. Field *qui tam* v. Carron, 2 H. Bl. 27. Vide tit. Coſts, *infra.*

Where there is any reaſon to ſuſpect that the defendant may loſe his coſts, if the plaintiff ſhould fail in the ſuit, he will be permitted to pay the iſſue money into court to abide the event. Whether the plaintiff can in ſuch caſe be compelled to give ſecurity for the coſts, is a point not yet ſettled, there being a difference of opinion in this reſpect between the courts of *Weſtminſter-hall*, the courts of Common Pleas and Exchequer holding the negative; whilſt the affirmative is maintained by the court of King's Bench.

Engliſh *qui tam* v. Cox, Cowp. 322.

The courts have refuſed to ſtay proceedings in an action for uſury, till the coſts of a *nonpros* in a former action by a different plaintiff againſt the ſame defendant were paid.]

(G) Whether the Penalty of a Penal Statute may be compounded or granted over.

BY the 18 *Eliz. cap.* 5. "No (*a*) informer or plaintiff shall compound or agree with any that shall offend, or shall be surmised to offend against (*b*) any penal statute, for an offence committed, or pretended to be committed, but after answer made in court to the suit, nor after answer, but by consent of the court in which the suit shall be depending; on pain, that whoever shall offend contrary to the true intent of this statute, or shall by colour or pretence of process, or without process, on colour of any offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without consent of some of his majesty's courts at *Westminster*, and shall be thereof convict, shall stand in the pillory, &c. and shall be disabled to sue on any popular or penal statute, and shall forfeit 10*l.* &c."

(*a*) Extends only to common informers. But it extends equally to those who sue for the whole penalty, as to *qui tam* informers, Cowp. 366. 2 Hawk. P. C. 397.

(*b*) Extends as well to subsequent penal statutes, as to those which were in being when it was made. Hutt. 35. Also it extends to the compounding of suits commenced in courts which have no jurisdiction, as much as if they had a jurisdiction. Keb. 106. Sid. 311.

By the 21 *Jac.* 1. *cap.* 3. "it is declared, That all commissions, grants, licences, charters, or letters patent, of power, liberty, or faculty, to dispense with, or to give licence or toleration to do any thing against the tenor or purport of any law, or to give or make any warrant for any such dispensation, &c. or to agree or compound for any forfeitures limited by any statute; or of any grant or promise of the benefit of any such forfeiture, before judgment thereupon, and all proclamations, &c. tending to the furthering of the same, are contrary to law, and void: *And it is enacted*, That all such commissions, &c. shall be examined, heard, tried, and determined by, and according to the common laws of this realm, and not otherwise; *but it is provided that this act shall not extend* (*c*) to any warrant or privy seal from the king to the justices of either bench, or the Exchequer, or of assise, or of *oyer* or *terminer*, and gaol-delivery, or peace, or other justices having power to hear and determine offences against any penal statute, to compound for the forfeitures of any penal statutes depending in suit before them, after plea pleaded. *Also it is further provided*, That the said act shall not extend to any grants, &c. that had been granted concerning the licensing of taverns, or selling, uttering, or retailing wines to be spent in the house of the party selling the same, or concerning the making of compositions for such licences, so as the benefit thereof be reserved to the use of the king, &c."

That this statute is in affirmance of the common law, vide 2 Hawk. P. C. 398.

(*c*) Such justices by such warrant can make such composition for the use of the king only; *per* Ld. Coke, 3 Inst. 178. But by the 18 Eliz. *supra*, they may give leave to an informer to compound with a defendant after plea pleaded. 2 Hawk. P. C. 399. [It is the rule of the Court of King's Bench, that where they give leave to compound, the king's half of the composition shall be paid into the hands of the master of the Crown Office for the use of his majesty. 4 Burr. 1929. The giving leave to compound is discretional in the courts. 1 Str. 167. 1 Wils. 79. 130. It hath been given after verdict for the plaintiff. 5 Term Rep. 98. If a defendant obtain a rule to stay proceedings upon payment of a sum agreed upon between him and the plaintiff, the Court will enforce the payment of that sum by attachment. 5 Term Rep. 257.]

Actions on the Caſe.

Co. Lit. 56. a. 6 Mod. 53, 54.

IT has been obſerved, that for every right, and for every injury done a man in his perſon, (*a*) reputation, or property, the party hath a remedy, but this remedy he muſt take according to the methods laid down and rules preſcribed by the law; for which purpoſe there are writs framed, and ſettled actions, to which he muſt apply; as debt upon a contract, treſpaſs on a manifeſt and open invaſion of his property, &c. but where the law has made no proviſion, or rather where no general action could well be framed before-hand, the ways of injuring, and methods of deceiving being ſo various, every perſon is (*b*) allowed to bring a ſpecial action on his own caſe, which is a liberal (*c*) action.

(*a*) For actions on the caſe for words, vide head of Slander.

(*b*) Nor is it any objection that ſuch action was never brought before; as where the leſſor coming to view the lands, to ſee if any waſte was committed, being hindered by a ſtranger from entering the premiſes, brought an action on the caſe againſt him; and it was holden to lie, though ſuch action had never been brought before. Cro. Jac. 478. Rol. Abr. 108, 109. 2 Rol. Rep. 311. *Vide* 6 Mod. 53. and Lit. ſect. 108. where, *per* Littleton, no action having been brought on the ſtatute of *Merton*, it is to be preſumed no action will lie: and Co. Lit. 81. b. *per* Ld. *Coke*, non-uſage is a good interpreter of a law. But *per* Holt Ch. Juſt. wherever an act of parliament gives a right, the common law gives a remedy; ſo where the common law gives a right, or makes a thing an injury, the ſame law gives a remedy or action. Salk. 20, 21. 6 Mod. 54. See note (2) to Co. Litt. 81. b. 13th edit. (*c*) 2 Burn. Rep. 906. 1011, 1012.

[They ariſe ſimply from tort or wrong, where no breach of any contract is ſuggeſted, and no forcible violence imputed to the defendant. 3 Wooddes, 167.]

These actions are founded on ſome fraud or deceit in contracts, or ſome ſecret injury to a man's right or property, and are ſaid to ariſe from a non-feaſance, male-feaſance, or miſ-feaſance; but as this diviſion ſeems too general, I ſhall chuſe the following, as more proper to include the moſt material caſes that fall under this head, referring to others for a more full diſcuſſion of ſeveral particulars relating to them.

(A) What Perſons, with reſpect to the Injury, may bring an Action on the Caſe.

(B) Againſt whom ſuch Action lies.

(C) For what Injuries an Action on the Caſe will lie; and herein of thoſe Caſes where a Man may be ſaid to ſuffer *Damnum abſque injuriâ*.

(D) At what Time the Right of Action ſhall be ſaid to have accrued.

(E) Of Actions on the Caſe for Fraud and Deceit in Contracts, on an implied or expreſs Warranty.

(F) Of Actions on the Caſe for Injuries to a Man's Perſon, Property, Right or Privilege: *And herein*,

1. Where

1. Where an Action on the Case will lie against Officers and Ministers of Justice.

2. Where Case will lie for Torts and Injuries committed by Persons contrary to the Duty of their Trades and Callings.

(G) Where an Action on the Case will lie for a Nusance, and therein of the Inconvenience of multiplying Actions.

(H) Where an Action on the Case will lie for a Conspiracy, and oppressive Proceedings in Prosecutions and Suits at Law.

(I) Where Case will lie though the Party injured has another Remedy.

(K) Where Case will lie though the Wrong-doer be punishable criminally.

(A) What Persons, with respect to the Injury, may bring an Action on the Case.

IF *A.* delivers goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own use, either *A.* or *C.* may have an action against *B.* but both shall not have an action, but he that first begins his action shall go on with the same. Bulst. 68. Hard. 321. S. P. and said they could not join.

If *A.* is seised in fee of the reversion of a close, expectant upon a term for years, and *B.* is possessed of another close adjoining thereto, between which closes there runs a rivulet, and *B.* stops it, *per quod* the close of *A.* is surrounded, so that the timber-trees, *&c.* become rotten; *A.* in respect of the prejudice to the reversion, and the termor, in respect of the possession, and of the shade, shelter, *&c.* may each (*a*) have an action; and satisfaction given to one is no bar to the other. 3 Lev. 209. Vide 2 Roll. Abr. 55. 4 Burr. 2141. acc.

(*a*) So if *A.* leases a house to *B.* for years, and this is burnt down through the neglect of a neighbour, *A* may have an action for the damage to his inheritance, and *B.* to his possession. 3 Lev. 360. But see 6 *Ann. cap.* 31. *sect.* 6. made perpetual by 10 *Ann. c.* 14. *sect.* 1. by which this remedy is taken away.

If a master of a ship brings an action on the case, and declares that the ship was laden with corn in such a harbour, ready to sail for *Dantzick*, and that the defendant entered and seized the ship, and detained her, *per quod impeditus & obstructus fuit in viagio*; this action well lies, for the master has not the property of the ship, but the owners; and he is only a particular officer, and can only recover for his particular loss; yet he might have brought trespass, as a bailiff of goods may, and then as bailiff he could only have declared on his possession, which is sufficient to maintain trespass. Salk. 10. pl. 4. Ld. Raym. 558. Pitts and Gaince.

If

Roll. Abr. 98. Cro. Jac. 223.

If a servant is cosened of his master's money, the master may have an action on the case against the cosener *.

So if a surgeon, in consideration of a sum of money, undertakes to cure my servant of a hurt, and he applies unwholsome medicines thereto, on purpose to make the wound worse, by which I lose the service of my servant for a long time, I may have an action on the case against the surgeon. Rol. Abr. 98. Roll. Rep. 124. S. C. *adjorn.* 2 Bulst. 332. S. C. and *quoad* the point of law, the Court inclined for the plaintiff, but for default in the pleadings adjourned. And after it was ended by composition. Roll. Abr. 88.

Roll. Abr. 97, 98. Cro. Eliz. 349. S. P. admitted *per cur.*

If a bailiff errant takes *J. S.* in execution upon a *capias ad satisfaciendum*, at the suit of *J. D.* and after *J. S.* escapes by a rescue of himself, the sheriff may have an action upon the case against him for this escape, for he is thereby chargeable (*a*) over for this to *J. D.* and this escape made from his bailiff was an escape from himself.

(*a*) But if such a prisoner, taken by a bailiff of a franchise, escape from a bailiff, the sheriff shall not have an action upon the case against him, because he is not chargeable over; but the bailiff only is chargeable. For this *vide* Rol. Abr. 97, 98, 99. Cro. Eliz. 26. 349. Moor, 432. and tit. *Escape in Civil Cases*.

Vide head of Master and Servant.

If a man gives money to his servant to carry to such a place, and he is robbed, the master cannot bring case against him, for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence.

Sid. 298. Hussey and Pacey. Lev. 188. 2 Keb. 88. S. C. Roll. Abr. 105. S. P.

But if *A.* is employed by *B.* to sail from *England* to the *Indies*, and *A.* covenants, that he or his servants will not thence import any *calicoes*, *&c.* and *A.* retains *C.* as his servant in this voyage, and acquaints him with the covenant; and notwithstanding *C.* falsely and fraudulently brings thence certain *calicoes*, *&c.* *A.* shall have an action against *C.*; for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently to the damage of his master, an action will lie.

Davis v. Jordan, 5 Burr. 2680. Moor v. Wilson, 1 Term Rep. 659.

[An action on the case for goods lost may be maintained against a carrier either by the consignor or consignee; and it may be brought by the former, notwithstanding a private agreement between him and the consignee, that the carriage should be paid by the latter, for the carrier is liable upon his agreement.]

(B) Against whom such Action lies.

9 H. 6. 53. b. Roll. Abr. 95. S. C.

IF the servant of a taverner sells wine to another which is corrupted, an action upon the case lies against the (*b*) master, though he did not (*c*) command the servant to sell it to any particular person.

(*b*) But no action lies against the servant. Roll. Abr. 95. So if an attorney in action of debt, knows of, and was a witness to a release of the debt made before the action brought for it, yet no action lies against the attorney, for he acted only as servant, and in the way of his calling. 1 Mod. 209. *per curiam*. *Vide* 2 Bl. Rep. 869. (*c*) If a servant sells an unsound horse, or other merchandize in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Roll. Abr. 95. S. C. Poph. 143. S. C. cited. 2 Roll. Rep. 6. S. C. cited. But if by the command and covin of the master he sells to a particular person, an action lies against the master, for it is then his own sale. 9 H. 6. 53. *Fitz. Action sur le Case*, 5. S. C. Roll. Abr. 95. Bridgm. 128. S. C. cited. *Sed Qy.* In the former case, if

The ſervant warrant a horſe ſound when he is unſound, and receive a ſound price of the buyer, whether the maſter is not bound by the warranty of the ſervant, and liable to an action?

So if a goldſmith makes plate, wherein he mingles droſs, ſo that it is not according to the ſtandard, and by his ſervant ſells it; an action lies againſt the maſter, becauſe it fails in the price of ſilver. *Vide* Cro. Jac. 471. 2 Roll. Rep. 28. S. C.

But if *A.* being poſſeſſed of certain artificial and counterfeit jewels, of the value of 168*l.* and knowing them to be ſuch, delivers them to *B.* his ſervant, commanding him to tranſport the ſaid jewels into *Barbary*, and them to ſell to the king of *Barbary*, or ſuch other perſon as would buy them, but gives *B.* no charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and knowing theſe jewels to be counterfeit, ſhews them to *C.* for good and true jewels, and affirming to *C.* that they were worth 810*l.* deſires *C.* to ſell them to the ſaid king for 810*l.* which money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his maſter; and after the jewels being diſcovered to be counterfeit, *C.* is impriſoned by the ſaid king till he repays the 810*l.* out of his own effects; of all which matter *C.* gives notice to *A.* and demands ſatisfaction, *&c.* yet no action lies againſt *A.*; for jewels are in themſelves of an uncertain value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary act of the ſervant, for which the maſter is not bound to anſwer. Bridg. 125, 126. Southern and How, adjudged. 2 Roll. Rep. 5. 26, 27. S. C. adjudged. Poph. 143. S. C. adjudged. Cro. Jac. 469. S. C. and there ſaid the Court inclined againſt the plaintiff, principally becauſe *A.* did not order *B.* to conceal their being counterfeit.

In an action on the caſe for a deceit, the plaintiff ſet forth that he bought ſeveral parcels of ſilk for —— ſilk, whereas it was another kind of ſilk; and that the defendant, well knowing this deceit, ſold them to him for —— ſilk; on trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant; but that it was in his factor beyond ſea: and the doubt was, if this deceit could charge the merchant? And *Holt* Ch. Juſt. was of opinion, that the merchant was anſwerable for the deceit of his factor, though not *criminaliter* yet *civiliter*; for ſeeing ſomebody muſt be a loſer by this deceit, it was more reaſonable that he that employs and puts a truſt and confidence in the deceiver, ſhould be a loſer, than a ſtranger; and upon this opinion the plaintiff had a verdict. Salk. 289. pl. 27. Ruled by Holt on evidence at *niſi prius*; but for this *vide* tit. Merchant and Merchandize.

If *A.* brings caſe againſt the maſter of a ſtage-coach, on the cuſtom of the realm, for a trunk loſt by his negligence, *&c.* and on evidence it appears that the trunk was delivered to the ſervant who drove the coach, who promiſed to take care of it, and that the trunk was loſt out of his poſſeſſion; the action does not lie againſt the maſter, for a ſtage-coachman is not within the cuſtom as a (*a*) carrier is, unleſs he take a diſtinct price for the carriage of goods as well as perſons; and though money be given the driver, yet that is a gratuity, and cannot bring the maſter within the cuſtom; for no maſter is chargeable with the acts of his ſervant, but when he acts in execution of the authority given by his maſter, and then the act of the ſervant is the act of the maſter. Salk. 282. pl. 11. Ruled by Holt at *niſi prius*, and plaintiff nonſuit. (*a*) That if a carrier's porter receives goods, the carrier ſhall be liable. Comb. 118. *per* Dolben Juſtice.

Salk. 17. pl. 8. 143. Carth. 487. Lane *v.* Sir Robert Cotton and Sir Thomas Frankland. 5 Mod. 455. 2 Mod. Ent. 108. Ld. Raym. 646. 12 Mod. 472. Comyns, 100.

If two are conſtituted poſt-maſters general, by letters patent, purſuant to the ſtat. 12 *Car.* 2. *cap.* 35. and in the patent there is a power to make deputies, and appoint ſervants at their will and pleaſure, and to take ſecurity of them in the name and to the uſe of the king, and that they the poſt-maſters general ſhould obey ſuch orders as from time to time ſhould come from the king; and as to the revenue, ſhould obey the orders of the treaſury; and it is farther granted to them, that they ſhould not be chargeable for their officers, but only for their own voluntary faults and miſbehaviours, and this is granted with a fee of 1500l. *per annum*, and *A.* having Exchequer-bills, incloſes them in a letter directed to *B.* at *Worceſter*, and delivers it at the poſt-office at *London*, into the hands of *J. S.* who was appointed by the poſt-maſter general to receive letters, and had a ſalary; by three judges againſt *Holt* Ch. Juſt. the poſt-maſters general are (*a*) not liable.

(*a*) *Vide* Carth. 487. S. C. with the arguments *pro* and *con.* at large; and Salk. 17, 18. *Holt*'s reaſons, who held alſo that *J. S.* was chargeable, but not as an officer, but as a wrong-doer. [The opinion of the three judges hath been confirmed in a late caſe of Whitfield v. Lord Le Deſpenſer, in which it was decided that the poſt-maſter was liable only for actual perſonal neglect or miſconduct. Cowp. 754. And caſe lies againſt a deputy poſt-maſter for a perſonal misfeaſance. Rowning v. Goodchild. 3 Wilſ. 443. 2 Bl. Rep. 906. S. C.]

Cheetham v. Hampſon. 4 Term Rep. 318.

[An action for not repairing fences, whereby a party is damnified, cannot be brought againſt the owner of the fee, who is not in poſſeſſion, but lies only againſt the occupier.]

Alleyn, 3. *per* Hale.

If one ſlanders my title, whereby I am wrongfully diſturbed in my poſſeſſion, though I have a remedy againſt the treſpaſſor, yet I may have an action againſt him that cauſed the diſturbance.

Roll. Abr. 90. So if I deliver goods to *A.* who delivers them to *B.* to keep to the uſe of *A.*, and *B.* waſtes them, I may have an *action upon the caſe* againſt *B.* though I did not deliver them to him. Roll. Abr. 90.

If I deliver my horſe to a ſmith to ſhoe, and he delivers him to another ſmith who pricks him, I may have an *action on the caſe* againſt him, though I did not deliver the horſe to him.

(C) For what Injuries an Action on the Caſe will lie; and herein of thoſe Caſes wherein a Man may be ſaid to ſuffer *Damnum abſque injuriâ.*

UNDER this diviſion various caſes may be comprehended; but, as ſeveral of them fall under others, I ſhall here only obſerve, that though in ſome caſes an injury happens to a man in his property, by the neglect of another; yet if by law he was not obliged to be more careful, no action will lie.

Leon. 223. Owen, 141.

As if a man finds butter, and by his negligent keeping it putrifies, yet no action will lie.

Cro. Eliz. 219.

Or if a man finds garments, and by negligent keeping they are motheaten, no action lies.

Cro. Eliz. 219.

So if a man finds goods, and loſes them again; or if he finds a horſe, and gives him no ſuſtenance, no action lies; for in theſe caſes the law has laid no duty on the finder; for it would

would be too rigorous to oblige him to be charitable in behalf of a careleſs owner.

But if he makes gain and advantage of the things he finds; as if he rides the horſe, or if he abuſes the things; as by putting paper into water, or if he kills ſheep, &c. he ſhall anſwer for them. Roll. Abr. 5. Leon. 224. Cro. Eliz. 219. Goulſ 155. Stile, 261.

If *A.* hires *B.* to carry a load of timber from one town to another to be unloaded there, at ſuch a place as *A.* ſhould appoint, and *B.* gives notice to *A.* that he will bring it ſuch a day, and requeſts him to appoint a place where he ſhall lay it, and he brings it accordingly, but *A.* will not appoint any place where it ſhall be laid, ſo that the horſes of *B.* are kept ſo long in the cart, that being hot they catch cold and die; yet *B.* ſhall have no action againſt *A.* for he might have taken his horſes out of the cart and walked them, or put them in a ſtable, or if *A.* would not have appointed a place, as ſoon as he came there, he might have unloaded in any convenient place, ſo that the injury the horſes received was through his own default. 2 Lev. 196. Virtue and Bride. Vent. 310. S. C. 3 Keb. 766. S. C. adjudged.

If it be *damnum abſque injuriâ*, no *action on the caſe* lies (*a*); as if a ſchool be ſet up in the ſame town where an ancient ſchool has been time out of mind, by which the old ſchool receives damage, yet no action upon the caſe lies, becauſe it is lawful for a man to teach where he pleaſes; and this is for the eaſe of the people. (*a*) *Damnum abſque injuriâ*, or *vice verſâ*, will not bear an an action. 6 Mod. 46. *per Gould* Juſtice. 3 Bulſtr. 95. 11 H. 4. 47. 22 H. 6. 14. b. *Fitz. Action ſur le Caſe*, 28. S. C. Bro. 42. S. C. Noy, 184. S. C. cited. Roll. Abr. 107. Mod. 69. S. P. *per Twiſden arguendo.*

So if I retain a maſter in my houſe to inſtruct my children, though this be to the damage of the common maſter, yet no action lies. 11 H. 4. 47. Roll. Abr. 107. S. C.

So if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminiſhed, yet no action lies againſt him; for every one (*b*) may lawfully erect a mill on his own ground. Roll. Abr. 107. Hard. 162. Brownl. 57. Noy, 184.

(*b*) But if I have had a mill by preſcription in my own land, if another erects a new mill upon his own land, if this draws away the ſtream from my mill, or ſtops it, or makes too great a quantity of water run to my mill, by which I receive damage, ſo that my mill cannot grind as much as it was uſed to do, I ſhall have an *action on the caſe* againſt him. 22 H. 6. 14. Dyer, 248. Roll. Abr. 107.

If a man hath a houſe upon his own ground by preſcription, yet if I build a houſe upon my own ground next adjoining, no action lies againſt me. 22 H. 6. 14. b. Roll. Abr. 107. But if I had a houſe by preſcription upon my ground, another cannot erect a houſe upon his own ground, ſo near to it as to ſtop the light of my houſe. 22 H. 6. 15. 9 Co. 59. Bland's caſe, Bulſt. 115. Hut. 136. Roll. Abr. 107. 2 Roll. Abr. 143. 3 Leon. 93.

If I have 100 acres of paſture in a town, and before this time no man hath ever had any paſture within the ſame town, and thoſe of the town have uſed to agiſt their cattle in my paſture, and another that has freehold within the town, converts his arable land to paſture, ſo that thoſe of the town agiſt their cattle there, 22 H. 6. 14. Noy, 184. Roll. Abr. 107.

per

per quod this is a damage to me, yet I cannot have any remedy againſt him; for it is lawful for him to make the beſt advantage he can of his own land.

Governor, &c. of the Britiſh Caſt Plate-glaſs Manufactory v. Meredith. 4 Term. Rep. 794.

[If I ſuſtain an injury by the act of commiſſioners appointed by an act of parliament, without any exceſs of their juriſdiction, no action lies either againſt the commiſſioners or the perſons acting under them.]

(D) At what Time the Right of Action ſhall be ſaid to have accrued.

Roll. Abr. 98. Cro. Jac. 474. S. C. 3 Term Rep. 57.

IF *A.* ſells ſheep to *B.* affirming them to be his own, whereas they belong to *C.* *B.* may have an action againſt *A.* for this deceit, before *C.* hath ſeized the ſheep, or interrupted him; becauſe they are things tranſitory, and therefore the action lies before interruption; for if he ſhould ſtay till *C.* interrupted him, he may be dead before, or other diſadvantage may happen.

Cro. Eliz. 53. adjudged. Cro. Eliz. 123. S. P. adjudged.

If *A.* recovers in debt againſt *B.* and thereupon a *capias ad ſatisfaciendum* is directed to *C.* the ſheriff of *N.* to take *B.* in execution, which is accordingly done, and after, *B.* reſcues himſelf, *per quod* *C.* becomes liable to anſwer for the debt; now *C.* may have an action againſt *B.* before *A.* ſues *C.*; for the reſcue and eſcape was a wrong to *C.* and he is always chargeable to *A.* for it; and if *C.* muſt ſtay till ſued by *A.*, *B.* may die in the interim, or fly his country.

Raym. 194. Goodyar and Banks. 2 Keb. 688. S. C. adjourn. 2 Keb. 716. S. C. adjourn. it appearing the judgment was ſet aſide before *B.* brought his action.

A. brings an action againſt *B.* in which *C.* is attorney for *A.* and after verdict for *A.*, *C.* enters judgment before the rules (according to the courſe of the Court) are out, *per quod B.* is prevented from moving in arreſt of judgment, and whether *B.* may have an action againſt *C.* was doubted; and *Twiſden* thought it hard the attorney ſhould be ſued after the judgment is ſet aſide; but *note*, it does not appear in the caſe, as reported by *Raymond*, otherwiſe than from what *Twiſden* ſaid, that the judgment was ſet aſide before the action brought.

—An action brought againſt the plaintiff's attorney, for entering judgment againſt the defendant, when the Court ordered a *non pros.* Hut. 125. and yet it appears the judgment was ſet aſide before the action brought. † We ſhould conceive an action would not lie againſt the attorney; there is in ſuch caſe a ſummary remedy—to move the Court to ſet aſide the judgment, and for leave afterwards to move in arreſt. And probably the Court would compel the attorney who occaſioned the expence of the application (if he had previouſly refuſed to wave his judgment) to pay the coſts.

Hob. 267. 6 Mod. 46. S. C. cited, where by the plaintiff's own ſhewing he had no right of action at the time of bringing it.

If a man forges a bond in my name, it is poſſible I may be damnified by it, but till it be put in ſuit againſt me I cannot bring an action againſt the forger.

Vide Carth. 113. and title *Error*.

(E) Of Actions on the Case for Fraud and Deceit in Contracts on an expreſs or implied Warranty.

1. On an implied Warranty in Law.

IF there be a communication between *A.* and *B.* for the buying of certain ſheep, and thereupon *B.* the vendor (*a*) ſays they are his own ſheep, when in truth they are the ſheep of another; but thereupon *A.* buys them of *B.* though *B.* made not any expreſs warranty of the ſheep, yet an *action upon the caſe*, in nature of deceit, lies againſt *B.*

Roll. Abr 90. Cro. Jac. 474. S. C.

(*a*) In an action for fraudulently ſelling to the plaintiff an horſe that was not the defendant's own horſe, the plaintiff muſt prove that the defendant knew him not to be his own horſe. Allen, 91. Keb. 523. but *quære & vide* Carth. 90, and Salk. 210. that the having poſſeſſion of any perſonal chattel, and affirming it to be his, amounts to a warranty; and an action lies on the affirmation. *Per Holt* Ch. Juſt. See acc. 3 Term Rep. 57.

So if the vendor affirms that the goods are the goods of a ſtranger, his friend, and that he had an authority from him to ſell them to him, and thereupon *B.* buys them, when in truth they are the goods of another; yet if he ſold them fraudulently and falſely, upon this pretence of authority, though he did not warrant them, and though it is not averred that he ſold them, knowing them to be the goods of a ſtranger, yet *B.* ſhall have an *action upon the caſe* for this deceit.

Roll. Abr. 91.

In an *action upon the caſe* by *A.* againſt *B.* if the plaintiff declares that the defendant craftily intended, *&c.* and offering to ſell a gelding to the plaintiff, affirmed that he brought up that gelding from a colt, and that the ſaid gelding was then his own, which the plaintiff believing, afterwards, that is to ſay, upon the ſame day and year, and at the place aforeſaid, did buy the ſaid gelding, *&c.* the action lies upon this declaration, though there was no warranty upon the ſale; for this was an apparent deceit, contrary to his own knowledge; and though it is not averred that he ſold him at the ſame time when he affirmed he bred him up from a colt, but that he *poſtea* the ſame day and place bought him, giving credit thereunto, this ſhall be intended immediately after the ſpeaking of the words; for all the words could not be ſpoken together.

Roll. Abr. 91. Stile, 310. S. C. Keb. 523. S. C. cited.

So in *caſe*, in which the plaintiff declared, that there being a *colloquium* between him and the defendant, concerning the buying and ſelling of two oxen, which the defendant then had in his poſſeſſion, that he (the defendant) *adtunc & ibidem falsè & malitiosè affirmabat*, that theſe oxen were his; to which he giving credit, bought them of the defendant for ſo much money; when in truth the ſaid oxen were the proper goods of *J. S.* and that he the ſaid *J. S. poſtea*, *&c.* lawfully recovered the ſaid oxen from the plaintiff, *&c.* it was holden after verdict, that the action lay on the bare affirmation, without an expreſs warranty; and though objected,

Carth. 90. Croſſe and Gardner. 3 Mod. 261. S. C. Comb. 142. S. C. Show. 68. S. C.

(*b*) *Falſe & fraudulenter vendidit, &c.* after verdict, impor

that it was *scientèr*, and supplies the want thereof.

objected, that it was not set forth that he (*b*) *sciens* that the oxen were the oxen of *J. S.* nor that he did it *deceptivè*.

Stile, 310. 3 Keb. 807. *vide* Keb. 309.—So *sciens*, &c. implies that it was *fraudulenter*. Sid. 146.—So where the plaintiff declares *quod improvidè & incautè, absque consideratione inopportunitatis loci*, he drove his horses over the plaintiff; though not said *sciens* that they were unruly. 2 Lev. 172.

Salk. 210. pl. 2. Medina *v.* Stoughton, for selling false bills of credit. This case is reported by Ld. Raymond, 593. and the distinction here made between the seller being in possession and out of possession is not mentioned by him.

So where the plaintiff declared, that the defendant being possessed of a certain lottery-ticket, sold it to him, affirming it to be his own, whereas in truth it was not his, but another's; defendant pleaded, he bought it *bonâ fide*, and so sold it: on demurrer, *Holt* Ch. Just. held, where one having the possession of any personal chattel, sells it, the bare affirming it to be his, amounts to a warranty, and an action lies on the affirmation; for his having possession is a colour of title, and perhaps no other title can be made out *aliter*, where the seller is out of possession; for there may be room to question the seller's title, and *caveat emptor* in such case to have either an express warranty, or a good title: so it is in the case of lands, whether the seller be in or out of possession; for the seller cannot have them without a title, and the buyer is at his peril to see it.

See Mr. J. Buller's observations upon it, 3 Ter. Rep. 58. Vide Stile, 343. 346. Cro. Jac. 197.

Cro. Jac. 196. Kelwell and Vaughan. Moor, 467. S. C.

If the plaintiff declares, that whereas queen *Elizabeth* was seised in fee of the advowson of the *vicarage* of *S.* whereto the tithes in *S.* did belong, and that the defendant, upon the ninth of *June*, did affirm himself to be lawful incumbent thereof, and that he had right to the tithes from the death of *J. N.* and after, upon the sixteenth of *June*, the plaintiff having a communication with the defendant about his buying of the defendant the said tithes till *Michaelmas* following, the defendant *adtunc sciens* that he had no right thereto (the defendant not having been instituted, &c.) *set falsè & deceptivè* sold them to the plaintiff for 30*l.* and alleges *in facto*, that *J. N.* was after presented, &c. and took the tithes, &c. the action does not lie; for there was no warranty that the plaintiff should enjoy them; and this affirmation also was in time precedent to the sale.

Yelv. 20. Harvey and Young. See 3 Term Rep. 57.

So if the plaintiff declares, that upon a communication between the plaintiff and the defendant, for the purchase of a certain term for years, which the defendant then had in certain lands, the defendant *asseruit* to the plaintiff that the said term was worth 150*l.* to be sold; to which the said plaintiff *fidem adhibens* did give the defendant 150*l.* for the same, and that after, the plaintiff offering the said term to sale, could not get so much for the same; the action does not lie; for here was only a naked affirmation of the defendant, that the term was worth so much; and it was the plaintiff's folly to believe him.

Salk. 211. pl. 3. Risney and Selbey. Ld. Raym. 1118. S. C (*a*) Lev.

But if on a treaty for the purchase of a house, the defendant affirms the rent to be 30*l. per ann.* whereas in truth it is but 20*l.* and thereby the plaintiff is induced to give so much more than the house is worth, the action (*a*) lies; for the value of the rent is matter that lies in the private knowledge of the landlord and tenant;

nant; and if they affirm the rent to be more than it is, the purchaſer is cheated, and (*a*) ought to have a remedy for it. 102. Sid. 146. Keb. 510. 518.

522. S. P. reſolved. (*a*) But if *A.* poſſeſſed of a term for years, offers to ſell it to *B.* and ſays that a ſtranger would have given him 20*l.* for this term, by which means *B.* buys it, though in truth *A.* was never offered 20*l.* no *action on the caſe* lies, though *B.* is hereby deceived in the value. Roll. Abr. 91. 101. Sid. 146. S. P.

2. Where Caſe will lie for a Fraud on an expreſs Warranty.

If *A.* being a goldſmith, and having ſkill in jewels and precious ſtones, hath a ſtone which he affirms to be a Bezoar-ſtone, and ſells it to *B.* for 100*l.* when in fact it was no Bezoar-ſtone, no action lies againſt *A.*; for every one in ſelling his wares will affirm that his wares are good, or that the horſe which he ſells is ſound; and yet if he does not warrant them ſo, if falſe, no action lies (*b*). Cro. Jac. 4. Adjudged between Chandler and Lopus, upon a writ of error in *cam' ſcacc'*, and the firſt judgment reverſed accordingly by all the juſtices and barons, *cont. Anderſon.* *Vide* Dyer, 75. in *Margin*, S. C. cited, as adjudged in *B. R.* and they ſaid, that the opinion of *Popham* was, That if I have any commodity, which is corrupt, and knowing it to be ſo, ſell it for good, and affirm it to be ſo, an action lies for this deceit; but though it be corrupted, if I know it not, though I affirm it to be good, yet no action lies, unleſs I warrant it to be ſo. Cro. Jac. 469. S. C. cited, as adjudged in *B. R.* 2 Roll. Rep. 5. S. C. cited, and ſaid that the judgment was reverſed, becauſe it was not pleaded that he knew it to be falſe at the time of the ſale. *Vide poſtea* letter (F), where the victuallers, *&c.* acting contrary to the duty of their calling, ſhall be charged, and the heads of *inn-keepers*, *carriers*, *&c.* [(*b*) An affirmation at the time of a ſale is a warranty, provided it appear in evidence to have been ſo intended. 3 Term Rep. 57. *ſupra*, (E.)]

But if a man (*c*) ſells a tun of wine, and warrants it to be ſound, and not corrupted, if it be corrupted, an *action upon the caſe* lies. 11 H. 6. 18. F.N.B. 94. S. P. Poph. 143.

S. P. cited. *A.* ſells ſheep, and warrants that they are ſound, and ſhall continue ſo for a year after, this is good, and ſhall bind him. *Vide* Danv. Abr. 188. 96. (*c*) This action lies, though he hath not paid for it; for the other may have debt for his money. Bro. Guarranty, 59.

So (*d*) if a man ſells a horſe, and (*e*) warrants him to be ſound of his wind and limbs, if he be not, an *action upon the caſe* lies. (*d*) 11 H. 6. 18. 1 Roll. Abr. 96.

S. C. (*e*) But without ſuch warranty no action lies. 20 H. 6. 35. F. N. B. 94. S. P. Bridg. 127. S. P. Roll. Abr. 90. S. P. [If ſold at the price of a ſound horſe, caſe in the nature of deceit would lie. Delancey v. Dymock, ſittings after Eaſter term 1789, *coram* Ld. Kenyon. See too 3 Wooddeſ. 199.]

If a man, knowing his horſe to be lame and foundred, offers him to me to buy, and warrants him to be ſound, *&c.* relying upon which I buy him, by which I am deceived, (*f*) though the warranty here was before the ſale, yet becauſe this was the cauſe of the ſale, an *action upon the caſe* lies thereupon. Roll. Abr. 96. (*f*) But *quære.* For it is a general rule, that the

warranty muſt be made at the time of the ſale. *Vide* Cro. Jac. 4. 196, 197. 630. nor can it be made after; *per* Bridg. 127. Godb. 31. *Vide* Salk. 211. pl. 4. [Where a treaty for the ſale of a commodity had been entirely broken off, a warranty made at the time of ſuch ſale was holden not to extend to a ſubſequent ſale of the ſame commodity at a reduced price. Anon. Str. 414.]

If *A.* ſells a horſe to *B.* and warrants him to be ſound of wind and limb, and clean of legs, whereas he well knows that he is ſhoulder-pitched, and has ſplints upon his legs, an action lies againſt him upon this warranty; (*g*) for theſe imperfections are not ſubject to the view of an unſkilful perſon. Roll. Abr. 97. adjudged. 2 Roll. Rep. 188. S. C adjudged. (*g*) But

quære of the warranty of a horſe that is blind. 2 Roll. Rep. 5. Bridg. 128. Diverſity where he has

has no eye, and where a counterfeit, false and bright eye; and *vide* Cro. Jac. 387. 3 Bulst. 95. 3 Keb. 101. Bro. Deceit, 29. Fitz. Deceit, 23. F. N. B. 94. note (*c*). 2 Wooddes. 415.

Salk. 211. pl. 4. Butterfield *v.* Burroughs.

The plaintiff declared, that the defendant sold him a horse such a day and place, *& adtunc & ibidem warrantizavit equum prædict'* to be sound wind and limb, whereupon he paid his money, and avers the horse had but one eye, *&c.* on plea *non warrantizavit*, the plaintiff had a verdict; and it was objected in arrest of judgment, 1. That the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities; but to this it was answered and resolved by the Court, that this might be so, and must be found to be so, since the jury have found that the defendant did warrant. 2. As the warranty is here set forth, it might be at a time after the sale, whereas it ought to be part of the very contract; and therefore it is always alleged *warrantizando vendidit; sed non allocatur;* for the payment was afterwards, and it was that which completed the bargain, which was imperfect without it.

Buchanan *v.* Parnshaw, 2 Term Rep. 745.

[If there be an express warranty not respecting the soundness of horses merely, but some distinct matter, as their age; and it be a condition of sale, that the horses, if conceived to be unsound, shall be returned in a limited time; an action may be maintained by the buyer if the horses are not of the age they are warranted to be, though they are not returned till after such time has elapsed, for the condition of sale applies only to the unsoundness; nor does the buyer lose his remedy, though upon the seller's refusing to take them back, he sells them again to a third person.

Fielder *v.* Starkin, 1 H. Bl. Rep. 17.

It has been determined by the court of Common Pleas, that the seller of an unsound horse warranted sound, if it can be clearly proved that the horse was unsound at the time of the sale, is liable to an action on the warranty, without notice or return.]

(F) Of Actions on the Case for Injuries to a Man's Person, Property, Right, or Privilege.

Vent. 295. 2 Lev. 172. 3 Keb. 650. S. C. and several cases cited of actions brought for injuries done to a man's person by wild and ungovernable animals. An action for keeping a mad bull which gored the plaintiff, *&c.* Lutw. 90. [But in such case it must be alleged in the declaration that the defendant *knew* that the bull was mad. Ibid. In all cases where the mischief is done by animals *mansuetæ naturæ*, the owner must be shewn to have had notice of their viciousness before he can be charged, and such notice must be set out in the declaration; but as to animals *feræ naturæ*, the person who keeps them is liable for any damage they may do, *without notice*. Ld. Raym. 606. 1583. 2 Salk. 662.]

IF *A.* rides an unruly horse in *Lincoln's-Inn Fields*, (being a place much frequented by the king's subjects, and unfit for such purpose,) to break and tame him, and the horse breaks from *A.* and runs over *B.* and grievously hurts him, *&c. B.* shall have an action against *A.*; for though the mischief was done against the will of *A.*, yet since it was his fault to bring a wild horse into such a place, where mischief probably might ensue, *A.* must answer for the consequence of so ill an act.

Roll. Abr. 88. and *vide* head of Nui-

So if a man lays logs of wood cross a highway, though a person may with care ride safely by, yet if by means thereof my horse stumbles,

ſtumbles, and thereby I am wounded or hurt, I ſhall have an *action on the caſe*. ſances and letter G.

For an injury accruing to a man in his (*a*) real eſtate of freehold or inheritance, caſe will lie; as if *A.* levies a fine, ſuffers a recovery, acknowledges a judgment, recognizance, ſtatute merchant, or ſtaple, in my name, I may have an action. Roll. Abr. 100. (*a*) If my feoffee in truſt for me refuſes to execute the truſt, I have no remedy but in Chancery; but if he enfeoffs another, an *action on the caſe* lies. Roll. Abr. 108. 2 Vent. 27. So if the officer refuſes to enrol a bargain and ſale. Sid. 209. 2 Bulſt. 336.

If a pariſhioner ſets out his tithes of hay duly, and requires the parſon to carry them off his land, but he does not carry them off in a convenient time, *per quod* the graſs where the hay lies is impaired by the hay's lying upon it, an *action upon the caſe* lies againſt the parſon. Roll. Abr. 109. 3 Burr. 1891. [The parſon is not obliged to take tithe of graſs the day it is cut, but may let it lie there long enough to make it into hay. Stra. 245.] *Vide* for this head of *Tithes*, and for treſpaſſes on land, title *Treſpaſs*.

If a man who ought to incloſe againſt my land does not incloſe, *per quod* the cattle of his tenants enter into my land and do damage to me, I may have an *action on the caſe* againſt him *. Roll. Abr. 105. * Or the cattle of any other perſon.
[The action can be brought only againſt the tenant in poſſeſſion. 4 Term Rep. 318. *Supra* (B).]

If *A.* being a maſon, and uſing to ſell ſtones, is poſſeſſed of a certain ſtone-pit, and *B.* intending to diſcredit it and deprive him of the profit of the ſaid mine, impoſes ſo great threats upon his workmen, and diſturbs all comers, threatening to maim and vex them with ſuits if they buy any ſtones, ſo that ſome deſiſt from working, and others from buying, *&c. A.* ſhall have an *action upon the caſe* againſt *B.*, for the profit of his mine is thereby impaired. Cro. Jac. 567. Roll. Rep. 162. S. C.

If a man menaces my tenants at will of life and member, *per quod* they (*b*) depart from their tenures, an *action upon the caſe* lies againſt him. Roll. Abr. 107, 108. (*b*) But the threatening, without their departure, is no cauſe of action. Roll. Abr. 108. Where a copyholder may have caſe againſt his lord for cutting the tops of trees, for not admitting on a ſurrender, or for not holding a court, *vide* head of *Copyhold*.

If a commoner, who hath a right to common by grant or preſcription, be diſturbed by the lord or a ſtranger, in the enjoyment, he may have an *action on the caſe*. But for this *vide* head of Common, and Danv. 74. 4 Mod. 175. 6 Mod. 19. Ld. Raym. 1225. Salk. 170. pl. 3. 364. pl. 5. Skin. 214. Lutw. 74. 101.

[If a man have a private way over the land of another, and be obſtructed in the enjoyment of it, this action lies, whether he claim it by expreſs reſervation in any modern deed, by grant, by preſcription, or by operation of law. This eaſement may be obſtructed in an actionable manner, not only by ſtopping up the way or paſſage, but by ploughing up the land over which the road lies. It is ſufficient as againſt a wrongdoer, for the declaration to allege 1 R. Abr. 109. Cro. El. 84. 466. 2 R. Abr. 140. 1 Ventr. 274. Com. 7.

In an action againſt a man for not repairing a private road leading through his grounds, it is ſufficient to charge him as occupier, upon his poſſeſſion merely. Rider v. Smith. 3 Term Rep. 766.

lege generally that the plaintiff was lawfully poſſeſſed of a certain tenement, and by reaſon thereof entitled to the way in queſtion, without deducing a regular title from any perſon ſeiſed in fee.

1 R. Abr. 89. Rex v. White, 1 Burr. 333.

If any perſon erects a ſmelting-houſe, or works for making aquafortis, or ſuch like, the vapour and ſmoke of which ſpoil the graſs or corn, or injure the cattle of his neighbour, it is a nuiſance to the land for which this action lies.]

For this *vide* Cuſtoms, and Roll. Abr. 107. Danv. Abr. 5, 6. and Carth. 117. Comb. 9. Skin. 175. pl. 5. 316. pl. 3. 389. pl. 25.

If *A.* hath a mill by preſcription which he hath uſed to repair, and at which all the tenants of the manor, time out of mind, have ground their corn and grain ſpent in the houſes of the tenants of the ſaid manor, if one of the tenants grinds his corn elſewhere, *A.* ſhall have an *action on the caſe* againſt him. So if *A.* by his preſcription has a mill on his own land, and *B.* erects a mill on his own land, if by this *A.*'s mill receives any prejudice by having the water ſtopped or drawn away, or having too great a quantity of water run on his mill, by which it cannot grind as much as it uſed to do, *A.* ſhall have an *action on the caſe* againſt him.

Brown v. Beſt, 1 Wilſ. 374.

[If a man have ancient pits which are repleniſhed by a rivulet, he may cleanſe, but cannot change or enlarge them, if he does, he is liable to an action on the caſe for diverting the water.

Bliſſet *v.* Hart, M. 18 Geo. 2. C. B. Bull. *Ni. Pri.* 76.

If a man have an ancient ferry, and another ſet up a new ferry ſo near to it as to draw away the cuſtom, caſe lies; for he who has an ancient ferry is compellable by law to keep boats, *&c.* and therefore the law having impoſed an obligation upon him, protects him in the excluſive enjoyment of the right.

Tripp v. Frank, 4 Term Rep. 666.

But an excluſive right to a ferry from *A.* to *B.* does not prevent perſons from going by any other boat from *A.* directly to *C.* though it be near to *B.*, provided it be not done fraudulently, and merely for the purpoſe of avoiding the regular ferry.]

Keil. 98. b. F.N.B. 127. (C). 2 Leon. 95. So A. may force B. to ſupport his under room for the preſervation of the upper room of *A.* Kelw. 98.

For injuries to a man's houſe or habitation, an *action on the caſe* will lie; as if *A.* hath the upper room, and *B.* the under room, and *A.* neglects to cover his upper room, *B.* may have an *action on the caſe* againſt *A.* and thereby compel him to cover his upper room for the preſervation of the timber of the under room.

Poph. 46. Edwards and Halinder, adjudged in the court of Exchequer, and affirmed in *Cam' Scac'*, 2 Leon. 93, 94. S. C.

If the plaintiff declares that *J. S.* being ſeiſed of a meſſuage in fee, 23 *April* 32 *Eliz.* did demiſe to the plaintiff a cellar from week to week, *&c.* and that after, *viz.* 29 *July* 32 *Eliz. J. S.* did demiſe to the defendant a warehouſe, being right over the ſaid cellar, to hold from week to week, *&c.* and that the plaintiff being poſſeſſed of the cellar, and the defendant of the ſaid warehouſe, and the plaintiff then having in the ſaid cellar three butts of ſack of the value of 40*l.* *&c.* the defendant 30 *July* 32 *Eliz.* did place ſo great a weight of goods in the ſaid warehouſe, and thereby

ſo over-burden the floor of the ſaid warehouſe, that by force and weight of the ſaid burthen, the ſaid floor on the ſaid 30 *July* broke, and the ſaid goods did fall upon the ſaid butts, and broke the ſame, *&c.* and the defendant pleads that a ſhort time before the floor did ſuſtain as great weight as this, and the warehouſe was let to him to lay in thirty tun weight, and that he had placed there but fourteen tun; and that what damage had happened to the plaintiff, was by reaſon that the floor at the time, as alſo before the leaſe to him made, was rotten, and the wall whereupon the floor lay ſo decayed, that the ſaid floor broke, *&c.* for want of reparations before the leaſe to him made; the plaintiff ſhall have his judgment, for it is expreſsly alleged that the floor, by the weight of the ſaid merchandiſe, did break, and that is not traverſed but anſwered argumentatively only, *viz.* that it did bear more before, *ergo*, *&c.* and though it was ruinous when the defendant took it, yet if it fell by reaſon of any weight by the defendant placed there, he muſt anſwer for the conſequence.

It was formerly holden, that if a fire broke out accidentally in a man's houſe, and raged to that degree as to burn his neighbour's, that he in whoſe houſe the fire firſt happened, was liable to an *action on the caſe* on the general cuſtom of the realm, *quod quilibet ignem ſuum ſalvo, &c.* 19. pl. 9. Carth. 425. Lutw. 33. For the caſes on this head, *vide* Danv. Abr. 10, 11. and Salk. 13. pl. 4.

"But now by the 6 *Ann. cap.* 31. *ſect.* 6, 7. it is enacted, that no action, ſuit, or proceſs whatſoever ſhall be had, maintained, or proſecuted againſt any perſon in whoſe houſe or chamber any fire ſhall accidentally begin, or any recompence be made by ſuch perſon for any damage ſuffered or occaſioned thereby, *&c. provided* that nothing contained in the act ſhall extend to defeat or make void any contract or agreement made between landlord and tenant." This ſection made perpetual by 10 Ann. c. 14. ſ. 1. Co. Litt. 57. a. n. 1. 13th ed.

If the plaintiff declares that he was and is yet poſſeſſed of a leaſe for ſeveral years *adtunc & adhuc ventur'* of and in a houſe, and that he demiſed the ſame to the defendant for ſix months, and that after the ſix months expired, the defendant being permitted to occupy the ſaid houſe for two months longer, pulled down the windows, *&c.* this action well lies, in regard that the plaintiff is chargeable over in an action of *waſte*. Cro. Car. 187. Jones, 224. S. C. adjudged.

If a man hath an ancient houſe, and another builds a houſe ſo near that his windows are darkened, he may have an (*a*) *action on the caſe* againſt him. 9 Co. 58. *Vide* for this title Nuiſances, and Danv. 203.

Orth. 454. Comb. 481. 6 Mod. 116. 313. See Ld. Raym. 392. 713. 2 Salk. 459. pl. 4. Sc. pl. 6. 12 Mod. 63. (*a*) So if a man builds a houſe ſo near mine as to cauſe the rain to fall on my houſe. Roll. Abr. 107. 2 Leon. 93. S. P. [1 Str. 643. Forteſc. 212. S. P.]

[If a man have a right to ſit in a particular pew in a church, and be diſturbed therein, he may have an action on the caſe. Such right may be claimed either by preſcription as appurtenant to a meſſuage from keeping it in repair; or under a faculty from the ordinary; or perhaps under an allotment and agree- Stocks *v.* Booth, 1 Term Rep. 428. Gibſ. Cod. 643. 1 B. E. L. 329. Ken-

rick *v.* Taylor, 1 Wilſ. 326.

ment with the miniſter and churchwardens, eſpecially where the church is rebuilt. In all caſes it ſeems neceſſary to claim the pew as appurtenant to a meſſuage in the declaration (*b*). Where this action is brought againſt a ſtranger or wrongdoer, it is ſufficient for the plaintiff to allege in his declaration that he is entitled by preſcription to the pew in queſtion, as appurtenant to his meſſuage, without farther ſtating the particulars of his claim (*c*). But againſt the ordinary, who has *primâ facie* the diſpoſal of all the ſeats in the church, a title or conſideration muſt be ſhewn in the declaration and proved; as a faculty from one of his predeceſſors having built at a diſtant period, or by due authority, ſuch pew, or having conſtantly repaired the ſame.

(*a*) From long uninterrupted uſage, a faculty may be preſumed, 5 Term Rep. 298. A faculty to a man and his heirs is not good; nor is a preſcription as appurtenant to land. 1 Term Rep. 428. 1 B. E. L. 331. See Croſs v. Salter, 3 Term Rep. 639. in which caſe the King's Bench held, that the ſentences in the eccleſiaſtical courts were not concluſive evidence of the right. But that caſe does not ſeem to afford any general rule, for the two ſuperior eccleſiaſtical juriſdictions appear not to have decided poſitively on the right. 3 Wooddeſ. 196. (*b*) 1 Wilſ. 326. 1 Term Rep. 431. (*c*) An uninterrupted poſſeſſion of the pew for thirty years is preſumptive evidence of a preſcriptive right; but that preſumption may be rebutted by proof of the non-exiſtence of the pew before that time. Griffith v. Matthews. 5 Term Rep. 296.

Godb. 200. Cro. J. 367.

If a parſon deface a grave-ſtone or coat armour in a church, this action lies, notwithſtanding the injury be wilful and direct: for in this caſe, as in that immediately preceding, treſpaſs *vi et armis* cannot be brought; becauſe the freehold of the church is in the rector.]

As to the torts and injuries affecting a man's perſonal property, and for which an *action on the caſe* is the proper remedy, they are ſo many and ſo various in their kinds, that they cannot well be laid together; I ſhall ſet down only ſome of them here, and ſuch as may govern in like caſes.

Paſley v. Freeman, 3 Term Rep. 51.

[Fraud and deceit in the defendant, and damage to the plaintiff, are a ſufficient foundation for this action, though no benefit accrue to the defendant; therefore it was holden by three Juſtices of the Court of K. B., againſt *Groſe* J. that it would lie for a falſe affirmation reſpecting the credit of a third perſon, made with intent to deceive the plaintiff, and by which he was injured, though it did not appear that the defendant was benefited by the deceit, or that he colluded with him of whom he gave the fictitious character.]

Roll. Abr. 100. For cheating with dice, *vide* Cro. Eliz. 90.

If a man razes the name of the obligor out of an obligation, and in the room thereof puts in the name of *J. S.* and after ſues him upon this obligation, *J. S.* may have an *action on the caſe*.

Co. Ent. 8. F. N. B. 95. Moor, 776. For keeping a dog, knowing him to be accuſtomed to bite ſheep. Danv. Abr. 19. [If he afterwards bite a horſe; for the owner ought to have deſtroyed him on notice of the firſt miſchief. Ld. Raym. 69. That he hath done ſo *twice* before is ſufficient proof of uſage. Dy. 236.] For uſing the ſame mark which the plaintiff hath uſed to ſet to his cloths. Popl. 144. Cro. Jac. 471. 2 Rol. Rep. 28.

Roll. Abr. 100. Lane, 67.

If *A.* takes my cattle and drives them into *B.*'s cloſe, where they do *B.* ſuch prejudice as ſubjects me to *B.*'s action, I may have an *action on the caſe* againſt *A.*

If a man lend or hire another's horſe, and for want of ſafe keeping the horſe die, the owner may have an *action on the caſe* to repair the damage ſuſtained by the negligence of the borrower. So if a man lend another ſheep to tath his land, and by the negligence of the borrower they are drowned. So if a man lend another a horſe, who puts him into a ruinous ſtable, which tumbles in upon him and kills him; or if a man over-ride a horſe lent or hired to him, in all theſe caſes an action will lie; but if the ſtable had fallen by a violent tempeſt, or the horſe died of any diſeaſe, then had the hirer or borrower been excuſed. Cro. Eliz. 777. 784. Owen, 52. 5 Co. 14. Dyer, 121. Godb. 72. *Doct. & Stud.* 240. Lutw. 98.

If *A.* obtains a judgment in debt againſt *B.* as executor to his father, and thereupon *A.* takes out a *fieri facias*, but before the ſheriff can execute it *B. ſecrete & fraudulenter* ſells, removes, and diſpoſes of all the teſtator's goods, ſo that the ſheriff is forced to return *nulla bona*, *&c.* an *action upon the caſe* lies againſt *B.*, for the ſheriff could not return a *devaſtavit*; and if this action does not lie, the party is without remedy. Godb. 285. 2 Roll. Rep. 312. Mod. 286. This laſt authority maintains the contrary.

If *A.* declares that he had obtained judgment againſt *J. S.* for 100*l.* and that 100*l.* more was due to him for rent arrear; that he intending to take out execution, and alſo to bring an action of debt for the rent in arrear, (the ſaid *J. S.* being then poſſeſſed of goods and chattels ſufficient to diſcharge the whole,) which being very well known to *B.* (the defendant) he, by covin conſpiring with the ſaid *J. S.* to defeat him of his execution, and of recovering the money for rent arrear, procured the ſaid *J. S.* to confeſs a judgment for 160*l.* (of ſuch a term) to one *J. N. ubi revera* the ſaid *J. S.* did not owe any thing to the ſaid *J. N.* and that he ſued out execution on this feigned judgment, by virtue whereof he ſeiſed all the goods and chattels of the ſaid *J. S.* which he eſloined to places unknown, and converted to his own uſe, by reaſon whereof the plaintiff loſt his debt; the action well lies. Carth. 3, 4. Smith and Tonſtall, adjudged on demurrer in B. R. and affirmed in the Houſe of Peers.

Alſo for injuries done to a man with reſpect to his wife, as by having criminal converſation with her; with reſpect to his child, as by enticing him away, or by enticing away his ſervant (*a*); or if my ſervant without cauſe or licence departs from my ſervice, and *J. S.* knowing him to be my ſervant, retains him in his ſervice, and ſo keeps him; an action lies. Leon. 240. Noy, 106. Kelw. 180. 2 Lev. 63. [Or by ſeducing his daughter, *per quod ſervitium amiſit*. If the daughter be of age, acts of ſervice muſt be proved. 2 Term Rep. 166. 3 Burr. 1878. In actions of adultery, the proper form is treſpaſs: and for the other injuries adverted to in the text, ſatisfaction may be had in that form of action. Cowp. 54. 3 Wilſ. 18. See 2 Term Rep. 167. Ld. Raym. 1032. and the remarks thereon in 3 Wooddeſ. 245, 246. n. (*a*) But where a ſervant had covenanted to work at a trade for a limited time, under a penalty, and having quitted his place, the maſter ſued him and recovered the penalty; this was holden to diſcharge the ſecond maſter from an action for hiring him, the penalty being deemed full ſatisfaction for the loſs of ſervice. Bird v. Randall. 3 Burr. 1345. 1 Bl. Rep. 373. S. C.]

[So it was holden, that this action would lie where the defendant falſely and maliciouſly wrote a letter to a perſon who was engaged to take the plaintiff as his wife, ſuggeſting, that he was her Sheperd v. Wakeman, 1 Sid. 79. 1 Lev. 53.

S. C. 1 Keb. 255. 269. 308. S. C. her huſband, by means whereof the intended marriage was fruſtrated.

It ſeems, unleſs ſome ſpecial damage could have been proved, that this cauſe would have been proper only for the eccleſiaſtical court, under the name of a ſuit for jactitation of marriage. 3 Wooddeſ. 211.]

Roll. Abr. 88. 2 Bulſt. 354. Roll. Rep. 124. (*a*) So for digging a pit, *per quod J. S.* for whoſe life I hold lands, was drowned. Keb. 847.

So if a man digs a ditch in the highway, into which my ſervant falls and breaks his thigh, by which I loſe his ſervice for a long time, I ſhall have an *action on the caſe* againſt him (*a*) for the loſs of his ſervice.

Vide Aſſumpſit. Roll. Abr. 196.

Alſo *actions on the caſe* are proper for injuries in diſturbing one in the enjoyment of any right or privilege he is entitled to; as if the beadle of an hundred ought by virtue of his place to have by preſcription certain gallons of beer of every brewer at a certain price, if the brewers will not ſuffer him to have it accordingly, an *action upon the caſe* lies.

7 H. 4. 44. b. 9 H. 6. 45. b. *Fitz. Action ſur le Caſe*, 26. S. C. Bro. 37. S. C. Roll. Abr. 106. S. C.

If a man ought to have toll upon the buying of cattle in a market, if one buys cattle and does not pay the toll, an *action on the caſe* lies againſt him.

In ſuch caſe, *aſſumpſit* is now uſually brought, 1 Term Rep. 616. 660. So if perſons coming to market are diſturbed, by which I loſe my toll, an action on the caſe lies. 11 H. 4. 47. b. Roll. Abr. 106. Vent. 26. 28. or if upon a ſale in a fair a ſtranger diſturbs the lord in taking the toll, an action upon the caſe lies. 9 H. 6. 45. Roll. Abr. 106. [It is the proper remedy for a fraud upon the toll of a market. Cowp. 664.]

Baſſett *v.* Godſchall, Eſq. and others, 3 Wilſ. 121.

[An action on the caſe will not lie againſt juſtices of the peace for refuſing to grant a licence to keep an inn or ale-houſe.]

43 E. 3. 30. Roll. Abr. 106, 107.

If my tenants within a certain ſeigniory, ought time out of mind to go free to every market and fair to ſell and buy goods without payment of toll, and one takes toll of them in his fair or market, an *action on the caſe* lies againſt him.

38 H. 6. 16. So if the lord's ſervants are diſturbed in collecting his tithes, 19 R. 2. 52. Roll. Abr. 107. So if a ſtranger who has no right, holds a court in my manor, and by diſtreſſes, *&c.* ſo impoveriſhes my tenants that they cannot pay their rents, an action on the caſe lies. 13 H. 4. 11. Roll. Abr. 106.

If a man diſturbs my ſteward in holding my leet, an *action on the caſe* lies againſt him.

38 H. 6. 9. b. Roll. Abr. 106. If in an action on the caſe the plaintiff declares that Q. *Elizabeth* did grant to him the office of ſteward of the manor of *D.* and that the defendants *eundem* the plaintiff *ad exercend' dictum officium, & vadia, feoda, commoda & proficua* thereto belonging *habere & percipere, vi & armis impediverunt, &c.* this is a good declaration, notwithſtanding the *cauſa cauſans, viz.* the interruption of the plaintiff to exerciſe the office, is laid to be done *vi & armis*, for the *cauſa cauſata, viz.* the loſs of the fees, is the point of the action. 9 Co. 50. 4 Leon. 243. Hob. 180. Palm. 46. 2 Brownl. 332. Cro. Car. 377. 2 Roll. Rep. 139.

If a man hath the aſſize of bread and beer, fines, amerciaments, and other matters of frankpledge, by the king's grant, and he diſtrains for an amerciament, and a ſtranger makes a reſcue, an *action upon the caſe* lies againſt him.

If the ſheriff of the county, or his bailiff, execute a writ in a franchiſe or liberty of one, who by grant or preſcription hath the execution and return of writs, an *action on the caſe* lies. 9 Co. 28. Vent. 399. Show. 17. Comb. 198.

We are next to inquire for what wrongs and injuries committed by officers and miniſters of juſtice, and others, acting contrary to the duty the law lays on them, with reſpect to their trades and callings, an *action on the caſe* will lie. And therefore,

1. Where an Action on the Caſe will lie againſt Officers and Miniſters of Juſtice.

It ſeems agreed, that (*a*) no action on the caſe lies againſt a judge of a court of record for a wrong judgment, and that if it appears to have been an (*b*) error of his judgment, he is ſubject to no proſecution whatſoever. 9 H. 6. 60. b. Roll. Abr. 92. Palm. 243. Hawk. P.C. 350.

(*a*) Not againſt a judge of an inferior court for taking inſufficient bail. Hutt. 120. An action lies againſt a judge of the Stannary court, for refuſing a plea which by law he ought to have accepted. 2 Roll. Rep. 498. *per Jones* Juſt. *cæteris abſentibus*; but for this *vide* title *Bills of Exceptions*. (*b*) But for corruption they are puniſhable; the judges in *Weſtminſter Hall*, properly by impeachment in parliament. 1 Hawk. P. C. 350. Inferior judges by information, attachment, *&c.* for which *vide* the heads; alſo the head of *Offices and Officers*; and 1 Salk. 396. where, *per Holt*, the mayor of *Hereford*, for giving judgment for his own leſſee in ejectment, was committed *.

* As to the immunity of the judges from proſecutions, *vide* 31 Ed. 3. ſt. 4. c. 17.

If the plaintiff declares that he affirmed a plaint of debt in the court of *B.* againſt *C.* and thereupon cauſed *C.* to be arreſted, and that the defendant (being the mayor, town-clerk, and gaoler of *B.*) did conſpire to delay the plaintiff in his ſuit; and in peril of his ſaid debt had let *C.* go at large, without taking any bail; this action lie, for the not taking of bail is not the cauſe of the action, but the conſpiracy. Leon. 189.

If the bailiffs in *ancient demeſne* hold plea after the record is removed in *bank*, by which the tenant loſes his land there, by recovery, he may have an *action upon the caſe* againſt them. 14 E. 3. 39. F.N.B. 93. Like point. Roll. Abr. 92. S. P.

action againſt the under ſteward of a court baron, for proceeding after a *corpus cum cauſâ* delivered. 3 Leon. 99. adjudged. Againſt a clerk who had the cuſtody of a record, and ſuffered it to be altered. Raym. 53. Sid. 77. Keb. 28. 346. *Vide* Lev. 64.

If an eſcheator returns a falſe office, contrary to what was found by the jury, in prejudice of the party, an *action upon the caſe* lies againſt him; for in this he is barely an officer, and not a judge. 4 Inſt. 226. 9 H. 6. 60. Roll. Abr. 92.

If my ſervant is robbed, and he goes to a juſtice of peace and prays to be examined touching the robbery, and the juſtice refuſes to examine him, ſo that I am thereby damnified, and cannot proceed againſt the hundred, I ſhall have an action againſt the juſtice; for the examination by him in this caſe is not as a judge, but as a particular miniſter by the (*c*) act appointed for this purpoſe. Leon. 323. (*c*) Stat. 27 Eliz. c. 13. But for this *vide* title *Juſtices of the Peace*.

(*d*) If a ſummoner of the eccleſiaſtical court falſely and maliciouſly *colore officii ſui* to the intent to ſcandalize *J. S.* with the Roll. Abr. 94. Carlian and

Mill. Cro. Car. 291. S. C. Jones, 312. S. C. (*d*) Like point in an action againſt church-wardens for ſuch a preſentment.

the fame of incontinency with *A.* and to put him to expence in the eccleſiaſtical court, cites *J. S.* to appear for incontinency with *A.* upon which *J. S.* appears, and is there charged by the judge with it, and upon his anſwer diſcharged, by which he is put to expence; *J. S.* may have an action upon the caſe againſt the ſummoner upon ſuch a declaration, though he be an officer of the eccleſiaſtical court, in as much as it is alleged that he cited him falſely and maliciouſly, *& colore officii*, it ſhall be intended that he did it without proceſs.

Cro. Car. 285. Jones, 305. S. P. Roll. Abr. 112. pl. 9. Like point againſt churchwardens. 2 Mod. 52. Like point. Vent. 86. Sid. 463. Lev. 292. Like point adjudged.

(*a*) 3 Bulſt. 212. *per Coke* Ch. J. Moor, 432. Like point *per curiam*.

(*a*) If a miniſter of juſtice hath a warrant to (*b*) attach (*c*) the goods of another, and can do it and does it not, an *action upon the caſe* lies againſt him.

(*b*) So if I ſhew *J. S.* to the ſheriff, and give him a writ to arreſt him, and he does not. Cro. Eliz. 873. *per* Walmſly. (*c*) But if upon a *capias utlegatum* before judgment, the ſheriff neglects to extend or ſeize goods, *&c.* this is the king's loſs, and the party ſhall have no action, though it was objected, the ſheriff extending, *&c.* would have been a means to force the defendant to appear; but it was ſaid, that if it had been ſhewn that the ſheriff might have taken his body, *&c.* there would have been more reaſon to ſupport the action. 2 Vent. 90.

For this *vide* head of Sheriff and Bail in Civil Actions.

If a ſheriff makes a falſe return, as if he return a *cepi corpus* and *paratum habeo*, or *languidus*, when the party is at large without bail, an *action on the caſe* lies againſt him for the falſe return; but if he had taken bail, though the party does not appear at the return of the writ, yet no action lies againſt the ſheriff; for by the 23 *H.* 6. *c.* 9. the ſheriff is obliged to take bail.

26 Aſſ. 48. Roll. Abr. 92. But to what actions the ſheriff is liable, *vide* head of *Sheriff*.

If the ſheriff returns the tenant ſummoned in a real action, where he was not, by which he (*d*) loſes by default, an action lies againſt him for this.

(*d*) For the judgment ſhould ſtand, and the party is put to his remedy againſt the ſheriff. Moor, 349. *Bro. Action ſur Caſe*, 5. Gould. 128.

Palgrave v. Windham, Str. 212.

[If a bailiff remove goods off the premiſes under a *fieri facias* before the landlord is paid his year's rent purſuant to the ſtatute 8 *Ann. c.* 17., caſe lies againſt him; and the action may be brought at the ſuit of an adminiſtrator.]

2 Roll. Rep. 47. But for this *vide* head of Bankrupts, and Gaol and Gaoler.

If at the petition of *A.* and the reſt of the creditors of *B.* a commiſſion upon the ſtatute againſt bankrupts is iſſued out againſt *B.* and thereupon the commiſſioners ſit, and offer interrogatories to *C.* and he refuſes to be examined, and by them thereupon is committed to priſon, and the gaoler ſuffers him to eſcape, *A.* may have an action againſt the gaoler for this eſcape.

Ravenſcroft *v.* Eyles, 2 Wilſ. 294.

[If a gaoler ſuffer a priſoner upon *meſne proceſs* to eſcape, he is liable to an action on the caſe, though the priſoner return the ſame day to the priſon, and the plaintiff proceed to final judgment againſt him.]

Roll. Rep. 78. Roll. Abr. 94. *Vide* head of

If a warrant upon a *fieri facias* to levy a debt at the ſuit of *J. S.* be directed to an under-bailiff of a liberty, and he by virtue thereof levy the debt, and after conceal the writ and make not any certificate

ficate thereof, an *action on the caſe* lies againſt the under-bailiff, becauſe he has done a perſonal *tort*. Attachment and Bailiff.

So if a diſtreſs at the ſuit of *A.* iſſues out of the court of *C.* directed to *J. S.* (who is not the uſual officer) to diſtrain the cattle of *B. &c.* or that *B.* ſhould find pledges to appear the next court; and thereupon *J. S.* diſtrains the cattle of *B.* and after re-delivers them to *B.* without taking ſufficient ſecurity, *&c.* and *B.* does not appear, *&c.* an action lies againſt *J. S.* notwithſtanding he is no known officer, but *hâc vice* only. Latch, 159. Adjudged upon a writ of error upon a judgment in Cheyney Court.

If a ſummoner of the eccleſiaſtical court, upon a premonition directed to him by the eccleſiaſtical court, to warn *J. S.* to pay certain coſts awarded againſt him by the Court, returns to the Court, that he hath warned the ſaid *J. S.* by which the ſaid *J. S.* is excommunicated, where in truth he never warned him; *J. S.* may have an *action upon the caſe* againſt him for this falſe return, though he be an eccleſiaſtical officer; for the excommunication is a temporal as well as a ſpiritual diſadvantage, as during its continuance he cannot bring an action, and is liable to an *excommunicato capiendo*. Roll. Abr. 93. 2 Bulſt. 266. Moor, 835. 12 Co. 128. Roll. Rep. 63. S. C. adjudged between Powle and Godfrey.

If a *fieri facias de bonis eccleſiaſticis* of *J. S.* be directed to the biſhop of *E.* and he return *quod nulla habet bona eccleſiaſtica*, which is falſe, an *action on the caſe* lies againſt the biſhop for this falſe return. Sid. 276. Keb. 947.

If upon a *mandamus* to reſtore *J. S.* to his place of a burgeſs of *P. vel cauſam nobis ſignif.* the mayor, *&c.* return a good cauſe, the matter of which is falſe, an action lies for the falſe return. 11 Co. 99. James Baggs's caſe, *per Curiam.* So an action lies againſt the mayor and commonalty of *L.* for making a falſe certificate of a cuſtom. Hob. 87. So againſt the ſurrogate of a biſhop, who makes a falſe return as to the cuſtom of chuſing churchwardens. 3 Lev. 362. *Vide* Carth. 227. 2 Salk. 428. pl. 1. 430. pl. 5. Ld. Raym. 391. *Vide* tit. *Mandamus*. [And *note*, that regularly an action on the caſe is the proper remedy for all falſe returns. Dougl. 153, 4.]

If the plaintiff declares, that within the city of *London* there is an ancient bridge, and that by cuſtom of the ſaid city two officers to look after it, called *bridge-maſters*, by the citizens at a common hall aſſembled have been yearly choſen or continued; and that if one of them within the year hath died, another for the remainder of the year hath always been choſen as aforeſaid, and that there are certain fees and profits belonging to the ſaid office; and that *A.* and *B.* were elected to this office; that *A.* during his ſaid year died, and upon a hall, by the defendant (being then lord mayor) called for the election of a bridge-maſter in the place of *A.* then and there the plaintiff and one *J. S.* as competitors ſtood for the ſaid office; and thereupon the queſtion did ariſe, who had the greater number of electors? and the plaintiff did aver his number to be the greater; and thereupon did requeſt the defendant, that according to the cuſtom they might go to the poll, but the defendant did refuſe to number the polls, and made proclamation that the electors ſhould depart, and diſcharged the court, and *J. S.* was ſworn; *per quod* the plaintiff loſt the profit of the place, *&c.* this action lies as well for this (*a*) injurious prevention Vent. 25, 26. between Turner and Sir Samuel Sterling, adjudged *per totam Curiam cont'* Vaughan, and Vent. 206. S. C. upon a writ of error in B. R. affirmed *per totam Curiam.* 2 Lev. 50. S. C. And there the cuſtom was laid, that if the electors were ſo divided, that the plu-

rality could not be known by the view,

of him from obtaining the office, as for an hindrance of him in the execution thereof; for *qui deſtruit medium deſtruit finem.*

the mayor ought to grant the poll, and that the electors were ſo divided, *&c.* And adjudged *per cur' præter Vaughan*, that the action lay; though it was not averred that he would have been elected if the poll had been granted; for the mayor did not his duty, and that the *per quod* he loſt the profits of his place is ſufficient after verdict. (*a*) If upon a writ *de coronatore eligend'* the ſheriff will not return him coroner who is choſen by the major part, an action lies. 2 Vent. 26. *Vide* 2 Sid. 168, 169, *&c.* 3 Keb. 664. 859. Diverſity between an office of government and an office of profit.

Salk. 20, 21, *&c.* Lord Raym. 938, *&c.* 3 Salk. 17. 8. St. Tri. 89. *Caſ. Temp.* Holt, 524. 6 Mod. 45. *&c.* Aſhby *v.* White *& al,'* adjudged by three judges, *contra* Holt Ch. Juſt. who held, that for every injury an action lay; that this was an injury done the plaintiff, as it deprived him of the greateſt privilege a

A. declares that the king's writ iſſued, and was delivered to the ſheriff of *Bucks*, for election of members of parliament in his county; that the ſheriff made out his precept to the defendants, being conſtables of the borough of *Ayleſbury*, for the election of two burgeſſes for that borough, which was delivered, and the burgeſſes duly aſſembled to chuſe, *&c.* and that the plaintiff being duly qualified, *&c.* and ready to give his voice for *L.* and *M.* to be burgeſſes, *&c.* the defendants, knowing the premiſes, maliciouſly obſtructed him, and would not allow or receive it, and that without his voice two burgeſſes were choſen; it was adjudged after a verdict for the plaintiff in *B. R.* by three judges againſt *Holt* Ch. Juſt. that the action did not lie; their chief reaſons were, that this was a parliamentary offence, and properly (*b*) inquirable there; that to determine it here, might occaſion a claſhing of juriſdictions; that it did not appear that the party had ſuffered any injury; that to allow of ſuch actions would create a multiplicity of actions, to the great prejudice of officers: and *per Gould* juſtice, the officer is a judge, and therefore not liable to an action; and *per Powis* juſtice, he is *quaſi* a judge, and therefore has a diſtinguiſhing power who to admit and who to refuſe.

ſubject has, which is that of conſenting to thoſe laws by which he is to be bound; that the parliament's having a juriſdiction is no objection, eſpecially in this caſe, where the grievance is, that the party is not repreſented; that the officer is neither a judge, nor *quaſi* a judge; that the multiplicity of actions is no objection; for if a man will multiply wrongs, it is but reaſonable that actions ſhould be multiplied, *&c.* And *note*; the judgment was reverſed in the Houſe of Lords, according to *Holt's* opinion: *Trevor* Ch. Juſt. and *Price* and 16 lords concurred with the judges of *B. R.* the reſt of the judges and 50 lords concurred with *Holt*. See Ld. Raym. 907, 908. 10 Mod. 54. 12 Mod. 26. (*b*) *Vide* Lutw. 88. Fareſ. 13. 2 Salk. 502. pl. 1, 504. pl. 1. 505. That no action on the caſe will lie for a falſe return of a member of parliament; but for this ſee *Court of Parliament*, and ſtatute 7 & 8 W. 3. c. 7. See too 3 Wooddeſ. 208, 209.

2. Where Caſe will lie for Torts and Injuries committed by Perſons contrary to the Duty of their Trades and Callings.

Roll. Abr. 2. *Vide* for this title Carrier, and head of *Trover and Converſion.*

If a man (*c*) delivers goods to a (*d*) common carrier, to carry them to a certain place, if he loſes them, an *action upon the caſe* lies againſt him; for by the common cuſtom of the realm he ought to carry them ſafely.

(*c*) An action lies againſt a ferryman that refuſes to carry paſſengers. Hard. 163. *Vide* a ſpecial declaration againſt a letter-carrier, for the non-delivery of a letter delivered out to him at the general poſt-office. Rob. Ent. 103. (*d*) So againſt a lighterman, maſter of a ſhip, or owners. Roll. Abr. 2. 2 Lev. 69. Hob. 25. That the undertaking makes him a common carrier. Cro. Jac. 262. Sid. 245. *Vide* head of *Bailment*. So if they are damaged. Palm. 523. So if he be robbed of them. 4 Co. 84. 2 Sand. 380. [The carrier is liable for every accident except by the act of God, or of the king's enemies. 1 Term Rep. 33.]

So

So if an inn-keeper refuſes to entertain a gueſt, on pretence that his houſe is already full, an *action on the caſe* lies againſt him; ſo if the goods of his gueſt are ſtolen or loſt in his houſe, &c. Roll. Abr. 3, 4. But for this *vide* head of Inns and Inn-keepers.

[So if a man ſuffer materially from the neglect or ignorance of a *common ſurgeon or* apothecary; *alitèr*, if of a perſon not making public profeſſion of ſuch buſineſs, for it was the plaintiff's own folly to truſt to one who was unſkilled: however, upon an expreſs undertaking, the action would lie, even in that caſe. Ld. Raym. 214. 1 Danv. 77. So where a ſurgeon and an apothecary broke the callous of the plaintiff's leg after it was formed; it appearing that it was done by their going out of the common courſe of practice, and in making an experiment with a new inſtrument. Slater *v.* Baker and Stapleton, 2 Wilſ. 359.]

If a ſmith (*a*) refuſes to ſhoe my horſe, or if he pricks him, an *action on the caſe* lies againſt him. (*a*) Kelw. 50. Roll. Abr. 91. Sand. 312.

So if a farrier kills my horſe with bad medicines, or by neglect in curing him; an *action on the caſe* lies, without any expreſs promiſe. Roll. Abr. 10. 92. 19 H. 6. 49. That an action lies againſt a *barber* for having the plaintiff *negligenter & inartificialiter*. 2 Bulſt. 333. *Vide* Hob. 211. 11 Co. 54. Sand. 312. Before 5 *Eliz. cap.* 4. no man was reſtrained from exerciſing any trade; but he that performed it falſely and inſufficiently was anſwerable in an action. [An action cannot be maintained againſt a carpenter ſimply as ſuch, and without any expreſs conſideration, for an injury ſuſtained in conſequence of his not entering upon a piece of work he had engaged to perform. Elſee *v.* Gatward, 5 Term Rep. 143.]

If a client receives an injury by the neglect or fraud of his attorney, an action lies; (*b*) as if an attorney ſuffers judgment to go againſt his client by *nil dicit*, when he had a warrant to plead the general iſſue: (*c*) ſo if in a plea of land he makes default; (*d*) or if an attorney by colluſion with *J. S.* and without any warrant from me, appears for me in an action of treſpaſs at the ſuit of *J. S.* and ſuffers the inqueſt to paſs againſt me by default, whereupon *J. S.* recovers againſt me, I may have an *action on the caſe*. *Vide* tit. Attorney. (*b*) Winch. 90. (*c*) Roll. Abr. 95. (*d*) F. N. B. 96. Cro. Jac. 695. Dyer, 362. Stile, 426. 2 Sid. 171. Comb. 2. And Q. Whether the judgment ſhould not be vacated. Cro. Jac. 344. 695. 3 Inſt. 122. Keb. 89. 2 Roll. Abr. 724. Where caſe will lie againſt a counſellor, *vide* Roll. Abr. 10. 91.

[It was holden to lie againſt an attorney for not charging a perſon in execution at his client's ſuit according to the terms of a rule of court, though it ſeemed to be rather an error of judgment than any actual negligence.] Ruſſell *v.* Palmer, 2 Wilſ. 325.

(G) Where an Action on the Caſe will lie for a Nuiſance, and therein of the Inconvenience of multiplying Actions.

IT is clearly agreed, that for a common nuiſance, which is an offence againſt the publick, either by doing a thing which tends to the annoyance of all the king's ſubjects, or by neglecting to do a thing which the common good requires, *no action on the caſe* will *Vide* head of Nuiſances. Co. Litt. 56. a. Roll. Abr. 88. 110.

2 Roll. Abr. 140, 141. Moor, 180. 4 Co. 18. 9 Co. 113. 2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. 451. Ld. Raym. 486. Salk. 15. pl. 17.

will lie; for this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore in ſuch caſes the remedy muſt be by indictment at the ſuit of the king.

Co. Lit. 56. Cro. Jac. 446. Keb. 847. 2 Jones, 157.

But if by ſuch a nuiſance I ſuffer a particular damage, as if by ſtopping up a highway with logs, &c. my horſe throws me, by which I am wounded or hurt, an action lies.

Vide the authorities *ſupra*. *Vide* Carth. 191. 451. Salk. 15. pl. 17. What ſhall be ſuch a ſpecial damage as will maintain the action.

Salk. 10. pl. 3. Carth. 455. Lord Raym. 370.

Alſo an action lies for continuing a nuiſance, as, where for erecting a nuiſance 2 *die Febr.* the defendant pleaded a prior action brought for erecting a nuiſance 20 *die Martii*, and a recovery thereupon, and averred theſe to be the ſame nuiſance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the ſame erection, yet he may for continuing the ſame nuiſance.

(H) Where an Action on the Caſe will lie for a Conſpiracy, and oppreſſive Proceedings in Proſecutions and Suits at Law.

Roll. Abr. 112, Several caſes to this purpoſe.

IT ſeems agreed, that for (*a*) a falſe and malicious proſecution for any crime, whether capital or not, by which the party may be put in peril of his life, ſuffer in his liberty, reputation, or (*b*) property, an action on the caſe in nature of a writ of conſpiracy lies; whether the proſecutor proceeded ſo far as actually to exhibit an indictment, on which the party was acquitted, or not.

(*a*) How far the proſecution muſt be falſe and malicious and without probable cauſe of ſuſpicion, *vide* Cro. Eliz. 70. 134. Leon. 107. Kelw. 81. Mo. 600. Danv. 212. and Salk. 15. where *per* Holt Ch. Juſt. That this action is not to be favoured, becauſe it deters men from proſecuting; and therefore, if the grand jury find the bill, the defendant ſhall not be obliged to ſhew a probable cauſe, but it ſhall lie on the plaintiff's ſide to prove an expreſs rancour and malice. *Quære*, How far the modern practice of granting a copy of the indictment upon an acquittal, makes it neceſſary that ſuch copy ſhould be produced, in order to prove it a falſe and malicious proſecution. And *vide* Carth. 416. Ld. Raym. 374 12 Mod. 208. 211. 5 Mod. 394. 405. 408. [A copy of the record of the acquittal granted by the court muſt be produced in order to ſupport an action for a malicious proſecution of a *felony*; but in the caſe of miſdemeſnors the practice is different. 1 Bl. Rep. 385.] (*b*) It has been holden, that for exhibiting an indictment, which only affected a man's property, no action lay, if the indictment were inſufficient, or the bill found *ignoramus* by the grand jury. *Vide* Danv. 208, 209. Several caſes put *pro* and *con*. And Salk. 15. *in margine*, that in an action on the caſe for maliciouſly procuring *H.* to be indicted for exerciſing the trade of a badger without licence, *per quod* he was put to great expence; in which it was agreed, that the indictment was inſufficient; it was reſolved by *Parker* Ch. Juſt. and the whole Court, upon great conſideration, that there was no reaſon for this diverſity between a malicious proſecution upon a good indictment and upon a bad one; and that this action will lie as well for damages by expence, as by ſcandal or impriſonment, though the indictment be inſufficient. *Hil.* 12 *Ann. Jones* and *Gwin*, 10 Mod. 148. 214. [Gilb. Caſ. 185, Str. 691, 977, Ca. Temp. Hardw. 54, 4 Term Rep. 247, acc. It may be brought by a huſband for the expence of defending his wife. 2 Str. 977.]

Carth. 416. Bull. *Ni. Pri.* 14. But

[If the action be brought againſt ſeveral and one only be found guilty, it is ſufficient; for there is a great difference between

between the action on the caſe in the nature of conſpiracy, and the writ of conſpiracy at common law; for in this caſe the damage ſuſtained is the ground of the action.

ſee a doubt in this caſe by Saunders, where the declaration

ſtated the injury to have been committed *per conſpirationem inter eos habitem.* Saund. 230.

In actions for proſecutions or oppreſſive proceedings, it is indiſpenſably neceſſary to make out two grounds; *malice* and *want of probable cauſe.* 4 Burr. 1974. From the latter, the former may be implied, but not *e converſo.* Where there had been a condemnation of goods by ſub-commiſſioners of exciſe for not entering and paying the duties, which was afterwards reverſed by the commiſſioners of appeal, it was adjudged that an action for a malicious proſecution did not lie againſt the informer, for the judgment of the ſub-commiſſioners ſhewed that there was a foundation for the proſecution. 1 Wilſ. 232. 1 Term Rep. 506. In actions of this kind the plaintiff muſt allege that the original ſuit, wherever inſtituted, is at an end; Dougl. 205. for otherwiſe the point would come to be tried too ſoon and diſorderly. Yelv. 117. it muſt be *legally* at an end; and therefore in an action againſt a juſtice for an illegal commitment on a ſuppoſed charge of felony, the Court held an allegation that the plaintiff was *diſcharged* from his impriſonment, to be inſufficient; becauſe there are various ways by which a *diſcharge* may be had, without putting an end to the ſuit: it ought to have been ſhewn *how diſcharged.* 2 Term Rep. 225. Str. 114. Hob. 206. 266. 10 Mod. 245. So in an action for maliciouſly holding to bail, it muſt be ſhewn what is become of the original action. 1 Salk. 15. Dy. 285. If it has been abandoned, it ſhould ſeem that an action will lie; for abandonment is an indication of its being falſe and hopeleſs. W. Jones, 93. So where the plaintiff ſuffered himſelf to be nonſuited. Bull. *Ni. Pri.* 13. 4th ed. But a *nolle proſequi* by the attorney general, is not ſuch a termination of a criminal ſuit as will authorize an action. 6 Mod. 261. See 10 Mod. 219. Gilb. Caſ. 185, *&c.* Q. Whether the defect of ſtating the original action to be determined, may not be cured by a verdict or plea in bar? Raym. 418. 2 Keb. 456. 753. 3 Keb. 781. Saund. 229.]

If a juſtice of peace *malitioſè & invidè machinans J. S. de bonis, nomine, famâ & vita deprivare,* directs his warrant to ſeveral conſtables to apprehend *J. S.* alleging, in his ſaid warrant, that *J. S.* was accuſed before him for ſtealing an horſe; whereupon he is arreſted, and detained till he enters into bond for his appearance; whereas he was not accuſed, nor ſtole ſuch horſe; an action will lie; for though the (*a*) juſtice is excuſed when upon a falſe accuſation he ſends out his warrant, yet it is otherwiſe where he makes it out without any accuſation at all (*b*).

Windham *v.* Clere, Leon. 187. Cro. Eliz. 130. S. C.

[(*a*) This caſe of Windham *v.* Clere is not law; for the immediate act of impriſonment proceeded from the juſtice; and therefore the action ſhould have been treſpaſs, and treſpaſs only: but where the act of impriſonment by one perſon is in conſequence of information from another, there an action on the caſe is the proper remedy, becauſe the injury is ſuſtained in conſequence of the wrongful act of that other perſon. Morgan v. Hughes. 2 Term Rep. 231.] (*b*) If a juſtice of peace procures ſome witneſſes to appear and give evidence upon an indictment, that is but his duty; and though his name was indorſed upon the indictment to give evidence, yet this made him no proſecutor, and ſo no action lies againſt him for a malicious proſecution. Vent. 47. 2 Keb. 572.

[An action on the caſe is the proper remedy againſt exciſe officers who enter a houſe under a legal warrant to ſearch for concealed goods, when there are none.

Boot *v.* Cooper and another, E. 25 G. 3. B. R.

Term Rep. 535. See the caſe of Boſtock v. Saunders and others. 2 Bl. Rep. 912. 3 Wilſ. 434. where the court of Common Pleas, after hearing two arguments, held, that treſpaſs would lie in ſuch caſe.]

An action on the caſe lies againſt church-wardens, for that they falſely and maliciouſly, to the intent to draw the plaintiff within the cenſures of the eccleſiaſtical court for adultery, preſented him there, upon a fame of living in adultery with *A. S.*

Vide Roll. Abr. 112. and 2 Bulſt. 343. where caſe will not lie for an eccleſiaſtical ſcandal. *Sed Qu.* If it will not lie for the expence, trouble, and vexation, attending defence?

If

Raym. 418. 2 Jones, 132. S. C. adjudged; the plaintiff declaring that the defendant knowing the

If *A.* was church-warden of *B.* and at the end of the year gave up his accounts to his ſucceſſor, and yet *A.* is falſely and maliciouſly cited by *D.* into the eccleſiaſtical court to render an account, and at the requeſt of *D.* he is excommunicated for not rendering up his account, an action lies againſt *D.* notwithſtanding this ſentence was given by the judge.

plaintiff had before made up his accounts, which were approved by the pariſh, *&c.* *Vide* Hard. 194, 195. S. C. and a long argument.

Salk. 14. 3 Lev. 200. Hob. 266. 3 Leon. 138. Cro. Jac. 432.

But it muſt be obſerved, that there is a great difference between a falſe and malicious proſecution by way of indictment, and bringing a civil action; for in the latter, the plaintiff aſſerts a right, and ſhall be amerced *pro falſo clamore;* alſo the defendant is entitled to his coſts; and therefore, for commencing ſuch an action, though without ſufficient grounds, no action on the caſe lies.

Sid. 424. 2 Keb. 546. Mod. 4. Lev. 275. 3 Lev. S. C. cited. Salk. 14. S. C. cited, and agreed; 3 Term Rep. 185. S. P.

But if the plaintiff declares, that he being arreſted in *Middleſex* at the ſuit of the defendant, and the defendant intending to detain him in priſon, *falſè & malitioſè dixit* to the ſheriff of *Middleſex*, that the plaintiff owed him 500*l.* requiring him to take bail accordingly, *per quod* he was detained in gaol ſeveral days; this action lies, becauſe of the ſpecial damage ſuſtained by the party on this falſe affirmation.

but it is not enough to declare generally that he brought an action againſt him *ex malitia & ſine cauſâ, per quod* he put him to great charge, *&c.* but he muſt ſhew the grievance ſpecially; for this *vide* Saund. 228. Vent. 12. 19. 86. Danv. 196. 1 Salk. 15. pl. 6. Ld. Raym. 503. 12 Mod. 273.

7 H. 6. 43. Roll. Abr. 101. S. C. March, 47. S. P. Cro. Eliz. 629.

If a ſtranger brings an action againſt *A.* in the name of *J. S.* without the conſent of *J. S.* an action on the caſe lies (*a*) againſt him.

(*a*) Or there may be remedy upon the 8 Eliz. c. 2. But *Q.* Where there are ſeveral plaintiffs, and one of them gives his conſent. Cro. Eliz. 236. 2 Sid. 162. If upon an iſſue between *A.* and *B.*, a ſtranger that was not returned of the jury, cauſes himſelf to be ſworn in the name of one that was returned of the jury, and a verdict is given for *B.* *A.* may have an action upon the caſe againſt the ſtranger. March, 81.

Sand. 131. Lake and King. Mod. 58. S. C. 2 Keb. 361. 462. 466. 659. 664. 801. 832. S. C. Lev. 240. S. C. Sid. 414. S. C. [*Aliter*, if it had been

If *A.* exhibits a petition to a committee of parliament, appointed for the examination of public grievances, and therein charges *B.* being a doctor of law, and vicar general to the biſhop of *L.* with ſeveral great offences, as extortion, *&c.* in his office; and for the better manifeſtation of theſe grievances, cauſes the ſaid petition to be printed, and to be delivered to ſeveral of the members of the ſaid committee; yet no action upon the caſe lies; for this printing and delivering of the caſe as aforeſaid, is according to the order and courſe of proceeding in parliament.

diſperſed abroad, before it had been preſented. Hardr. S. C. 2 Keb. 832. 1 Hawk. P. C. c. 73. ſ. 8. 12. 15. Caſe will not lie for words ſpoken or ſworn in a legal and judicial way. 2 Burr. 810. If a man brings a writ of forgery againſt a peer, *&c.* and the defendant is found not guilty, yet ſhall he not have *ſcandalum magnatum*, and lay the charge contained in the writ to be a ſcandal. Roll. Abr. 34. Moor, 38. Hetl. 55. Hob. 266. No action lies againſt a witneſs for perjury, in giving his evidence in a cauſe. *Vide* Danv. 195.

[If one hold another to bail in an inferior court, when the ſum actually due would not require bail, this action may be maintained againſt him.] Smith v. Cattle, 2 Wilſ. 376.

In *caſe*, the plaintiff declared that the defendant maliciouſly levied a plaint in *London*, and proſecuted the plaintiff thereon, *ubi revera* the cauſe of action did ariſe in *D.* in *Kent*, out of the juriſdiction of the court of *London;* after verdict for the plaintiff, the Court inclined that the action would not lie; for the plaintiff might have pleaded to the juriſdiction, and if they had refuſed his plea, he might have applied for a prohibition. Carth. 189. Temple v. Killingworth, Show. 194. 254. Caſes, B. R. 4. S. C. But no reſolution, and there ſaid, that it was fit to have the opinion of all the judges; for that ſuch action was never held to lie till *North*'s time. *Vide* Vent. 669. 2 Jones, 214. Hob. 205. Cro. Ja.. 667. Sid. 463. Sand. 221. 4 Co. 14. No action lies for ſuing an attorney in an inferior court; for who knows whether he will inſiſt on his privilege, and if he does, he may plead it. Mod. 209, 210. *per cur'*. [It is now ſettled that an action of the caſe will lie for maliciouſly ſuing a perſon in an inferior court, when that court has no juriſdiction of the cauſe: and the court of Common Pleas, after due conſideration, refuſed a new trial in ſuch a caſe, though the declaration did not allege as it ought to have done, that the defendant knew that the inferior court had no juriſdiction. 2 Wilſ. 302.]

[An action on the caſe is maintainable for a malicious abuſe of delegated authority of the higheſt nature; as where the governor and vice-admiral of one of his majeſty's iſlands ſuſpended the judge of the vice-admiralty court from the exerciſe of that office, maliciouſly and without any reaſonable cauſe. Sutherland v. Murray, Sittings at Weſtminſter after Eaſter 1783. cor. Eyre, B. 1 Term Rep. 538.

But this action will not lie for a malicious proſecution before a naval court martial, for an offence cognizable therein (*a*): nor for delaying to bring an officer under arreſt to a court martial, it being a military offence. Nor will it lie (*b*) againſt a commanding officer for an improper exerciſe of his power, *flagrante bello*, and out of the Britiſh dominions.] Johnſtone v. Sutton, 1 Term Rep. 493. (*a*) Particularly if the defendant has not been tried for it by a court-martial. (*b*) Barwis v. Keppel. 2 Wilſ. 314.]

(I) Where Caſe will lie, though the Party injured has another Remedy.

IF one ſlanders my title, whereby I am wrongfully diſturbed in my poſſeſſion, though I have remedy againſt the treſpaſſer, yet I may have an action againſt him that cauſed the diſturbance. Allen, 3.

If a man ſtops a water-courſe, *per quod* his neighbour's ground is ſurrounded, he may have an aſſiſe, or action on the caſe, at his election. Dyer, 250. in Margine. Leon. 247. So if he diverts *totum curſum aquæ* from my water-courſe to my mill, though I may have an aſſiſe for this, yet I may have an action upon the caſe, at my election. Roll. Abr. 104.

If a copyholder in fee ſurrenders a meſſuage to the uſe of one for life, the remainder to another in fee, and the defendant (the huſband of the tenant for life) pulls down part of the meſſuage, &c. he in the remainder may have an action on the caſe againſt him. 3 Lev. 130. by Pemberton and Levinz *cont'* Windham and Charlton. And ſee *Pemberton* and *Levinz*, where *Coke* ſays, that before the ſtatute of *Glouceſter*, the leſſor was without remedy

remedy for waſte done by his tenant; that muſt be intended according to the ſubject matter of which he was ſpeaking, *ſcilicet*, that he had no remedy by action of waſte: and *Pemberton* ſaid, that without doubt at this day the leſſor may wave his remedy by action of waſte, and bring an action on the caſe*.

* Where the eſtate of any one in remainder or reverſion is injured by the tenant in poſſeſſion or any other perſon, an *action on the caſe*, in the nature of an action of waſte may be maintained.

Kinlyſide *v.* Thornton and others, 2 Bl. Rep. 1111.

[An action on the caſe in the nature of waſte, as well as an action of covenant, will lie againſt a tenant for years after the expiration of his term.]

Roll. Abr. 108. 2 Bulſt. 336. Roll. Rep. 125.

If *ceſtui que uſe* at common law had requeſted his feoffees to make a feoffment to *J. S.* and they had refuſed, no action on the caſe lay againſt them, but his remedy was in chancery only.

Carth. 224. 3 Lev. 268. S. C. Lutw. 116. [This action lies for the neglect of repairing a *prebendal* houſe by a ſucceeding prebendary againſt the predeceſſor, or his perſonal repreſentative, as well as in the caſe of parochial preferments. Radcliffe v. D'Oyley. 2 Term Rep. 630. 3 Wooddes, 206. n.]

If a parſon is guilty of dilapidations, and after takes another benefice, by which his former becomes void, his ſucceſſor may have an action on the caſe againſt him; though it was objected, that his proper remedy was in the ſpiritual court.

Where an action on the caſe lay for a legacy in *Cromwell's* time. Raym. 23. 2 Sid. 21. 85. Keb. 116.

Roll. Abr. 110. *Secus* if it were a public chapel. Roll. Abr. 110. Cro. Eliz. 664. Sid. 34.

If *A.* and his predeceſſors have uſed time out of mind to find a chaplain to ſing divine ſervice, and to perform the ſacraments and ſacramentals in the chapel of *B.* within his manor of *D.* for *B.* his ſervants and family, and he does not find a chaplain according to the cuſtom; *B.* may have an action on the caſe againſt him.

An action on the caſe lies againſt a parſon for refuſing to give *J. S.* the ſacrament, becauſe a man is bound to receive it upon a penalty. *Per* Keb. 947. Sid. 34 *dubitatur*. Againſt a biſhop for not taking caution of a party excommunicated. Raym. 226. 2 Inſt. 623. Againſt an ordinary for refuſing to grant adminiſtration. Carth. 126. [Againſt an archdeacon for refuſing to induct. F. N. B. 47. H. Forteſc. Rep. 291.]

Chapman *v.* Pickerſgill, 2 Wilſ. 145. 3 Burr. 1418.

[Caſe will lie for falſely and maliciouſly ſuing out a commiſſion of bankrupt, though the chancellor has power under the ſtatute of 5 Geo. 2. to give 200*l.* damages.]

(K) Where Caſe will lie though the Wrong-doer be puniſhable criminally.

Stile 346. Yelv. 89. 90. Jones 147. Latch. 144.

IT ſeems to be the better opinion of the books, that a perſon guilty of felony, and pardoned, or burnt in the hand, may be proceeded againſt in a civil action at the ſuit of the party injured; for when the party is proſecuted, there can be no (*a*) inconvenience in allowing the action, and the criminal proſecution ought to be no bar to it; for why ſhould he not anſwer in damages to the party whom he hath injured, as well as be made an example of for the ſake of the public, whom he hath offended?

(*a*) But no action can be brought whilſt the party is under indictment for the ſame crime, for if that were allowed it might hinder all exemplary puniſhment. Stile, 346. See 4 Term Rep. 332. 3.

Sid. 375. Cooper and Witham.

In caſe againſt huſband and wife, the plaintiff declared that the wife *malitioſè*, &c. affirmed herſelf to be unmarried & *ſtrenue requiſivit*

quiſivit him to marry her; to which affirmation he giving credit, married her, being then the defendant's wife, by which he was put to great charge, injured in his reputation, and greatly troubled in his conſcience; and the Court held, that the ground of this action being the converſation and contract of the wife, could not bind the huſband. Lev. 247. S. C. 2 Keb. 399. And note; *per* Twiſden, this action does not lie; becauſe the marrying of the ſecond huſband is felony. [See St. 1. J. 1. c. 11. That if ſeven years have elapſed without the former huſband or wife having been heard of, the guilt of felony is not incurred. However, where a man falſely pretending himſelf ſingle, only ſolicits, but does not actually contract a ſecond marriage with the plaintiff, and ſhe ſuſtains ſpecial damage in conſequence of ſuch deceit, as, by rejecting other offers, there can be little doubt of her right to ſue this action. 3 Wooddeſ. 201, 2.]

But where the plaintiff declared that ſhe was a virgin of good name and fame, and ſought to for marriage by *J. S.*, that the defendant, pretending himſelf to be a ſingle perſon, made love to her, and married her; when in truth he was married to another woman, *&c.* whereby ſhe became of leſs credit, *&c.*, the Court held that the action lay. Skin. 119.

Affidavit.

AN affidavit is an oath in writing, ſigned by the party depoſing, ſworn before, and atteſted by him who has anthority to adminiſter the ſame. As moſt motions and orders of Court are grounded on affidavits, it ſeems impracticable, and indeed unneceſſary, to inſtance in what caſes they are to be made uſe of, or when they may be ſaid to be defective, ſhort, or evaſive; this being a matter of practice, and few things relating thereto being thought worth reporting.

We ſhall, however, under this head, ſet down what we find relating to

(A) The taking and filing of Affidavits.
(B) Where an Affidavit is neceſſary.
(C) Where it may be ſaid to be ſhort and defective.

(A) The Taking and Filing of Affidavits.

Style Pract. Reg. 78.

AFFIDAVITS were only to be taken by ſome judge of that court in which they were to be made uſe of. But now,

By the 16 & 17 Car. 2. c. 9. the chancellor of the duchy of Lancaſter may impower perſons to take affidavits. [By the 4 Geo. 3. c. 21. a ſimilar power is given to the chancellor and juſtices of the court of Pleas in the county Palatine of Durham.]

" By the 29 *Car.* 2. *cap.* 5. the chief juſtice, and other the juſ-
" tices of the court of *King's Bench*, or any two of them, where-
" of the chief juſtice to be one for that court; the chief juſtice of
" the Common Pleas, and the reſt of the juſtices there, or two of
" them, whereof the chief juſtice to be one for that court; and
" the lord treaſurer, chancellor and barons of the Exchequer, or
" two of them, whereof the lord treaſurer, chancellor, or chief
" baron to be one for that court, may by commiſſion or commiſ-
" ſions under the ſeal of the ſaid reſpective courts, from time to
" time, as need ſhall require, impower perſons in the ſeveral
" counties to take affidavits concerning any thing depending or
" concerning any proceedings in the ſaid courts, as maſters in
" chancery extraordinary uſe to do; and any judge of aſſize in
" his circuit, may take affidavits concerning any thing depending,
" *&c.* as aforeſaid: which affidavits ſhall be filed in the ſeveral
" offices of the ſaid courts, and be made uſe of as other affidavits
" taken in the ſaid courts: and all perſons forſwearing themſelves
" in ſuch affidavits ſhall incur the ſame penalties as if they had
" been taken in open court; the perſons taking ſuch affidavits
" ſhall receive only 1*s.* for ſo doing, beſides the king's duty, which
" duty ſhall be paid to the proper officers in the ſaid courts, be-
" fore ſuch affidavit be there filed or made uſe of."

[By a rule of the Court of King's Bench E. 31 Geo. 3. it is ordered, " That where any affidavit is taken by any commiſſioner
" of that court made by any perſon, who from his or her ſigna-
" ture appears to be illiterate, the commiſſioner taking ſuch affi-
" davit ſhall certify or ſtate in the jurat, that the affidavit was read
" in his preſence to the party making the ſame, and that ſuch
" party ſeemed perfectly to underſtand the ſame, and alſo that
" the ſaid party wrote his or her ſignature in the preſence of the
" commiſſioners taking the ſaid affidavit."

3 Atk. 813. 3 Term Rep. 403. Affidavits taken before a perſon who is ſolicitor in the cauſe are not allowed to be read either at law or in equity.]

2 Salk. 461. pl. 2. If affidavits taken before commiſſioners in the country, according to the above ſtatute, be expreſſed to be in a cauſe depending between *A.* and *B.* and there be no ſuch cauſe in court, they cannot be read, becauſe the commiſſioners have no authority to take them, and there can be no perjury; otherwiſe, if there be a cauſe in court, and this concerns ſome collateral matter.

2 Term Rep. 644. [If an affidavit in a cauſe have no title, it cannot be received, though the adverſe party is willing to wave the objection.

1 Str. 704. An affidavit upon a motion for a *certiorari* to remove an indictment is properly entitled, the King v. A. B. (the defendant)."

Bevan v. Bevan, 3 Term The affidavits on which to apply for an attachment for diſobeying an award, where the ſubmiſſion is made a rule of Court under

der the ſtatute, need not be entitled in any cauſe: but thoſe in anſwer muſt. Rep. 601. The ſame practice prevails in affidavits to move for informations. Rex v. Pierſon. Andr. 310. 2 Str. 1107. S. C.

Affidavits for attachments in civil ſuits are to be entitled, with the names of the parties, but as ſoon as the attachments iſſue, the king is to be named as proſecutor. Wood v. Webb 3 Term Rep. 253.

Where an affidavit has been read and filed, it cannot be taken off the file. 2 Wilſ. 371.

Affidavits made for one purpoſe may occaſionally be uſed for another. Thus an affidavit taken before a judge at *niſi prius* upon an information out of the King's bench, and afterwards returned into that court and filed, was admitted as a ground on which to grant another information, the Court conſidering the authority of the judge at *niſi prius* in that caſe as an emanation of their own. So, affidavits upon which a defendant hath obtained his diſcharge in one cauſe, have afterwards been admitted for a ſimilar purpoſe in another cauſe.] Rex v. Jolliffe 4 Term Rep. 285. Cooke v. Schmoll. Ibid.

(B) Where an Affidavit is neceſſary.

THE law and practice of the Courts require, that on all motions for an information, attachment, complaint againſt any officer for an offence not committed in the face of the Court, for a new trial, relating to the ſerving and returning of writs or proceſſes, *&c.* oath or affidavit be made of what is affirmed, that the judges may be ſatisfied, as well of the truth thereof, as of the reaſonableneſs of granting relief when made out. *Vide* the ſeveral heads. [By the St. of 7 & 8 W. 3. c. 34. it is enacted that the ſolemn affirmation and declaration of a Quaker ſhall be accepted in all caſes, except in a criminal cauſe, inſtead of an oath in the uſual form. See too 12 G. 2. c. 13. 22 G. 2. c. 46.]

Alſo by acts of parliament affidavits are made neceſſary, as by 4 *Ann. cap.* 16. *ſect.* 11. in the caſe of dilatory pleas; and by the 12 *Geo.* 2. *cap.* 29. to hold to ſpecial bail.

If a perſon exhibits a bill for the diſcovery of a deed, and prays relief thereupon, he muſt annex an affidavit to his bill, that he has not ſuch deed in his poſſeſſion, or that it is not in his power to come at it; for otherwiſe he takes away the juriſdiction of the common law courts, without ſhewing any probable cauſe why he ſhould ſue in equity. Chan. Ca. 11. 231. Vern. 180. 247. 3 Chan. Rep. 6. Gilb. Hiſt. Ch. 51. Eq. Abr. 13. 2 Eq. Abr. 13. 2 Freem. 71. 2 Will. Rep. 541. Prec. Ch. 536. 3 Atk. 17. 132. Contr. 1 Vern. 59. evidently a miſtake..

But if he ſeeks diſcovery of the deed only, or that it may be produced at a trial at law, he need not annex ſuch affidavit to his bill; for it is not to be preſumed that in either of theſe caſes he would do ſo abſurd a thing, as exhibit a bill, if he had the deed in his poſſeſſion. Vern. 180. 247.

[It is alſo unneceſſary in the caſe of a bill for diſcovery of a cancelled inſtrument, and to have another deed executed, for if the plaintiff King v. King. Moſely 1, 2.

plaintiff had the cancelled inſtrument in his hands, he could make no uſe of it at law, and the relief prayed is ſuch as a court of equity only can give.]

Abr. in Eq. 14. Prec. Ch. 536. Gilb. hiſt. Ch. 52.

Alſo, if he ſets forth the whole circumſtances of his caſe, and prays general relief, the prayer of relief ſhall be applied to the diſcovery only.

Philips v. Carew, 1 P. Wms. 117. Shirley v. Earl Ferrers, 3 P. Wms. 77. 1 Atk. 450. Mitf. Eq. pl. 51. 131.

[If a bill be filed for examining a material witneſs upon the ground that his evidence is likely to be loſt by death or departure from the realm, there muſt be an affidavit annexed to it, of the circumſtances from which the danger of ſuch loſs is apprehended. So, if a bill be filed for perpetuating the teſtimony of a witneſs upon the ground of his being the only witneſs to a particular point, and his evidence being of the utmoſt importance, an affidavit of the witneſs himſelf ſhould be annexed to it. The principle on which it is required in theſe caſes to annex to the bill an affidavit of the circumſtances which render the examination of witneſſes proper in a court of equity; though the matter is capable of being made immediately the ſubject of a ſuit at law, ſeems to be the ſame as that on which the practice of annexing an affidavit of the loſs or want of an inſtrument, to a bill ſeeking to obtain in a court of equity the mere legal effect of an inſtrument, is founded; namely, that the bill tends to alter the ordinary courſe of the adminiſtration of juſtice, which ought not to be permitted on the bare allegation of a plaintiff in his bill.

Taylor v. Sharp, 3 P. Wms. 371. Mitf. Eq. pl. 78. 82.

In order to obtain the leave of the court to bring a bill of review, or a ſupplemental bill in the nature of a bill of review *upon the diſcovery of new matter*, there muſt be an affidavit that ſuch new matter could not have been produced or uſed by the party claiming at the time when the decree was made.]

Bunb. 303.

In an interpleading bill, the party who prefers it muſt make affidavit that he does not collude with either of the other parties.

[(*a*) He muſt ſwear poſitively that the defendant is indebted to him in a ſum *certain*: where indeed a bill is for an account only, the plaintiff's ſwearing that he believes the balance in his favour will be ſo much, will be ſufficient. 3 Atk. 501.]

He who moves for a *ne exeat regno* againſt another, muſt make affidavit of the loſs he is like to ſuſtain by the party's going out of the kingdom, and that thereby the debt may be loſt, and that the party is actually going out of the kingdom (*a*).

Wood v. Story 1 P. Wms. 781.

[A Quaker hath been permitted to put in an anſwer to a frivolous and vexatious bill without either oath or affirmation.

3 P. Wms. 142. note.

Where a party excepts to a fact certified by a maſter's report, he muſt ſupport his exception by an affidavit.

Jones 155. Seld. 3 Vol. p. 2. 1335.

The nobility of this kingdom, and lords of the upper houſe of parliament, are of ancient right to anſwer in all courts as defendants upon proteſtation of honour only, and not upon oath.]

Preced. in. Eq. 93. Duke Hamilton and Lady Gerrard; but Q. Whether an order that a peer or peereſs ſhould produce writings on affidavit, or be examined on oath, as

A peereſs by her anſwer owned that ſhe had ſeveral deeds in her power, but did not ſet them forth; and on motion ſhe was ordered to produce them on oath, but that order was changed, and ſhe to produce them on honour only, being in ſupplement to her anſwer, which was on honour.

to any thing in his anſwer, is not good. [Lord Harcourt held, that the privilege of a peer to depoſe on his honour only, was confined ſolely to his anſwer in Chancery; that in all other caſes he muſt be upon oath; and therefore the Lord Stourton was put to anſwer upon his oath to interrogatories. Sir Thomas Meers v. Lady Stourton, 1 P. Wms. 146.]

(C) Where it may be ſaid to be ſhort and defective.

AN affidavit muſt ſet forth the matter poſitively, and all material circumſtances attending it, that the court may judge whether the deponent's concluſions be juſt or not.

And therefore, on motion to put off a trial for want of a material witneſs, it muſt appear that ſufficient endeavours were made uſe of to have him at the time appointed, and that he cannot poſſibly be preſent, though he may on further time given. Fareſ. 121. Comb. 422.

Upon a rule to ſhew cauſe, the plaintiff offered ſeveral new affidavits, and this diverſity was taken, *viz.* where they contain new matter, and where they tend only to confirm what was alleged and ſworn when the rule was made; in the latter caſe they may be read, not in the former. 2 Salk. 461. pl. 1.

[When a defendant who has ſuffered judgment by default in a criminal proſecution, is brought up for judgment, each party ſhould come prepared with affidavits diſcloſing his caſe (if he mean to produce any); but if in the courſe of the inquiry the Court wiſh to have any point further explained, they will give the defendant an opportunity of anſwering it on a future day. Rex v. Wilſon 4 Term Rep 487.

When a defendant who has been convicted on an indictment comes up for judgment, the proſecutor may read affidavits in aggravation, though made by witneſſes who were examined at the trial, which affidavits the defendant is at liberty to anſwer.] Rex v. Sharpneſs 1 Term Rep. 228.

If there be affidavit againſt affidavit, the proper method is to have it tried by an iſſue at law. Comb. 399. But this is matter diſcretionary in the Court. See 3 Mod. 108. where an action on the caſe was brought for ſcandalous matter inſerted in an *affidavit*; that the party it to put nothing in the *affidavit* but what is material to the point, and therefore not to ſet forth the merits of his cauſe on motion. Stile Prac. Reg. 79. where the *affidavit* of one who ſtood in the pillory was read. 2 Salk. 461. But for this *vide* tit. *Evidence*.

Agreements.

AN (*a*) *agreement* is the conſent of two or more perſons concurring, the one in parting with, and the other in receiving ſome property, right, or benefit: the notion of contracting or entering into agreements aroſe from the increaſe of commerce, and

(*a*) An agreement is defined *aggregatio mentium in*

re aliqua facta vel facienda. Plowd. 17. a.

the neceſſity men were under of bartering their ſuperfluities for things of real uſe, which lay out of the way of their acquiring: that men ſhould execute their agreements and perform their promiſes, though made without writing or conſideration, is enjoined by the law of nature; but in civil ſocieties, and in ours in particular, circumſtances are required which protect the weak, and thoſe who are under the power of others; alſo proviſion is made againſt fraud and circumvention, and that no man ſhould be injured in his property by the turn of an unwary expreſſion.

Though a contract executed with all the ſolemnity required by law, may properly be called an agreement, yet in the more common acceptation of the word, articles, minutes, and Eſcrow, *&c.* containing ſomething preparatory to a more ſolemn and formal execution, are called *agreements*.

Under this head we will conſider,

(A) Who are capable of contracting and binding themſelves or others by their Agreements.

(B) Of Agreements which are good in Law, and will be decreed in *Specie* in Equity: And herein,

1. Of unreaſonable agreements, and ſuch as may be ſaid to be obtained by fraud or circumvention.
2. Of voluntary Agreements.
3. Of the Manner in which they are to be performed.

(C) Of Parol Agreements, or ſuch as may be ſaid to be within the Statute of Frauds and Perjuries.

(A) Who are capable of contracting and binding themſelves or others by their Agreements.

But for this *vide* head of Idiots and Lunaticks.

A Perſon *non compos* is not capable of entering into any agreement, for an agreement is an act of the underſtanding which ſuch perſons are incapable of, and therefore are to be under the care of their curators or guardians, by a commiſſion from the publick.

Vide alſo head of Infancy and Age.

An infant for the ſame reaſon is incapable of contracting. [If an infant, ſays Ld. Mansfield, does a right act which he ought to do, or which he was compellable to do, it ſhall bind him. 3 Burr. 1801. And if an infant enter into a contract with the advice and concurrence of his friends, and ſuch contract appear to be beneficial to the intereſts of the infant, equity will ſupport and give it effect. 1 Eq. Caſ. Abr. 287.]

Vide tit. Baron and Feme

A wife during the intermarriage is (*a*) incapable of entering into any agreement *in pais*, being under the power of her huſband.

(*a*) But it is ſaid, that if a feme covert, by agreement made with her huſband, is to ſurrender a copyhold or levy a fine, though the huſband die before it be done, equity will compel her to perform the agreement. 2 Vern. 61. pl. [illegible]

Eq. Caſ. Abr. 25. pl. 6. Upon looking into the Regiſtrar's book it appeared, that the Court made no decree in it; but it was by conſent referred to Mr. Serjeant *Rawlinſon* for his arbitration. Eq. Caſ. Abr. 62. pl. 2. per *Cur'*.

The anceſtor ſeiſed in fee may by his agreement bind his heir; therefore if *A.* agrees to ſell lands, and receives part of the purchaſe money, but dies before a conveyance is executed, and a bill is brought againſt the heir, he will be decreed to (*a*) convey, and the money ſhall go to the executor, eſpecially if there are more debts due than the teſtator's perſonal eſtate is ſufficient to pay. 2 Vern. 215.

[(*a*) So in the caſe of a cuſtomary heir. 2 Vez. 640.] But if a man for 100*l.* aſſumes to make a leaſe for 21 years, and dies, his heir is not compellable in a court of equity to make the leaſe, for this is againſt the common law. *Quære.* Eq. Caſ. Abr. 265. pl. 4.

So if a father conveys to a younger ſon by a defective conveyance, and dies, the heir at law in two caſes ſhall be compelled to make it good. 1. Where there is a (*b*) covenant for further aſſurance, binding the heir, becauſe the heir is bound by the covenant. 2. Where there is a proviſion made by the father in his life-time for the heir, or he hath ſuch a proviſion by deſcent from the father (*c*).

Vide infra of voluntary Agreements.

(*b*) J. S. upon a marriage treaty was to ſettle 500*l. per annum* as a jointure, in conſideration of a marriage portion; *J. S.* was entruſted with the drawing of the ſettlement, which was never read by the wife; the jointure ſettled was but 400*l. per annum*, of which the huſband took notice, and talked of making it up ſo much, but dying before it was done, his heir was decreed to make it up, although there was no covenant by which he bound his heir to make it up ſo much. Vern. 16.

[(*c*) See the caſe of Chetwynd v. Fleetwood, 4 Br. P. C. 435. where a ſpecifick performance of an agreement made by the anceſtor, only tenant for life, was decreed againſt the heir, the agreement being clearly for his benefit.]

If tenant in tail agrees to convey, or bargains and ſells the lands for valuable conſideration, without fine or recovery, and dies before the fine or recovery be levied or ſuffered, the iſſue is not (*d*) bound either in law or equity, for equity cannot ſet aſide the ſtatute *de donis*, which ſays, *voluntas donatoris obſervetur*; nor can the Court ſet up a new manner of conveyancing, and ſuperſede fines and recoveries; for thereby the king would loſe the perquiſites by fines, on the writs of entry and fines for alienation. Hob. 203. Chan. Ca. 171. 10 Mod. 469. 2 Vent. 350.

(*d*) So tho' there be a decree againſt the tenant in tail to levy a fine and ſuffer a recovery, and he dies in contempt and in priſon for not executing it, yet the iſſue ſhall not be bound. *Vide* Eq. Abr. 25. pl. 4. 265. pl. 2. 2 Vern. 306. [2 Vez. 634. But ſee Hill v. Carr, 1 Ch. Ca. 294. The iſſue not bound by a covenant for further aſſurance. 1 Lev. 237. nor by articles to convey for payment of debts. 2 Eq. Ca. Abr. 28. p. 34. By analogy to the caſes of tenants in tail who claim *paramount* to the contracting party, it hath been holden, that the widow of a copyholder for life, who had agreed for the ſale of his eſtate, but died before the conveyance was executed, was not debarred by this agreement of her *free bench*; for that her claim was not under the huſband, but from the cuſtom of the manor. Muſgrave v. Daſhwood, 2 Vern. 45. 63. But Ld. Hardwick thought that the widow's eſtate was a branch of, and aroſe from that of the huſband, and that the cuſtom merely directed its derivation; and therefore where the agreement was for a valuable conſideration, paid, as to the greateſt part, he decreed a ſpecifick performance againſt her. Hinton v. Hinton, 2 Vez. 631. 638. Ambl. 277. S. C. In the ſame caſe of Muſgrave v. Daſhwood, 2 Vern. 63. and upon the ſame principle, it was ſaid, that if a joint-tenant enter into an agreement to alien, and die without doing ſo, equity would not enforce the agreement againſt the ſurvivor. But this, it ſeems, muſt be taken with this limitation, where the articles are not ſuch as amount to a ſeverance of the jointure; if they are ſuch, equity will decree againſt the ſurvivor. Per Ld. Hardwicke, 2 Vez. 634. Co. Litt. 59. b.]

A. ſeiſed of lands in tail, agrees with *B.* that he and his heirs ſhall enjoy the entailed lands, if *A.* and his heirs may enjoy his fee-ſimple Chan. Ca. 171. Roſs and Roſs.

ſimple lands; this agreement is executed accordingly, and *B.* had a decree againſt *A.* to levy a fine and ſettle it, purſuant to the agreement; but *A.* died without doing it: though it was decreed that *A.* himſelf was bound by this agreement to convey, yet ſince he died before he executed the fine, his iſſue was not bound by the agreement: but if the iſſue in tail had approved of his anceſtor's agreement, as he did in this caſe, by entering on the land of *B.* then it becomes his own agreement, and conſequently in equity he ſhall be (*a*) obliged to perform it.

(*a*) So if the iſſue in tail had recovered part of the purchaſe money in his father's life-time, or after his death, or if he had joined in the deed with the father, or covenanted for further aſſurance, &c. Chan. Ca. 171. Lev. 238. [Any agreement with an equivalent will bind the iſſue, as a partition, though but by parol, or an exchange of lands. 2 Vern. 202. Co. Litt. 174. a. 384. a.]

Chan. Ca. 234. 2 Chan. Ca. 64. 2 Vent. 350. Vern. 13. 440.

If there be tenant in tail in equity as of a truſt, or under an equitable agreement, and he for valuable conſideration bargain and ſell the land without fine or recovery, this ſhall bind his iſſue, becauſe the ſtatute *de donis* doth not extend to it, being an entail in equity and a creature of the court (*b*).

2 Vern. 133. 583. 702. [(*b*) It ſeems, that upon the ſame principle the heir in tail of a copyhold, whoſe anceſtor had entered into an agreement to ſell, but had died before ſurrender, would be decreed to convey to the purchaſer; for the entail of a copyhold is not within the ſtatute *de donis*. Powell on Contr. 126.]

Bro. Contract, 26. 11 Co. 50. Pop. 194.

As tenant in tail is reſtrained from alienating the eſtate without fine or recovery, ſo he is from charging it, or diſpoſing of the laſting improvements after his death; therefore if tenant in tail ſells the trees growing on the inheritance, the vendee muſt ſever them during the life of the tenant in tail, for if he dies before they are cut down, his iſſue ſhall have them as part of the inheritance, and the vendee, though (*c*) obliged to pay the whole ſum contracted for, yet ſhall not be allowed to cut down one tree after the death of tenant in tail; for as the tenant in tail has power over the inheritance but during his own life, ſo he cannot delegate that power to another but for the ſame time; and conſequently, whatever remains part of the inheritance at the death of tenant in tail, at which time his power over it ceaſes, muſt neceſſarily go to the heir, to whom the inheritance belongs.

(*c*) *Qu.* Whether he may not have relief in equity; or rather *Qu.* If an action for money had and received would not lie againſt the repreſentative? [If tenant in tail covenant to make a leaſe, which he has power to make, and die before execution, equity, it ſeems, will carry it into execution againſt his heir. 10 Mod. 469. If tenant for life, with power to make leaſes for 21 years, grant one for 26 years, ſuch leaſe ſhall bind the remainder-man for 21 years, for under the power of leaſing, there is a reſerable privity given. Campbell v. Leach, Ambl. 740.]

Highter v. Sturman, 1 Vern. 210.

[A mother, acting as adminiſtratrix, may bind her children.

Dr. Martin v. Nutkin, 2 P. Wms. 266.

Churchwardens are in that character competent to enter into any agreement which may be beneficial to the pariſh, and thereby to bind the pariſhioners and their ſucceſſors, as alſo ſucceeding churchwardens.

Johnſon v. Ogilby, 3 P. Wms. 279. Parrot v. Wells, 2 Vern. 127.

If a party undertaking for and on the behalf of another have no authority from his principal, there it is a fraud, and the undertaker ought himſelf to be liable. But where a due authority is given to treat, there the performance of the contract ſhall be enforced againſt the principal.

Ducheſs of Marlborough v. Strong, 5 Vin. Abr. 533. p. 38. 2 Br. P. C. 500. S. C. If an attorney ſhould

should bid more for an eſtate ſold under a decree of the court of Chancery, than he was empowered to bid, and declare his principal, Sir Thomas Sewell, Maſter of the Rolls, thought that the attorney himſelf would be liable, but doubted whether the principal would. Ambl. 498. But where many are concerned in intereſt, and the credit is evidently given to the perſon, and not to any fund, the immediate contractors are liable. Thus where a man contracted to pave the ſtreets of a town by a written inſtrument executed between him and two of the pariſhioners, the Court of Exchequer decreed him relief againſt the undertakers, and left them to their remedy over againſt the reſt of the pariſh; more eſpecially as the written contract, which was the plaintiff's evidence, was in the hands of one of the defendants. Merick v. Wymondſold, Hardr. 205. So it was holden, that a bill might be ſupported againſt the committee of a club for an agreement entered into by them on account of the club, without making the reſt of the ſubſcribers parties. Cullen v. Duke of Queenſbery, 1 Br. Ch. Rep. 101. affirmed in Dom. Proc. March 27, 1787. So where the commiſſioners of a navigation act entered into an agreement with an engineer, they were holden to be *perſonally* liable. Horſley v. Bell, Ambl. 770. S.C. in 1 Br. Ch. Rep. 101. in not.

Where an agent employed by huſband and wife to ſell the wife's eſtate by publick auction ſold it by private contract, at a higher price than they had required, the Court refuſed to compel them to execute the contract, the agent not having acted purſuant to the authority given him. Daniel v. Adams, Ambl. 495.

But if a factor ſell goods at leſs price than he is commiſſioned, the ſale will bind the principal for the convenience of trade. Ambl. 498.

The agreements of the ſolicitors in a cauſe, relative to orders of court, are binding on their clients.] Cox v. Peele, 2 Br. Ch. Rep. 334.

(B) Of Agreements which are good in Law, and will be decreed in Specie in Equity: And herein,

1. Of unreaſonable Agreements, and ſuch as may be ſaid to be obtained by Fraud or Circumvention.

IN many caſes the party injured by breach of an agreement, may have a remedy either by action at (*a*) common law, or by recourſe to a court of equity; but here a general rule muſt be obſerved, that wherever the matter of the bill is merely in damages, there the remedy is at law, becauſe the damages cannot be aſcertained by the conſcience of the chancellor, and therefore muſt be ſettled by a jury (*b*).

(*a*) *Vide* tit. Actions Aſſumpſit and Covenant. *Vide* Abr. Eq. 16.

[(*b*) It is the rule of Courts of Equity not to entertain the ſuit unleſs the plaintiff wants the thing in ſpecie, and cannot have it in any other way. Errington v. Aynesley, 2 Br. Ch Rep. 343. Therefore, in general, they will not allow a bill for a ſpecifick performance of contracts of ſtock, corn, hops, or other articles of merchandize, but will leave the plaintiff to his remedy at law. 1 P. Wms 570. 5 Vin. Abr. 538. S. C. Capper v. Harris, Bunb. 135. Doriſon v. Weſtbrook, 2 Eq. Ca. Abr. 161, p. 8. 5 Vin. Abr. 540. p. 22. A breach of the common covenant to repair demiſed premiſes, is conſidered as much in the ſame light, and proper only to be redreſſed by action at law. Whiſtler v. Mainwaring, in Ch. Mich. 14 Geo. 3. cited in 3 Wooddes, 464. n. z. But on a covenant to rebuild, as it was holden by Lord Hardwicke, the landlord or leſſor may come into Chancery for a ſpecifick performance, if he is in due time, and no conſtructive acquieſcence can be imputed to him. City of London v. Naſh, 1 Vez. 12. and 3 Atk. 512. S. C. This doctrine, however, has been lately controverted, and perhaps entirely over-ruled. Lucas v. Comerford, 3 Br. Ch. Rep. 166.—In the caſes of Gardener v. Pullen, 2 Vern. 394. Thomſon v. Harcourt, 2 Br. P. C. 415. a performance of an agreement for ſtock was decreed. But it ſhould be obſerved, that in thoſe caſes, the party who had undertaken to transfer the ſtock was plaintiff, ſeeking relief againſt a penalty, in which he had bound himſelf for performance of the contract, and that the performance of it was the only ground on which equity could relieve him. Fonbl. Notes on Eq. Tr. p. 120. But on a bill filed againſt the party who had undertaken to transfer the ſtock, Lord King did not think the rule ſo invariably ſettled, as to allow a demurrer to the bill for want of equity. Colt v. Netterville,

Nettervill, 2 P. Wms. 304. And contracts reſpecting mere perſonal chattels will be enforced in equity where the damages recoverable at law would not be an adequate compenſation for the non-performance. Buxton v. Liſter, 3 Atk. 383. and Tayler v. Neville, and Duke of Buckingham v. Ward, there cited; and Lord Ranelaugh v. Hays, infra.]

Chan. Rep. 158. Abr. Eq. 17.

But if there be matter of fraud mixt with the damages, as if *A.* ſues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction upon this equitable ſuggeſtion, that the covenant was obtained by fraud, if *A.* files his croſs-bill for relief upon that covenant, the Court will retain it, becauſe the validity of the covenant is diſputed in that court, and on a head properly cognizable there; and therefore, if the validity of the deed be eſtabliſhed, the Court will direct an iſſue for the *quantum* of the damages.

See Chan. Ca. 42. where an agreement in nature of a wager was decreed in ſpecie.

So where the agreement is to do ſomething in *ſpecie*, as to convey lands, execute a deed, *&c.* there it will be proper to apply to a court of equity for a ſpecifick execution, to which the party is entitled, if the agreement be good and ſufficiently proved, when otherwiſe he could only recover damages at law.

Vern. 189. pl. 190. Lord Ranelaugh v. Hays. 2 Chan. Ca. 146. S.C.

The plaintiff aſſigned ſome ſhares of the exciſe to the defendant, who thereupon covenanted to ſave him harmleſs, and to ſtand in his place touching all payments to the king; the plaintiff being ſued by the king, brought his bill to have the agreement performed in *ſpecie*; and although it was inſiſted that the plaintiff might recover damages at law, and that this was not a covenant for any thing certain; and by this means a Maſter in Chancery was to tax damages inſtead of a jury; yet it was decreed, that the defendant ſhould perform his covenants; and it was directed to a maſter, that, as often as any breach ſhould happen, he ſhould report it ſpecially; that the court, if occaſion ſhould be, might direct a trial in a *quantum damnificat'*.

Abr. Eq. 18. pl. 7. [(*a*) In Denton v. Stewart, 4th July 1786. Sir L. Kenyon, Maſter of the Rolls, directed the Maſter to inquire what damage the plaintiff had ſuſtained by the defendant's not having performed his agreement, of which a ſpecifick performance was prayed by the bill, but which could not be decreed, the defendant having, by ſale of the eſtate, put it out of his power to perform his agreement with the plaintiff. Fonbl. Notes on Eq. Tr. 389.]

So if a jointreſs brings her bill to have an account of the real and perſonal eſtate of her late huſband, and to have ſatisfaction thereout for a defect of value of her jointure lands, which he had covenanted to be and to continue of ſuch value; and the defendant inſiſts, that this is a covenant which ſounds only in damages, and properly determinable at law; though it be admitted that a court of equity cannot regularly aſſeſs damages; yet in this caſe, a Maſter in Chancery (*a*) may properly enquire into the value and defect of the lands, and report it to the court, who may decree ſuch defect to be made good, or ſend it to be tried at law, upon a *quantum damnificat'*.

Abr. Eq. 18. pl. 8. [(*b*) It hath been holden that to found a decree for a ſpecifick performance, the contract muſt be good at law; and therefore it is ſtated by Sir Tho. Clarke, Maſter of the Rolls, in Ambl. 406. that it was the practice before Lord Somers' time

The condition of a bond was to ſettle certain lands in ſuch a manor, by ſuch a day; and the obligor died before the day, ſo that the bond was ſaved at law; yet the Court decreed a ſpecifick execution (*b*).

with reſpect to agreements, to ſend the party to law, and if he recovered any thing by way of damages, then to entertain the ſuit." But equity will often enforce a performance of agreements, though no action will lie at law upon them, as in the caſe in the text, and in Cannel v. Buckle, 2 P. Wms 243. Acton v. Pierce, 2 Vern. 480. Scott v. Wray, 1 Chan. Rep. 45. Edwin v. Eaſt Ind. Comp. 2 Vern. 210.]

But here it muſt be obſerved, that agreements, out of which an equity can be raiſed for a decree in ſpecie, ought to be obtained with all imaginable fairneſs, and without any mixture tending to ſurprize or circumvention; and that they be not unreaſonable in themſelves (*a*).

Abr. Eq. 17. 3 Atk. 386. Caſ. temp. Talb. 234. Pr. Ch. 538. 1 Br. Ch. Rep. 440.

[(*a*) Vaughan v. Thomas, 1 Bro. Ch. Rep. 556. acc. Stanhope v. Toppe, 2 Br. P. C. 183. 2 Eq. Ca. Abr. 55. note to Ca. 1. But inadequacy of price, ſimply and of itſelf, independently on any other circumſtances, is not a ground with the Court to annul an agreement, though executory, Keen v. Stukeley, Gilb. Rep. 155. and 2 Br. P. C. 396. Mortimer v. Capper, 1 Br. Ch. Rep. 156. Floyer v. Sherrard, Ambl. 18. Jackſon v. Lever, 3 Br. Ch. Rep. 605. Still leſs is it a ground to reſcind one already executed. Nicols v. Gould, 2 Vez. 422. Henley v. Acton, 2 Br. Ch. Rep. 17. Spratley v. Griffith, 2 Br. Ch. Rep. 179. Willis v. Ternegan, 2 Atk. 251. But ſee Herne v. Meeres, 1 Vern. 465. In the caſe of Heathcote v. Paignon, 2 Br. Ch. Rep. 167. Lord Thurlow admitted, that mere inadequacy of price was ſcarcely ſufficient; but ſaid, that "there was a difference "between that and evidence ariſing from inadequacy: If there is ſuch inadequacy as to ſhew that the "perſon did not underſtand the bargain he made, or was ſo oppreſſed that he was glad to make it, "knowing its inadequacy, it will ſhew a command over him which may amount to fraud." And ſee acc. Young v. Clerk, Pr. Ch. 538. And where agreements are endeavoured to be ſet aſide, for ſuppoſed weakneſs of underſtanding in one of the contracting parties, for breach of confidence, or other ſubſtantive reaſon, the inequality of the terms may be a material ingredient in the caſe, as evidence of impoſition. 3 Wooddeſ. 453. and Griffin v. De Veulle, and others, reported in the Appendix. It is to be further obſerved, that where an agreement appears very unequal, the Courts will lay hold of very ſlight circumſtances to avoid enforcing the execution of it; as where the plaintiff had not made out his title by the time ſtipulated. Kenn v. Stukely, 2 Br. P. C. 396. a circumſtance which in general has not any weight with them. Gibſon v. Patterſon, 1 Atk. 12. If the contract be fair in its creation, it ſhall not be affected by a ſubſequent event, which has thrown the advantage greatly, or wholly on one ſide. See the caſe of Caſs v. Rudele, 2 Vern. 280. more correctly ſtated in 1 Br. Ch. Rep. 157. City of London v. Richmond, 2 Vern. 423. Carter v. Carter, Ca. temp. Talb. 271. Mortimer v. Capper, 1 Br. Ch. Rep. 156. and the caſe there referred to by Ld. Thurlow. Adams v. Weare, 1 Br. Ch. Rep. 567. Jackſon v. Lever, 3 Br. Ch. Rep. 605. where contracts under ſuch circumſtances have been ſpecifically decreed: And ſee the caſe of Nicols v. Gould, 2 Vez. 422. Henley v. Acton, 2 Br. Ch. Rep. 17. Baldwin v. Boulter, cited in 1 Br. Ch. Rep. 156. where the Courts have refuſed to ſet them aſide. To this current of authorities muſt be oppoſed the dictum of the Maſter of the Rolls, in Stent v. Bailis, 2 P. Wms 220. and the caſe of Pope v. Roots, 7 Br. P. C. 184. in which caſe an eſtate was ſold for an annuity, but the vendor dying before any payment was made; and after the day on which the firſt payment was to have been made, the contract was reſcinded, though not impeached in any other reſpect. James v. Owen, E. T. 1733. cited in Fonbl. Notes on Tr. Eq. c. 2. ſ. 11. appears to have proceeded on a different ground: the plaintiff had agreed to preſent the defendant to the Court of Aldermen, and to reſign the place of printer to the city of London in his favour, to which place certain fees and profits were then annexed, but which the Court of Aldermen intimated their intention to reduce; and, for that reaſon, the defendant refuſed to perform his agreement. The Court thought, that the object of the agreement being the then profits, which were not purely contingent, and the plaintiff not having actually ſurrendered, the performance of the agreement ought not to be decreed. A party who demands a ſpecifick execution of an agreement, muſt ſhew that he has performed all that was to be done on his part, or that he is ready to do ſo; "for if he either will not, or through his own "negligence, cannot perform the whole on his ſide, he has no title in equity to the performance of the "other party, ſince ſuch performance could not be mutual." Tr. of Eq. c. 6. ſ. 2. But it muſt be obſerved, that though a plaintiff has not performed what was required on his part, within *the time* ſtipulated, he is yet in general entitled to a ſpecifick execution, eſpecially if the non-performance has not ariſen by his default. Penn v. Ld. Baltimore, 1 Vez. 450. If in the ſale of an eſtate, it be ſtipulated that the price ſhall be paid, or the title be completed by a certain day, which elapſes without either being done, ſtill the contract ſhall be enforced; for the general rule is, not to conſider the time as of the eſſence of agreements. Gibſon v. Paterſon, 1 Atk. 12. In the caſe of non-completion of the title by the day appointed, if the vendee, immediately upon the vendor's failure in that reſpect, demand a return of the depoſit, and diſtinctly refuſe to go on with the purchaſe, the Court will not compel him: but if he acquieſce in the delay, knowing the ſtate of it, or do not ſufficiently declare his determination not to proceed in the purchaſe, he will not be allowed to reſiſt the performance afterwards upon that ground. Pincke v. Curteis, 1 Br. Ch. Rep. 329. and the caſe of Ambroſe v. Hodgſon, therein cited. Vernon v. Stephens, 2 P. Wms 66. However, in either caſe, if any injury would accrue to the other party from the failure, or if the circumſtances which occaſioned it are likely to create any embarraſſment, or to protract the final completion

completion of the agreement for any unreaſonable time, the Court will ſet it entirely aſide. In the caſe of Mackreth v. Marlar, at the Rolls, Jul. 10, 1786, Sir L. Kenyon decreed a contract for the purchaſe of an eſtate to be delivered up, the purchaſer having died ſhortly after the contract, and a ſuit having been inſtituted for an account of aſſets, which was then depending. The purchaſer had agreed to complete his purchaſe on or before the 30th of November; he died on the 12th of January following; and the vendor filed this bill in the beginning of the year 1785. The decree was, that the defendants, the executors of the purchaſer, ſhould deliver up the contract to the plaintiff the vendor, and that the plaintiff ſhould retain his coſts out of the depoſit. 2 P. Wms 67, Note 1. Equity, too, diſtinguiſhes between thoſe caſes, where the one party having performed part of the agreement, is rendered unable to perform the whole by ſome ſubſequent accident; and yet, notwithſtanding the part performance, is *in ſtatu quo*, and thoſe where after ſuch part performance he is not in *ſtatu quo*, and in the latter holds him entitled to a performance from the other party, though it refuſes it in the former. To this diſtinction muſt be referred the difference of deciſion in the caſes of Earl of Feverſham v. Watſon, Rep. temp. Finch. 445. 2 Freem. 35. S. C. Meredith v. Wynn, Pr. Ch. 312. Gilb. Ch. 242. S. C. 1 Eq. Ca. Abr. 70. pl. 15. S. C. Gilb. Eq. Rep. 170. S. C. If the plaintiff has taken all neceſſary ſteps to perform his part of the agreement, but has been prevented by the defendant, his endeavours will be conſidered as equivalent to performance. Blackwell v. Naſh, 1 Str. 535. Hotham v. Eaſt Ind. Comp. 1 Term Rep. 638. Though it be generally ſaid that contracts are entire, and ſhall be performed *in toto*, or *not at all*, yet there are caſes in which the Courts will decree a performance, notwithſtanding a partial failure, as in the caſe of marriage agreements, in favour of a wife or children, where there has been a failure by the father's or mother's relations in the part they had engaged to perform; Earl of Feverſham v. Watſon, ſupra, Perkins v. Lady Thornton cited in Pyke v. Pyke, 1 Vez. 376. or of part becoming illegal by a ſubſequent ſtatute; Dr. Betteſworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 66. or of part exceeding the power of the contracting party; Pawſey v. Bowen, 1 Ch. Ca. 23, Campbell v. Leach, Ambl. 740. So in the caſe of a ſale of an eſtate by lots, though the vendor cannot make a good title to all the lots, yet the Court will oblige the purchaſer to take thoſe to which a good title can be made, if they can be ſeparated from the others without being leſſened in value. Poole v. Shergold, 2 Br. Ch. Rep. 118.]

2 Ch. Ca. 27. As where by a marriage agreement the ſon's intended wife was to have more than would have been left for the father (though indebted), his wife and two daughters unpreferred, the Court would not decree it; principally, by reaſon of the extremity of it, but left the party to his remedy at law.

Vern. 227. pl. 225. Phillips v. Duke of Bucks. So where *A.* articled for the purchaſe of *B.*'s eſtate, pretending he bought it for one whom *B.* was willing to oblige, and thereby got it ſomewhat cheaper, when in truth he bought it for another (*a*), equity would not decree an execution of this agreement.

[(*a*) In the caſe of Lord Irnham v. Child, 1 Br. Ch. Rep. 95. Lord Thurlow is reported to have ſaid, that "he "ſhould be very ſorry to lay it down, that a man treating with a third perſon in truſt for a ſecond, whom "he had refuſed to deal with, could therefore ſet the contract aſide; that no caſe had gone ſo far; "that Phillips v. Duke of Bucks was upon a difference of price." But in the caſe of Eyre v. Popham, M. 14 G. 3. Ld. Bathurſt held, that an agreement entered into under the circumſtances ſtated by Ld. Thurlow, was not that fair agreement which ought to be decreed in ſpecie by a court of equity.]

Bromley and Jefferies. 2 Vern. 415. So where *A.* on a marriage of his daughter to *B.* covenanted that *B.* ſhould have his lands at his death cheaper than any other perſon, and he lived twenty years after, and deviſed to *B.* 1000*l.* and to his daughter *B.*'s wife, 500*l.* and he deviſed the lands to his grandſon; the Court refuſed to decree an execution of the agreement, becauſe of the uncertainty of it; and it not being mutual, *B.* not being bound to take it at any price.

2 Vern. 632. Green and Wood. Ca. tem. Talb. 236. Savage v. Taylor, S. P. An agreement for a purchaſe being obtained by an attorney from an old woman of ninety, and ſeveral ſuſpicious circumſtances appearing, the Court would neither decree it to be carried into execution againſt the heir at law, nor to be delivered upon a croſs bill exhibited for that purpoſe; but left the parties to their remedies at law.

But as theſe caſes, and all others on this head, depend ſo much upon circumſtances, and are to ſtand or fall according to the degrees of fraud or circumvention attending them, and proved in the cauſe, or by what appears unreaſonable on the face of them; I ſhall only obſerve, that a court of equity will much more eaſily be prevailed on to diſmiſs a bill which prays a ſpecifick execution of an unreaſonable agreement (*a*), than ſet aſide an agreement, though not ſtrictly fair (*b*), on a bill for that purpoſe; for this deprives the party of what he had a right to by law; and that where ſuch agreements are ſet aſide, it muſt be on refunding what was *bonâ fide* paid, making allowances for improvements, &c. (*c*)

[The Court will not compel a purchaſer to take a title which is at all doubtful; Shapland v. Smith, 1 Br. Ch. Rep. 75. Cooper v. Denne, 4 Br. Ch. Rep. 80. nor will they interpoſe where a party has forborne to inſiſt upon an agreement for ſeveral years, Scolefield v. Whitehead, 2 Vern. 127. Wingfield v. Wheley, 5 Vin. Abr. 534. pl. 38. Powell v. Hankey, 2 P. Wms. Orby v. Trigg. 9 Mod. 2. unleſs the delay can be accounted for by ſpecial circumſtances; Eq. Tr. c. 4. ſ. 27. nor in caſe of a written agreement, afterwards diſcharged by parol; Goman v. Saliſbury, 1 Vern. 240. Ld. Milton v. Edgworth, 6 Br. P. C. 580. Legal v. Miller, 2 Vez. 299. nor in the caſe of a ſale by auction, where an accident has happened to caſt a damp upon the ſale, though without blame imputable to any one; as where the vendor's agent, *known to be ſuch to the company preſent*, bid for the purchaſer; Twining v. Morrice, 2 Br. Ch. Rep. 326. nor if the agreement be to do a thing which would tend to extortion, or promote inebriety; Mythwold v. Walbank, 2 Vez. 238. nor if damages be ſtipulated; Woodward v. Gyles, 2 Vern. 119. but a penalty in general will not be allowed to releaſe parties from their agreements; it being uſually deſigned merely as a medium for ſecuring the performance of the contract. Parks v. Wilſon, 10 Mod. 517. Chilliner v. Chilliner, 2 Vez. 528. Sloman v. Walter, 1 Br. Ch. Rep. 418. Howard v. Hopkyns, 2 Atk. 371. nor will they interpoſe, if the agreement be founded on an illegal conſideration, as that of ſtifling a proſecution for felony, or for fraud. 3 P. Wms 279. Keen v. Stukely, Gilb. Eq. Rep. 153. Hanger v. Eyles, 2 Eq. Ca. Abr. 20. p. 16. Hickes v. Phillips, Pr. Ch. 575. (*a*) See acc. Savage v. Taylor, Ca. temp. Talb. 236. Young v. Clerk, Pr. Ch. 538. Vaughan v. Thomas, 1 Br. Ch. Rep. 556. Davis v. Symonds, Scac. 1787. (*b*) Solemn conveyances, releaſes, and agreements by parties, are not ſlightly to be blown off and ſet aſide, *per* Ld. Macclesfield, Cann v. Cann, 1 P. Wms 227. Equity therefore will not avoid a *reaſonable and fair agreement*, though founded on miſtake. Frank v. Frank, 1 Ch. Ca. 84. Stapleton v. Stapleton, 1 Atk. 10. or though the party were intoxicated, or in priſon, at the time he entered into it, or ſome paternal authority were exerted, and ſome benefit accrue to the father under it. Cory v. Cory, 1 Vez. 19. Hinton v. Hinton, 1 Vez. 632. Kinchant v. Kinchant, 1 Br. Ch. Rep. 369. It will not decree a forfeiture after an agreement, in which, if there were a miſtake, it was the miſtake of all the parties to it. Pullen v. Ready, 2 Atk. 592. Malden v. Merril, 2 Atk. 8. (*c*) Savage v. Taylor, Ca. temp. Talb. 236. For caſes of Fraud, *vide* infra, tit. *Fraud.* (B).]

2. Of voluntary Agreements.

As men have a right to their acquiſitions, ſo may they diſpoſe of them at their pleaſure, and without valuable conſideration; but if a man promiſes to convey lands, or to give goods, without valuable conſideration, or without delivering poſſeſſion of them, this alters no property, nor has the party any remedy in law or equity, it being *nudum pactum unde non oritur actio* (*d*).

3 Co. 81. b. 2 Bl. Com. 443. Dy. 336. b. 2 Bulſtr. 225.

[(*d*) Tho' we have borrowed this maxim from the civil law, yet we do not agree with the civilians in their definition of what conſtitutes a *nudum pactum*, the want of conſideration not being regarded by them. In their law, "*Nuda conventio eſt, quæ in nudis placiti et conventionis finibus ſtat, nec certum nomen habens, nec ullam obligandi cauſam præter conventionem.*" D. l. 7. § 1. 2. and 4. de pact. l. 27. Vinnius, in his Commentary on the Inſtitutes, p. 578. explains ſome of the terms of this definition. "*Duo ſunt conventionum genera; unum eorum, quæ ſpeciale nomen habent, ex quo genere ſunt emptio-venditio, locatio-conductio, ſocietas, mandatum, depoſitum, commodatum, pignus, et ſimiles contractus, qui, quod certum nomen habent, dicuntur contractus nominati, et obligationem actionemque producunt, non utique propter nomen, quod extrinſecum quid eſt atq; accidens; ſed propter utilitatem commercii, cujus indicium eſt, quod certo ac proprio nomine appellantur; vel potius quia hæ conventiones ob frequentiorem uſum talem accepere vim ac naturam, quæ etiamſi nihil ſpecialiter dictum ſit, ex ipſo nomine ſatis intelligatur.* Grot. L. 2. *de jure bell. et pac.* 12. n. 3. *Alterum genus eſt earum conventionum, quæ nomine quidem proprio carent, ſed quibus præter conſenſum ſubeſt cauſa, ut hoc exprimit juriſconſultus.* D. l. 7. § 2. *Et hæ quoque conventiones*

" *ventiones*

"*ventiones obligationem et actionem pariunt. Causam definio dationem vel factum certâ lege, puta,* "*quid tibi dedi aut feci eâ lege, ut vicissim mihi aliquid dares aut faceres.*" See further Fonbl. Notes on Eq. Tr. p. 326. A mere agreement by a creditor to take a less sum than that which is owing to him, is *nudum pactum*. Heathcote v. Crookshanks, 2 Term Rep. 24. As to *nudum pactum*, see Elsee v. Gatward, 5 Term Rep. 143. A consideration executed will not support a subsequent promise, unless the act were done at the request of the party promising. Dy. 272. Lampleigh v. Braithwaite, Hob. 105. Hayes v. Warren, 2 Barnard, 141. Robertson v. St. John, 2 Br. Ch. Rep. 140. or unless the party promising were under a moral obligation to do the act himself, or to procure it to be done. Church v. Church, cited in Hunt v. Wotton, Sir T. Raym. 259. Turner v. Watson, Bull. *Nisi Pri.* 147. 4th ed. Trueman v. Fenton, Cowp. 544. An agreement to settle boundaries, though nothing valuable is given, implies sufficient consideration extending to both parties, who have an interest in shunning contention. Penn v. Lord Baltimore, 1 Vez. 444.]

Pl. 308, 309. Yelv. 196. Cro Jac. 270. Brownl. 111. 3 Burr. 1637. 2 Bl. Comm. 446.

But if it be done by deed duly executed, under seal, this is good in law, though there be no consideration, or no delivery of possession; because a man is estopped to deny his own deed, or affirm any thing contrary to the manifest solemnity of contracting (*a*).

[A consideration is by our law necessary, though the agreement be evidenced by *writing*, unless the writing, as in the text, from its being of the highest solemnity, import a consideration, or unless it be negotiable at law, and the interests of *third* persons be involved in its efficacy; for in this latter case *as between the original parties*, the want of consideration may be averred, and will bar the plaintiff from recovering. Pearson v. Garnett, 4 Mod. 242. Jefferies v. Austin, 1 Str. 674. Gilb. Lex Prætoria, 288, 289. Fonbl. Notes on Eq. Tr. 335. (*a*) Though the agreement be under seal, yet if there be no consideration, equity will not decree specifically; for as in such case nominal damages only could be recovered at law, equity, which follows the law, will not give more substantial relief. 1 Vez. 450. 1 Atk. 10. Forsaker v. Robinson, 1 Eq. Ca. Abr. 123. Pr. Ch. 475. S. C. Gilb. Eq. Rep. 479. S. C. Tudor v. Anson, 2 Vez. 582.]

Vern. 100. 132. 427. 456. 464. 1 Ch. Rep. 173. 2 Ch. Rep. 432. For cases respecting creditors, &c. see tit. *Fraud*.

So in equity, voluntary conveyances are good against the parties, and cannot be revoked; nor will the Court interpose in behalf of one volunteer against another; but if they affect creditors, purchasers, or younger children, the Court will set them aside.

2 Vent. 365. 1 Vern. 37. 2 Vern. 475. 1 Ch. Rep. 147. 2 Freem. 65. [(*b*) Equity will not supply the want of a surrender of a copyhold in favour of a bastard daughter against the heir of her father, though the father had convenanted to convey it, and make further assurances; for the daughter is, in consideration of law, a mere stranger, *nullius filia*, and the conveyance is merely voluntary. Forsaker v. Robinson, 1 Eq. Ca. Abr. 123.]

If there be a defective conveyance, without an equitable consideration, a court of equity will not oblige the party to make it good, though there be a covenant for further assurances; as if a man makes a feoffment to a stranger, without livery, the feoffor, or his heir, shall not be obliged to make good that feoffment, but it shall be construed in equity to be an estate at will, as it is at law (*b*).

Abr. Eq. 24. p. 7. 93. p. 5. [(*c*) Equity will enforce the payment of a bond given to an innocent woman whom the obligor hath seduced, for it is *præmium pudoris*. Marchioness of Annandale v. Harris, 2 P. Wms. 432. Eq. Cas. Abr. 87. p. 6. S. C. 3 Br. P. C. 443. S. C. Cray v. Rooke, Ca. temp. Talb. 153. S. P. And a bond of this kind hath been holden good at law. Turner v. Vaughan, 2 Wilf. 339. So where a provision has been made for her by an ineffectual conveyance, it will interpose in her behalf both against the grantor himself and his representative. Ord v. Blackett, cited in 2 P. Wms. 435. and Carew v. Safford, ibid. See the last case in Ambl. 520. by the name of Cary v. Stafford. Nor will it relieve against a bond given even to a common prostitute.

If an annuity is granted by one to his house-keeper, with a bond for payment of it, and the bond is lost, equity will decree payment of the annuity; for service is a consideration, and no *turpis contractus* shall be presumed, unless proved (*c*).

proſtitute, if there be no fraud in the caſe, though the application be made by the repreſentative of the obligor. Hill v. Spencer, Ambl. 641. a circumſtance which hath been formerly thought to ſtrengthen the ground for relief. Matthew v. Hanbury, 2 Vern. 187. Aliter where there is fraud, as where the plaintiff claims it as *præmium pudicitiæ*, and ſhe is found to have been a proſtitute prior to the time of her having been connected with the party giving it. Clark v. Periam, 2 Atk. 333. But bonds of this kind entered into *ex turpi cauſâ* are void: as where a woman, *knowing* a man to be married, ſubmits to his temptation; Prieſt v. Parrot, 2 Vez. 160. or where a woman having ignorantly married a man who had another wife alive, upon coming afterwards to the knowledge of his ſituation, continues to live with him. Lady Cox's caſe, 3 P. Wms. 339. So where the condition of the bond was that the parties ſhould live together in a ſtate of fornication. Walker v. Perkins, Adminiſtrator, 3 Burr. 1568. 1 Bl. Rep. 517. S. C.]

[Equity will not carry a merely voluntary covenant beyond the letter of it.

In decreeing the execution of agreements, it regards the intent of the parties, and does not confine itſelf to the ſtrictly legal operation of the words. Where, therefore, marriage articles, literally taken, would give the huſband or wife an eſtate tail, it decrees a ſtrict ſettlement; for otherwiſe the proviſions for the iſſue (*a*), the object of the ſettlement, might be defeated.]

Baſſe v. Grey, 2 Vern. 692.

[(*a*) This rule is eſtabliſhed in favour of *iſſue male* by many caſes; firſt, where there are articles *only* as in Jones v. Laughton, 1 Eq. Ca. Abr. 392. pl. 2. Nandick v. Wilkes, 1 Eq. Ca. Abr. 393. pl. 5. Cuſack v. Cuſack, 1 Br. P. C. 470. Trevor v. Trevor, 1 P. Wms. 622. Dodd v. Dodd, Ambl. 274. Robinſon v. Hardcaſtle, 2 Term Rep. 252. So where there are articles before marriage, and a ſettlement is made after marriage in the words of the articles, as in Streatfield v. Streatfield, Ca. temp. Talb. 176. or where there are both articles and ſettlement before marriage, and the ſettlement is made *in purſuance* of the articles, as in Honor v. Honor, 1 P. Wms. 123. Roberts v. Kingſley, 1 Vez. 238. But otherwiſe, where the ſettlement made *before* marriage is *not* in purſuance of the articles; for then the parties will be preſumed to have come to a new agreement. Legg v. Goldwire, cited in Ca. temp. Talb. 20. Partyn v. Roberts, Ambl. 315. And the ſame equity ariſes to the iſſue female. Burton v. Haſtings, Gilb. Eq. Rep. 113. Weſt v. Eriſſey, 2 P. Wms. 349. and Hart v. Middlehurſt, 3 Atk. 371. But this muſt be underſtood where the articles make no other proviſion for them. Powell v. Price, 2 P. Wms 535. (*b*) But where this miſchief does not occur, or where the intention of the parties to create an eſtate of inheritance is not ſufficiently explicit, it ſeems the rule is not applicable. Chambers v. Chambers, Moſ. 333. Green v. Eakins, 2 Atk. 476. Partyn v. Roberts, Ambl. 315. Cordwell v. Mackrill, Amb. 515. Highway v. Banner, 1 Br. Ch. Rep. 584.

In contracts proper for a ſpecifick performance, equity conſiders them often as actually performed (*c*) from the time they are entered into. Money covenanted to be laid out in land, it conſiders as land; and land articled to be ſold, it treats as money; and inveſts each with the qualities of the other.

Money covenanted to be laid out in land, will go to the heir, and not the

executor. Chaplin v. Homer, 1 P. Wms. 483. Scudamore v. Scudamore. Pr. Ch. 540. Edwards v. Lady Warwick, 2 P. Wms. 171. Lechmere v. Earl of Carliſle. 3 P. Wms. 221. Settled on the wife of a freeman of London in lieu of dower, will not bar her of her cuſtomary part. Babington v. Greenwood, 1 P. Wms. 530. It will not be perſonal aſſets; Earl of Pembroke v. Bowden, 3 Ch. Rep. 115. 2 Vern. 52. S. C. Lawrence v. Beverley, 2 Keb. 841. cited alſo in 1 Vern. 471. It ſhall be ſubject to the curteſy of the huſband, Sweetapple v. Bindon, 2 Vern. 536. Otway v. Hudſon, 2 Vern. 583. Cunningham v. Moody, 1 Vez. 176. but not to the dower of the wife, becauſe ſhe is not dowable of an equitable eſtate. It ſhall paſs as land by a will, under ſweeping words, if at the time of making the will the teſtator has an equitable eſtate therein, Davie v. Beardſham, 1 Ch. Ca. 39. Prideaux v. Gibbon, 2 Ch. Ca. 144. Milner v. Mills. Moſ. 123. Alleyn v. Alleyn, Moſ. 262. Greenhill v. Greenhill, 2 Vern. 679. Pr. Ch. 320. S. C. Shorer v. Shorer, 10 Mod. 39. Lingen v. Sowray, 1 P. Wms 172. Pr. Ch. 400. S. C. Langford v. Pitt, 2 P. Wms 629. Guidot v. Guidot, 3 Atk. 254. Potter v. Potter, 1 Vez. 437. Gibſon v. Lord Montfort, 1 Vez. 494. And it will not paſs as money under a general bequeſt to a legatee, unleſs deſcribed as ſo much money agreed to be laid out in land. Croſs v. Addenbroke, and Fulham v. Jones, cited in a note 3 P. Wms. 221. Where recovery would be neceſſary to give a perſon the abſolute intereſt in it, if land; a fine will not be ſufficient. Colwell v. Shadwell, cited in 1 P. Wms. 471. 485. Edwards v. Counteſs of Warwick, 2 P. Wms 171. Collet v. Collet, 3 Atk. 11. Trafford v. Boehm, 3 Atk. 447. Carter v. Carter, Ca. temp. Talb. 272. But equity will not conſider money as land, unleſs the covenant or direction to lay it out in land be expreſs, Symons v. Rutter, 2 Vern. 227. Curling v. May, cited in 3 Atk. 255. And money thus circumſtanced ſhall be deemed as part of the perſonal eſtate of one who might have

aliened it, there being no other uſe but to himſelf. Chicheſter v. Bickerſtaff, 2 Vern. 295. Pulteney v. Earl of Darlington, 1 Br. Ch. Rep. 236. Wade v. Paget, 1 Bro. Ch. Rep. 368. But ſee Lechmere v. Earl of Carliſle, 3 P. Wms. 220. Ca. temp. Talb. 90. S. C.—Where land is agreed or directed to be ſold, it ſeems, the creditors of the bargainor may compel the heir to convey the land. Beſt v. Stamford, 1 Salk. 154 (c). Therefore the perſonal eſtate of a man, who, in conſideration of marriage with an orphan of a citizen of London, had covenanted to take up his freedom of the city, was divided according to the cuſtom, though the covenant was not performed. Frederick v. Frederick, 1 P. Wms. 710. 4 Br. P. C. 7.]

3. Of the Manner in which they are to be performed.

Gerrard v. Vaux, Vern. 121. How agreements and promiſes are to be executed at law, *vide* heads of *Aſſumpſit* and *Covenant*.

If an agreement be to quit the poſſeſſion of lands, the Court will not decree a conveyance of the lands themſelves; but if the agreement was to convey the lands, it is ſaid that the Court would have decreed the agreement, though the party was not apprized what eſtate he had in the lands.

Gardner v. Pullen, 2 Vern. 394. *Vide* ſupra (B) 1. note c.

If one is bound to transfer 300*l.* *Eaſt-India* ſtock before ſuch a time, which he neglects to do, and the ſtock is much riſen, he ſhall be obliged to transfer the ſtock in *ſpecie*, and account for all dividends from the time that it ought to have been transferred.

Vern. 210. [Ambl. 332. But *qu.* whether equity will not relieve in ſuch caſe, if the ſecurity be bettered. 1 Ch. Ca. 110.]

If a creditor agrees with his debtor to take leſs than his debt, ſo that it be paid preciſely at ſuch a day, and the debtor fails of payment, he cannot be relieved, for *cujus eſt dare, ejus eſt diſponere*.

2 Vern. 134. Halifax v. Higgins. [(*a*) As this caſe is ſtated in Lady Holles v. Wyſe, 2 Vern. 289. and in Shode v. Parker, 2 Vern. 316. the intereſt was reſerved at 6*l.* *per cent.* with an agreement to accept 5*l.* *per cent.* if duly paid: a ſtatement doubtleſs correct, as it reconciles the caſe to the other deciſions upon this point, which at preſent it claſhes with. See Jury v. Cox. Pr. Ch. 160. Walmſley v. Booth Bernard, Ch. Rep. 481. Nicholls v. Maynard, 3 Atk. 519. 3 Burr. 1374.]

If money be lent on a mortgage, at 5 *per cent.* and the mortgagor covenants to pay 6 *per cent.* if he make default for the ſpace of ſixty days after the time of payment; if he makes default, the Court will not relieve, this being the agreement of the parties (*a*).

Vern. 316. Barker v. Holder, 1 Eq. Ca. Abr. 28. pl. 5. S. C.

If a leſſee for a long term of years covenants to lay out 200*l.* upon the premiſes within the firſt ten years, and lays out but 30*l.* and after the expiration of thirty years of the leaſe, the leſſor brings an action of *covenant*, and recovers 150*l.* damages, equity will neither relieve againſt the damage, nor decree the money to be now laid out in the improvements; for though the damages ſeem exceſſive, yet the jury were proper judges; and to decree it to be laid out now the leaſe is almoſt expired, is not proper; for it is probable the leſſee would not be ſo careful in laying it out in laſting improvements, as he would have been if laid out at firſt.

(C) Of Parol Agreements, or ſuch as may be ſaid to be within the Statute of *Frauds and Perjuries*.

THE common law required no other ſolemnity in paſſing lands or tenements, but that of livery and ſeiſin, which being a tranſlation of the feud *ccram paribus curtis*, and teſtified by them, was held an act of ſufficient notoriety to direct the lord of whom to demand his ſervices, and ſtrangers againſt whom to commence their actions; but now, Co. Lit. 48. Spelm. Gloſſ. 510. 9 Co. 137. Roll. Abr. 7.

By the 29 *Car.* 2. *c.* 3. *ſect.* 1. it is enacted, "That all leaſes, "eſtates, intereſts of freehold, or terms of years, or any un- "certain intereſt of, in, or out of any meſſuages, manors, lands, "tenements or hereditaments, made or created by livery and "ſeiſin only, or by parol, and not put in writing, and ſigned by "the parties ſo making or creating the ſame, or their agents "thereunto lawfully authorized by writing, ſhall have the force "and effect of leaſes or eſtates at will only, and ſhall not, either "in law or equity, be deemed or taken to have any other or "greater force or effect; any conſideration for making any ſuch "parol leaſes or eſtates, or any former uſage to the contrary "notwithſtanding.

"Except leaſes not exceeding the term of three years from the S. 2. "making thereof, whereupon the rent reſerved to the landlord, "during ſuch term, ſhall amount unto two third parts, at the "leaſt, of the full improved value of the thing demiſed."

Alſo it is enacted, "That no leaſes, eſtates or intereſt, either S. 3. "of freehold or terms of years, or any uncertain intereſt, not "being copyhold or cuſtomary intereſt of, in, to or out of any "meſſuages, manors, lands, tenements or hereditaments, ſhall "be aſſigned, granted or ſurrendered, unleſs it be by deed or "note in writing, ſigned by the party ſo aſſigning, granting or "ſurrendering the ſame, or their agents thereunto lawfully au- "thorized by writing, or by act or operation of law."

And it is further enacted, "That no action ſhall be brought S. 4. "whereby to charge any executor or adminiſtrator, upon any "ſpecial promiſe to anſwer damages out of his own eſtate, or "whereby to charge the defendant upon any ſpecial promiſe to "anſwer for the debt, default or miſcarriages of another perſon; "or to charge any perſon upon any agreement made upon con- "ſideration of marriage, or upon any contract or ſale of lands, "tenements or hereditaments, or any intereſt in or concerning "them; or upon any agreement that is not to be performed "within the ſpace of one year from the making thereof, unleſs "the agreement upon which ſuch action ſhall be brought, or "ſome *memorandum* or note thereof, ſhall be in writing, ſigned "by the party to be charged therewith, or ſome other perſon by "him thereunto lawfully authorized." S. 7. it is enacted, "That "all declarations or creations of truſts, or confidences of any "lands, tenements or hereditaments, ſhall be manifeſted and

" proved by ſome writing ſigned by the party who is by law en-
" abled to declare ſuch truſt," or by his laſt will in writing, elſe
they ſhall be utterly void and of no effect (*a*).

[(*a*) By 4 Ann. c. 16. ſ. 15. it is declared, that declarations of uſes, truſts, &c. of fines or recoveries ſhall be valid and effectual, though the deed of uſes be made after the levying or ſuffering of ſuch fine or recoveries.]

S. 8. " Provided that where any conveyance ſhall be made of any
" lands or tenements, by which a truſt or confidence ſhall or
" may ariſe, or reſult by the implication or conſtruction of law,
" or be transferred or extinguiſhed by an act or operation of
" law, then, and in every ſuch caſe, ſuch truſt or confidence
" ſhall be of the like force and effect as the ſame would have
" been if this ſtatute had not been made."

" Sect. 17. it is enacted, That no contract for the ſale of any
" goods, wares and merchandizes for the price of ten pounds
" *ſterling*, or upwards, ſhall be allowed to be good, except the
" buyer ſhall accept part of the goods ſo ſold, and actually re-
" ceive the ſame, or give ſomething in earneſt to bind the bar-
" gain, or in part of payment; or that ſome note or memoran-
" dum in writing of the ſaid bargain be made and ſigned by the
" parties to be charged, or their agents thereunto lawfully autho-
" rized."

In the conſtruction of this ſtatute, the following points have been reſolved:

Attorney General v. Day, 1 Vez. 218.

[That a judicial ſale of an eſtate under a decree of the court of Chancery is not within the ſtatute. Thus *A.* being likely to die, made a conveyance of a real eſtate in favour of a charity, and then made a will, by which he gave 3000*l.* (the exact value of that land,) and alſo 250*l.* to the ſame charity, and gave the eſtate to *D.* (wife of *B.*) and *C.* A bill was brought for an account, and for the direction of the Court for a ſettlement of the eſtate under the will; and a decree was had thereupon, and the maſter was thereby directed to receive a ſcheme for carrying the conveyance into execution; the foundation of part of which was to conſider, in what way the money ſhould be laid out, and a perpetual fund created for the maintenance of the charity. The maſter reported a ſcheme for laying out the money in the purchaſe of lands; and the caſe being ſet down to be heard on the matter reſerved, the Court made a decretal order confirming the maſter's report, and ordering that the ſcheme ſhould be approved of, and the other matters therein carried into execution. Theſe directions were all acquieſced under by *B.* and *D.* who ſurvived him. After her (*D.*'s) death, an information was brought on behalf of the charity, together with the adminiſtratrix of *D.* to have this purchaſe carried into execution by the aid of the Court againſt the deviſee of the heir at law of *D.* and the infant ſon of *C.* the co-deviſee with *D.* And it being objected that there was no agreement ſigned purſuant to the ſtatute of Frauds, one queſtion was, whether the tranſactions which paſſed in the life-times of *D.* and *C.* amounted to a binding agreement on them for the ſale of the lands? And Lord *Hardwicke* held, that

that here was ſuch an agreement as the Court ought to execute notwithſtanding the ſtatute; this being a judicial ſale of the eſtate. And upon the ſame principle it is holden that purchaſers before the maſters are out of the ſtatute, and the Court will in ſuch caſes carry into execution againſt the repreſentative, a purchaſe by a bidder before the maſter, without the bidder's ſubſcribing, after confirmation of the maſter's report that he was the beſt bidder; the judgment of the Court taking it out of the ſtatute. So if the authority of an agent who ſubſcribed for a bidder before the Maſter cannot be proved, yet if the Maſter's report can be confirmed, the Court will carry it into execution, unleſs there be ſome fraud. Ibid. 221. Ibid.

And Lord *Thurlow* was of opinion, where the attornies, concerned in a ſuit by a firſt mortgagee for a foreclоſure, agreed, with reſpect to the final decree, that the eſtate ſhould be ſold, the firſt mortgagee paid principal and intereſt, and the remainder paid to the ſecond mortgagee, but that the former ſhould in the mean time take a decree; that if the firſt mortgagee made an improper uſe of the decree, this agreement, though by parol, might be read, on an application to open the foreclоſure, as an agreement relative to a decree; the attornies being competent to make agreements relative to the orders of the Court. And upon that ground he admitted the evidence of it *de bene eſſe*, though it had been rejected at the Rolls, becauſe it was not in writing, and therefore void under the ſtatute.] Cox v. Peele, 2 Br. Ch. Rep. 334.

If there be a parol agreement for the purchaſe of lands, and a bill brought for a ſpecifick execution thereof, and the ſubſtance of the agreement is ſet forth in the bill, and confeſſed by the defendant's anſwer, the Court will decree a ſpecifick execution, becauſe there is no danger of perjury, which was the principal thing the ſtatute intended to prevent. Abr Eq. 19. pl. 3. Gilb. Eq Rep. 35. S. C. Gilb. Ch. 237. S. C. Prec. Ch. 208. S. C. Symondſon

v. Tweed, Pr. Ch. 374. Lacon v. Martins, 3 Atk. 3. Attorney General v. Day, 1 Vez. 221. S. P. Gunter v. Halſey, Ambl. 586. Potter v. Potter, 1 Vez. 441. [See Eyre v. Iviſon, Scac. Tr. 1785. cited 2 Br. Ch. Rep. 563. Stewart v. Careleſs, Scac. Apr. 1785. cited *ibid.* 564. and Rondeau v. Wyatt, 2 H. Bl. Rep. 68. If the party himſelf die, his heir will, it ſeems, be bound on a bill of revivor. Per Lord Hardwicke, 1 Vez. 221. And, upon this principle, equity will decree an agreement on evidence of its having been confeſſed by a party to it, although it be denied by his anſwer. As where an agreement was proved by one witneſs only, and poſitively denied by the defendant's anſwer; but there was proof in the cauſe that the defendant had confeſſed the agreement: the Maſter of the Rolls offered to direct an iſſue to try the agreement if the defendant deſired it; but he declined that, unleſs his Honour would make an order that his anſwer ſhould be read at the trial, which his Honour refuſed, there being circumſtances to corroborate the evidence of the ſingle witneſs, and decreed the agreement to be carried into execution. Only v. Walker, 3 Atk. 407. Where the two defendants in a ſuit confeſſed an agreement in their anſwer, but different from that ſtated in the bill, and an agreement different from either was proved by the teſtimony of only a ſingle witneſs, Lord Loughborough C. decreed a performance purſuant to the terms of the agreement confeſſed by the anſwer. Mortimer v. Orchard, 2 Vez. jun. 243. In what manner, and in what caſes the ſtatute may be pleaded to a bill for the performance of a parol agreement, *vide* in Whitbread v. Brockhurſt, 1 Br. Ch. Rep. 404. Whitchurch v. Bevis, 2 Br. Ch. Rep. 559. and the caſes there mentioned. See alſo Mitf. Eq. Tr. 212. Taylor v. Beach, 1 Vez. 297.]

If a parol agreement is agreed to be reduced into writing, and in part executed, but the reducing it into writing is prevented by fraud, it may be decreed in equity; as if upon a marriage-treaty inſtructions are given by the huſband to draw a ſettlement, and by him privately countermanded, and afterwards he draws in Abr. Eq. 19. pl. 4. 1 P. Wms. 618. S. C. Prec. Ch. 526. S. C.

Stra. 236. S. C. Gilb. Hiſt. Ch. 244. S. C. 2 Br. Ch. Rep. 565.

the woman by perſuaſions and aſſurances of ſuch ſettlement to marry him (*a*).

Abr. Eq. 20. p. 5. 2 Freem. 269. 281. Skin. 143. 3 Atk. 389. 3 Wooddeſ. 429.

So where a parol agreement was concerning the lending of money on a mortgage, and the conveyance propoſed was an abſolute deed from the mortgagor, and a deed of defeaſance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refuſed to execute the defeaſance, yet it was decreed againſt him on the point of fraud.

[Where a man, in confidence of a parol promiſe, has omitted making that proviſion for others which he intended, ſuch promiſe has been enforced in equity on the ground of fraud. Deveniſh v. Baines, Pr. Ch. 3. 2 Eq. Ca. Abr. 43. S. C. Sellock v. Harris, Vin. Abr. tit. *Contract* and *Agreement*, (H). p. 31. Reech v. Kennigate, Ambl. 67. Harris v. Horwell, Gilb. Eq. Rep. 11.]

Abr. Eq. 20. 2 Vern. 373. S. C. but no mention made of the fraud, only that the father conſented to the match.

So where the defendant on a treaty of marriage for his daughter with the plaintiff, ſigned a writing comprizing the terms of the agreement, and afterwards deſigning to elude the force thereof, and get looſe from his agreement, ordered his daughter to put on a good humour and get the plaintiff to deliver up that writing, and then marry him, which ſhe accordingly did, and the defendant ſtood by at a corner of the ſtreet to ſee them go by to be married; and the plaintiff was relieved on the point of fraud.

2 Vern. 322. Freem. 291. S. C. Where a letter from the father, promiſing a portion, and a marriage

On a bill exhibited for a marriage portion, the chief evidence to ſupport it was a letter proved to have been written by the father's direction, where it was ſaid he would give 1500*l.* portion with his daughter, and that he was afterwards privy to the marriage, and conſented to it, and the portion was decreed the huſband.

had in purſuance thereof, has been held ſufficient, *vide* 2 Vent. 361. 2 Vern. 200. 2 Ch. Rep. 157. Preced. in Chan. 561. Where an uncle in his letter promiſed his niece 1000*l.* portion; but in the ſame letter diſſuaded her from marrying the perſon; Lord Chancellor would not decree the payment, but left the party to his action at law. 2 Vern. 202. [A letter from a father to his daughter that he will give her 3000*l.* not ſhewn to the huſband, who afterwards accepts of 2000*l.* under a will, is no foundation for a decree. See a different ſtate of this caſe in 9 Mod. 3. 2 P. Wms. 65. Nor is a letter promiſing a portion, but not reducing it to any certainty. Hall v. Butler, Eq. Ca. Abr. p. 7. Gilb. Lex Prætor. 243. For a letter cannot be ſet up as an agreement unleſs the terms of the contract are diſtinctly ſet forth therein. Seagood v. Neale, 1 Str. 426. Pr. Ch. 560. Clerk v. Wright, 1 Atk. 13. But a letter (though not ſigned) referring to, and promiſing to perform an agreement in which the terms are ſet forth, is ſufficient. Tawney v. Crowther, 3 Br. Ch. Rep. 318. Q. Whether a court of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, (but not executed,) varying the terms expreſſed in the letter? Cookes v. Maſcal, 2 Vern. 35. Or if the terms be varied by parol? Jordan v. Sawkins, 3 Br. Ch. Rep. 388. See 2 Ch. Ca. 180. Fitzgib. 213. 2 Salk. 444. That an agreement in writing may be diſcharged by parol, ſee 1 Vern. 240. 2 Vez. 376. A bond given by a woman to her intended huſband, conditioned to ſettle an eſtate upon him in fee, is good evidence of the agreement ſo ſpecified in the condition on a bill in equity to carry it into execution, though it be void at law. Cannel v. Buckle, 2 P. Wms. 242. It is a ſufficient ſigning, if a perſon, *knowing the contents*, ſubſcribe a deed as a witneſs only. Welford v. Beazely, 3 Atk. 503. 1 Vez. 6. 1 Wilſ. 118. As to the ſignature, in order to comply with the requiſitions of the ſtatute, it muſt have the effect of giving authenticity to the whole inſtrument; and where it has that effect, it is immaterial in what part of the inſtrument it is found: but where a party had given written inſtructions to his agent for a leaſe, and had inſerted his name in thoſe inſtructions as applicable only to a particular purpoſe, the Court of Exchequer held that this did not amount to a ſufficient authentication. Stokes v. Martin, 1 P. Wms. 771. note 1. It was formerly thought neceſſary that both parties ſhould ſign; but in the caſe of Cotton v. Lee, before the Lords Commiſſioners 1770, it was determined to be ſufficient, if the party charged has ſigned. Cited in 2 Br. Ch. Rep. 564. An agreement ſigned by one party may, in ſome caſes, be concluſive againſt both. Owen v. Davies 1 Vez. 82. But, though the contract itſelf muſt be in writing, an authority to buy, or treat as agent for another, may be good without writing. Vin. Abr. tit. *Contract* and *Agreement*, (H), p. 45. Wedderburne v. Carr, in the Exchequer, T. T. 1775. 3 Wooddeſ. 427.]

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But where on a marriage-treaty the lady's father propoſed to give 4500*l.* portion, and the huſband was to ſettle 4 or 500*l.* *per ann.* for a jointure; the father and intended huſband went to Mr. *Minſhul*'s chambers, who hearing the propoſals on both ſides took down minutes or heads thereof in writing, and the ſame day gave them to his clerk to draw a ſettlement according to the terms of the agreement; the next day the father fell ſick ſuddenly, and died in two hours after, and the next morning the marriage was conſummated; and on a bill brought to have a ſpecifick performance of the agreement, my Lord Chancellor decreed it to be within the ſtatute of *frauds*, and ſaid he knew no caſe where an agreement, though written by the party himſelf, ſhould bind, if not ſigned or in part executed by him (*a*); and that thoſe preparatory heads might have received ſeveral alterations or additions, or the agreement might have entirely broke off upon ſome further enquiry of the party's circumſtances; and this decree was thought very juſt by the Bar, who all agreed with my Lord Chancellor, that if the marriage had been on the foot of this writing, and the father had been privy and conſenting to it, that he ſhould afterwards have been obliged to execute his part thereof.

Abr. Eq. 21. Bawdes and Amhurſt. [Pr. Ch. 402. S. C. See Lord Hardwicke's obſervations upon this caſe, 3 Atk. 503.

(*a*) A note ſigned and given by a huſband to his wife previouſly to their marriage, promiſing to rectify a miſtake in the ſettlement, in conſideration of which ſhe was induced to execute it, was holden to be part of the ſettlement, and binding on the huſband and his aſſignees. Tyrrell v. Hope, 2 Atk. 558.]

On the marriage of the plaintiff with the defendant's daughter, the defendant promiſed to give her 450*l.* portion, and accordingly paid the plaintiff 200*l.* in part, but took a bond from him for it till a ſuitable ſettlement ſhould be made, and the defendant himſelf gave particular directions concerning the ſettlement, which was drawn accordingly and engroſſed; but before it was executed the plaintiff's wife died, and the bill was brought to have the 200*l.* bond delivered up, and the remaining 250*l.* paid; the defendant pleaded the ſtatute of *frauds* and *perjuries*, the agreement not being reduced into writing and ſigned by the parties; and by way of anſwer denied that the 200*l.* was paid in part of the portion, but ſaid it was lent the plaintiff, and the bond given for it; and the plea was allowed; for if the marriage ſhould be looked upon as an execution of the agreement on the one ſide, ſo as to take it out of the ſtatute, it would entirely evade it; for all promiſes of this kind ſuppoſe a marriage either already had or to be had.

25 Jan. 1724. On plea and demurrer, adjudged between Sanſum and Butter.

[The plaintiff agreed with the defendant to ſell him a houſe for 640*l.* and by conſent of both parties an attorney was employed to make a draft of the conveyance; which the attorney accordingly prepared and ſent to the defendant, who made ſeveral alterations therein with his own hand, and delivered it back to the attorney to be engroſſed; upon which a time was appointed for the plaintiff and defendant to meet at a tavern to execute the writings, and for the latter to pay the money. The plaintiff and his attorney came to the tavern, where the plaintiff executed the writings, and having gotten the conveyance regiſtered, (the houſe

Hawkins v. Holmes, 1 P. Wms 770.

being in *Middleſex*,) brought his bill againſt the defendant to compel him to pay the purchaſe-money. The defendant pleaded the ſtatute of *frauds*; and it was holden he was not bound, he not having ſigned the agreement.

Whaley v. Bagenal, 6 Br. P. C. 45.

A. agreed by parol with *B.* for the purchaſe of lands. *B.* delivered a rent-roll which was dated and altered in his own hand-writing, and ſhewed by the title of it that an agreement had been made between them for the ſale of the eſtate at 21 years purchaſe. An abſtract of the title was alſo delivered to *A.* together with the deeds, in order to be compared with the rent-roll. *B.* likewiſe wrote letters to ſeveral of his creditors, informing them that he had contracted with *A.* for the ſale of his eſtate at 21 years purchaſe, and ſent the tenants to treat with *A.* for the renewal of their leaſes. Notwithſtanding all theſe circumſtances, upon *A.*'s filing a bill for a ſpecifick performance, the plea of the ſtatute of *frauds* was allowed by the Houſe of Lords both as to the diſcovery and relief.

2 Br. Ch. Rep. 569.

If there be general inſtructions for an agreement conſiſting of material circumſtances, to be hereafter extended more at large and to be put into the form of an inſtrument with a view to be ſigned by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he ſhall not be compelled to perform ſuch an agreement as that, when he inſiſts upon the ſtatute of *frauds*. *Per* Lord *Thurlow*.]

There are ſeveral caſes in which it has been holden, that a parol agreement in part executed ſhall be performed in the whole; but as thoſe caſes are not exactly ſtated or well reported, it will be ſufficient to mention what ſeems to be the ſenſe of them, and what with any juſtneſs can be collected from them. If an agreement be made concerning lands, though not in writing, and the party by whom it was made receive all or part of the money, equity will compel a ſpecifick performance of the whole agreement; becauſe this is out of the ſtatute, which deſigned to defeat ſuch agreements only, no part whereof was carried into execution, and ſet up merely by parol; for that was the occaſion of the ſtatute, that perſons uſed to ſwear verbal agreements upon others, and by ſuch falſe oaths charge the parties in equity to perform ſuch agreements, though they had never been made; and therefore the mere parol proof of ſuch agreements concerning lands cannot be admitted in a court of equity: but where the price is paid, there it doth not ſtand upon the parol proof of the agreement only, but upon the execution of part of the agreement which is evidence that the agreement was really made; and therefore there is the ſame reaſon that the plaintiff in equity ſhould have the land for his (*a*) money, as it is that he ſhould deliver the goods where he hath received the money; but the doubt in these caſes is, what ſhall be a proof of the receipt of the money. Thus far it ſeems certain, that if the defendant in his anſwer confeſs the receipt of the money for that purpoſe in the bill, or if he deny the receipt, and it be proved upon him by writing, or by letter under his hand, or other written evidence, he ſhall be obliged

Leek v. Morrice, 2 Ch. Ca. 135. Alſop v. Patten, 1 Vern. 472. Gilb. H. C. 239.

Barnett v. Gomeſerra, Bunb. 94. Binſted v. Coleman, Bunb. 65.

[(*a*) In Lacon v. Mertins, 3 Atk. 4. Lord Hardwicke ſaid, that payment had always been holden a

obliged ſpecifically to perform the whole agreement, becauſe he hath carried part into execution: but if the defendant confeſs the receipt of the money, but ſay that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff muſt prove the receipt of the money by the defendant, for the purpoſe in the bill, by ſome (*a*) written agreement.

part performance. But it ſeems that it is not ſo in the caſe of lands. Seagoode v. Meale, Pr.Ch. 560. Lord Pengall v. Roſs, 2 Eq. Ca. Abr. 46. pl. 12. Simmons v. Cornelius, 1 Ch. Rep. 128. But ſee Voll v. Smith, 3 Ch. Rep. 16. Anon. 2 Freem. 128. Acts done in part performance, muſt be ſuch as could be done with no other view or deſign than to perform the agreement, and not ſuch as are merely introductory or ancillary to it: they muſt be ſuch, too, as would be a prejudice to the party who has done them, if the agreement ſhould afterwards be vacated; and where no fraud is alleged, it ſeems, that the terms of the agreement muſt be certainly proved. Gunter v. Halſey, Ambl. 586. Whitbread v. Brockhurſt, 1 Br. Ch. Rep. 412. The giving of poſſeſſion is to be conſidered as an act of part performance. Butcher v. Stepeley, 1 Vern. 363. Pyke v. Williams, 2 Vern. 455. Lockey v. Lockey, Pr. Ch. 519. Lacon v. Mertins, 3 Atk. 4. Floyd v. Buckland, 2 Freem. 268. Stewart v. Denton, Fonbl. Notes on Eq. Tr. 38. but poſſeſſion wrongfully obtained, or from perſons not competent to give it, of however long continuance, will not avail. Hole v. White, cited in 1 Br. Ch. Rep 409. Ireland v. Rittle, 1 Atk. 541. The giving directions for conveyances, and going to view the eſtate, are not conſidered as acts of part performance. Clerk v. Wright, 1 Atk. 12. Whaley v. Bagenal, 6 Br. P. C. 45. Hole v. White, ſupra. Nor will deſiſting from a purchaſe of lands in favour of another, upon certain terms, take an agreement in favour of the party deſiſting, as to part of the lands, out of the ſtatute. Lames v. Bayley, 2 Vern. 627. and ſee Vin. Abr. tit. *Contract*, &c. H. pl. 32. 2 Eq. Ca. Abr. 45. 10. which ſeem to be the ſame caſe.]

(*a*) For a parol evidence, as to the receipt of the money, ſeems to be as much excluded by the ſtatute, as parol evidence relating to the agreement; *tamen Quære*, Whether parol evidence may not properly be applied to the act of *receiving*; though not to the act of *contracting*. See 1 Pow. on *Contracts*, 306, 7, 8.

If a man, on a promiſe of a leaſe to be made to him, lays out money on improvements, he ſhall oblige the leſſor afterwards to execute the leaſe, being executed on the part of the leſſee, and the leſſor ſhall not be allowed to take advantage of his own fraud, and run away with the improvements made by another; but if no ſuch expence had been on the leſſee's part, a bare promiſe of a leaſe, though accompanied with poſſeſſion, would be within the ſtatute of *frauds*.

Pr.Ch. 561. So leſſee obliged where poſſeſſed ſix years. 2 Stra. 783. Earl of Aylesford's caſe.

One that could read made an agreement for a leaſe of twenty-one years; the leſſor himſelf drew the leaſe but for one year, and yet read it for twenty-one years, and after the expiration of the year ejected the leſſee; on a bill brought to be relieved upon this matter, which was proved, the Court held it to be within the ſtatute of *frauds* and *perjuries*, and diſmiſſed the bill with coſts, it being the plaintiff's own folly, being able to read; *ſecùs*, if he had been unlettered.

Skin. 159. pl. 6. Anon. [That a defect in a written agreement cannot be ſupplied, ſee Binſted v. Coleman, Bunb. 65.

But on the ground of fraud or miſtake it may. Joynes v. Statham, 3 Atk. 388.]

If a man purchaſes lands in another's name, and pays the money, it will be a truſt for him that paid the money, though there be no deed executed declaring the truſt thereof; for the ſtatute of *frauds* and *perjuries* extends not to truſts raiſed by operation of law.

2 Vent. 361. Vern. 366. S. P. where it is ſaid that the proof muſt be very clear, that he paid the purchaſe money; but for this *vide* head of *Evidence*.

[Although parol agreements are bound by the ſtatute, and agreements are not to be part parol, and part in writing; yet a depoſit

Hales v. Vanderchem,

2 Vern. 617. Ruſſell v. Ruſſell, 1 Br. Ch. Rep. 269.

depoſit or collateral ſecurity for the performance of a written agreement, is not within the purview of the ſtatute.]

Alſo the following points have been reſolved in the common law courts, on the ſeveral branches of the abovementioned ſtatute.

2 Jones, 108. Gilmore and Shutter. 1 Freem. 466. S. C. Vent. 330. 2 Mod. 310. 2 Lev. 227. 2 Show. Rep. 16. S. C.

1. That the clauſe which enacts, that no action ſhall be brought, &c. to charge an executor, &c. extends not to promiſes made before, though to be performed after the making of the ſtatute; for it would be againſt natural juſtice, that a promiſe made upon good conſideration ſhould be deſtroyed by the retroſpect of a law which none could divine would be made.

Raym. 450, 451. 2 Jones, 158. S. C. 2 Salk. 519.

2. That the plaintiff in his declaration need not ſhew any note in writing, but it will be ſufficient for him to produce it on the trial; but if ſuch promiſe is pleaded in bar of another action, it muſt be ſhewn to be in writing, ſo that it may appear to the Court to be ſuch a promiſe upon which an action will lie.

3 Lev. 65. *vide* Skin. 196. which ſeems *cont.*

3. That the clauſe relating to marriage extends as well to a promiſe to marry, as to the payment of marriage-portions.

and Ld. Raym. 387. 2 Eq. Abr. 248, and Str. 34. are expreſs, that the ſtatute does not extend to mutual promiſes to marry, but only to promiſes made in conſideration of marriage. Bull. *Niſi Pri.* 280. 4th edit.

Salk. 280. Agreed by all the Judges, on a caſe put by Treby, Ch. Juſt. Skin. 326. pl. 4. 353. pl. 1. S. P. [Nor does it extend to a promiſe to marry at

4. That the clauſe which ſays, *that no action ſhall be brought upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs it be in writing*, extends not to a parol promiſe made to pay ſo much money upon the return of ſuch a ſhip, which ſhip happens not to return within two years after the promiſe made; for the ſhip by poſſibility might have returned within the year; and the clauſe extends only to ſuch promiſes where, by the expreſs appointment of the party, the thing itſelf is not to be performed within a year.

the plaintiff's father's death, or to leave an annuity by will, for ſuch promiſes may be perfected within the year. Cook v. Parker, Str. 34. Fenton v. Emblers, 3 Burr. 1278. 1 Bl. Rep. 353.]

Salk. 27. pl. 15. 28. pl. 17. 6 Mod. 248, 249. Ld. Raym. 224. 2 Ld. Raym. 1085. 1087. See 12 Mod. 250.

5. On the clauſe, *that no action ſhall be brought on a ſpecial promiſe to anſwer for the debt, default*, &c. *of another*, it has been reſolved that if *A.* is about hiring a horſe from *B.* and *C.* to encourage him to lend the horſe, promiſes that *A.* ſhould deliver him ſafe; this is a collateral promiſe, and an undertaking within the ſtatute; for *C.* ſubjects himſelf to an action, on the breach of the original contract by *A.* againſt whom *detinue* lies on the bailment. So if two come to a ſhop, and one of them contracts for goods, and the ſeller does not care for truſting him, whereupon the other ſays, let him have them, and I will undertake he ſhall pay you; but if the promiſe be, I will ſee you paid; or I will be your pay-maſter, it is otherwiſe. So if *A.* comes to *B.* and tells him, let your horſe to *J. S.* and I will ſee you paid the hire; there the hiring is to *A.* and not to *J. S.* who is conſidered as

ſervant

ſervant to *A.* So in all caſes where the whole credit is given to the undertaker, he alone is liable to an action.

[A doubt was formerly entertained, whether, if the undertaking of a third perſon were before the delivery, it were within the ſtatute. But the general line now taken, is, that if the perſon for whoſe uſe the goods are furniſhed is liable at all, any promiſe by a third perſon to pay that debt, muſt, in all caſes, be in writing. 2 Term Rep. 80. Cowp. 227. 1H.Bl. 120.

If *A.* in conſideration that *B.* will ſtay proceedings in an action he had commenced againſt *C.* to recover a ſum of money due from *C.* to him, promiſe to pay that money, ſuch promiſe muſt be in writing, for it is to pay a debt of another perſon ſtill ſubſiſting: but where in conſideration that the plaintiff in an action of aſſault and battery againſt *J. S.* would withdraw his record, and forbear to proceed, the defendant promiſed to pay him 30*l.* the Court held the ptomiſe not to be within the ſtatute, for the conſideration was new, here was no ſubſiſting debt; it could not be known before the trial whether the plaintiff would recover any damages or not. Fiſh v. Hutchinſon, 2 Wilſ. 94. Reed v. Naſh, 1 Wilſ. 305.

J. S. becoming inſolvent, made a bill of ſale to the defendant of all his goods in his dwelling-houſe in truſt to be ſold for the benefit of his creditors. After the defendant had taken poſſeſſion, the landlord came to diſtrain for rent, and to prevent the diſtreſs, and that the ſale might go on, the defendant promiſed to pay it. This promiſe is not within the ſtatute. Williams v. Leaper, 3Burr.1886. 2 Wilſ. 308.

6. That as to the clauſe reſpecting ſales, it has been formerly thought, that it means only preſent and immediate ſales, and does not include executory contracts, where goods are beſpoken, and time is given by ſpecial agreement for the delivery of them, and payment of their value. But this conſtruction (*a*) has been denied in a recent determination of the court of Common Pleas, *Wilſon*, J. diſſent., where an executory contract, merely a contract of ſale, even though confeſſed by the defendant in his anſwer in Chancery, was determined to be within this proviſion. To this opinion, it may be added, Lord *Thurlow* intimated an inclination, when the caſe was before him in Chancery. Alexander v. Comber, 1 H. Bl. Rep. 20. Towers v. Oſborne, 1 Str. 506. Clayton v. Andrews, 4 Burr. 2101. (*a*) Rondeau v. Wyatt, 2 H. Bl. Rep. 63. 3 Br. Ch. Rep. 154. S. C.

An auctioneer is an agent as well for the buyer as the ſeller; and an entry of the contract in his books is ſufficient to ſatisfy this proviſion of the act. Simon v. Metivier, 3 Burr. 1921. 1 Bl. Rep. 599. S. C. Bull. *Niſi Pri.* 280. 4th ed.

A contract for the ſale of timber growing upon land is not within the ſtatute, but may be by parol, becauſe it is a bare chattel. *Per Treby*, C. J. 1 Ld.Raym. 182.

Wherever a man is under a moral obligation to do a thing, and another does it without requeſt, a ſubſequent promiſe to pay is good, though not in writing; as where an overſeer promiſes by parol to pay an apothecary, who, without his knowledge, has adminiſtered medicines to a pauper. Watſon v. Turner, Scac. Tr. 7. G. 3. Bull. *Ni. Pri.* 281. 4th ed.

A. promiſed if the widow of an inteſtate would permit him to be joined with her in the letters of adminiſtration, that he would make Tomlinſon v. Gill, Ambl. 330.

make good any deficiency of aſſets to pay debts. Lord *Hardwicke* held this promiſe not within the act; not within the firſt branch of the ſection, for *A.* was not adminiſtrator at the time of making it; not within the ſecond, for here is a new diſtinct conſideration.

In addition to the ſolemnities required by the ſtatute of *frauds* in order to give validity to agreements, the legiſlature, by the ſtatute of 23 *Geo.* 3. *c.* 58. have impoſed a ſtamp duty of ſix ſhillings "upon every ſkin or piece of vellum or parchment, or ſheet "or piece of paper upon which any agreement ſhall be engroſſed, "written, or printed, whether the ſame ſhall be only evidence of "the contract, or obligatory upon the parties from its being a "written inſtrument.

Sect. 3. "Provided that nothing in the act ſhall extend to charge or "make liable any label, ſlip, or memorandum, containing the "heads of inſurances to be made by the Corporation of the "Royal Exchange Aſſurance, or London Aſſurance, or the Cor-"porations of the Royal Exchange Aſſurance of houſes and "goods from fire, and London Aſſurance of houſes and goods "from fire, or any of them, to the payment of the ſtamp duties "charged by this act upon contracts or agreements.

Sect. 4. "Provided alſo, that nothing therein ſhall extend to charge "with the above duty, any memorandum or agreement for any "leaſe at rack-rent, of any meſſuage under the yearly value of "five pounds; or to charge any memorandum or agreement for "the hire of any labourer, artificer, manufacturer, or menial "ſervant: or to charge any memorandum, letter, or agreement "made for or relating to the ſale of any goods, wares, or mer-"chandizes; or to charge any memorandum or agreement where "the matter of ſuch memorandum or agreement ſhall not ex-"ceed the ſum of twenty pounds; or to charge any memoran-"dum or agreement in that part of *Great Britain* called *Scotland*, "that ſhall be ſtamped with the duty required on deeds in that "part of *Great Britain* called *Scotland*.

Sect. 5. By ſtat. 32 Geo. 3. c. 51. agreements reſpecting merchandize, notes, or bills of exchange contained in letters paſſing by the poſt, between merchants reſiding 50 miles from each other, are exempted from the above duties.

"Provided alſo, that no memorandum or agreement not "ſtamped ſhall be deemed to be void in caſe the ſame ſhall be "ſtamped at the head office, or the ſaid duty ſhall be paid "thereon, and a receipt given thereon for the ſame by the pro-"per officer receiving ſuch duty, within twenty-one days after "the ſame ſhall have been entered into."

Ford v. Compton, 2 Br. Ch. Rep. 32. The implication from the laſt proviſo ſeems to be that the inſtrument cannot be ſtamped after the twenty-one days have elapſed: but the practice is otherwiſe, and upon payment of the penalty, it may be ſtampt at any time.

Hearne v. James, 2 Br. Ch. Rep. 309. Upon a bill for a ſpecifick performance of a contract for the leaſe of a houſe, an unſtampt paper being offered in evidence as containing the terms of the agreement, the Maſter of the Rolls, upon the above act, rejected it, obſerving that where the terms are

are reduced into writing the inſtrument muſt be ſtampt, though parol evidence might otherwiſe have been given of them.

A broker, when he bought goods for his principal, agreed for one half per cent. to indemnify him from any loſs on the re-ſale: it was holden, that this agreement, though in writing, need not be ſtampt, it being a contract *relating to the ſale of goods*, and ſo within one of the parts of the proviſo in the fourth ſection.] Curry v. Edenſon, 3 Ter. Rep. 524.

Aliens.

(A) Who are Aliens, and this either by the Common Law, or by Statute.

(B) Of Naturalization and Denization, the Difference and Effect of them.

(C) Of the Diſadvantage which Aliens lie under by our Law.

(C 2.) How far the Laws of this Country attach upon Aliens.]

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend and one whoſe King is at Enmity with us.

(E) Of pleading Alienage.

(A) Who are Aliens, and this either by the Common Law, or by Statute.

ALL thoſe are natural-born ſubjects whoſe parents, at the time of their birth, were under the actual obedience of our king, and whoſe place of birth was within his dominions. 7 Co. 18. a. In Calvin's caſe, thoſe who were born in *Nor-*

dy, Gaſcoigne, &c. while under actual obedience to the kings of *England*, were ſubjects born. o. 20 b. Vaugh. 270. S. P. And this by the ſtatute 42 *Ed.* 3. *c.* 10. is declared to have been common law; but ſee Br. Denizen, 14. but thoſe born there now are aliens, thoſe places not being in actual poſſeſſion of our king. 7 Co. 18. a.

If

7 Co. 18. a. If one of the king's ambaſſadors in a foreign country hath iſſue there by his wife, being an *Engliſh* woman, by the common law they are natural-born ſubjects.

Dyer. 224. Vaugh. 281, 282. If the king of *England* make a new conqueſt, the perſons there born are his ſubjects; but if it be taken from him again, the perſons there born afterwards are aliens.

Vaugh. 279. 301. 7 Co. 1. to 28. Molloy Bk. 3. c. 2. ſ. 9. One born in *Ireland*, (*a*) *Scotland*, or *Wales*, or any of the king's plantations, is a natural ſubject of *England*, becauſe he is born within the ligeance of the king.

(*a*) The *Antenati*, or thoſe born in *Scotland* before the deſcent of the *Engliſh* crown to King *James* I. are aliens; for the uniting the kingdoms by a ſubſequent deſcent cannot make them ſubjects of that crown to which they were born aliens; but the *poſtnati*, or ſuch as were born after, are not aliens: for being born within the allegiance, and under the protection of the King of *England*, they are his natural ſubjects, and not aliens. 7 Co. 1. to 28. *Calvin*'s caſe adjudged, with the reaſons at large.

7 Co. 18. a. If aliens come as enemies into the realm, and poſſeſs themſelves of a town or fort, and one of them has iſſue born here, this iſſue is an alien; for it is not *cælum* or *ſolum* that makes a ſubject, but the being born within the allegiance, and under the protection of the king.

Vaugh. 281. If the king of *England* enter with his army in a hoſtile manner the territories of another prince, and any be born within the places poſſeſſed by the king's army, and conſequently within his protection, ſuch perſon is a ſubject born to the king of *England*, if from parents ſubjects, and not hoſtile.

Molloy Bk. 3. c. 2. ſ. 9. Thoſe born on the *Engliſh* ſeas are not aliens.

25 Ed. 3. ſt. 2. "By a ſtatute 25 *Ed.* 3. *de natis ultra mare*, it is declared, that "the king's children, wherever born, ought to inherit; and that "all children inheritors, which from henceforth ſhall be born "without the ligeance of the king, whoſe fathers and mothers "at the time of their birth be and ſhall be of the faith and allegi- "ance of the king of *England*, ſhall have and enjoy the ſame "benefits and advantages to have and bear the inheritance within "the ſame ligeance as other inheritors aforeſaid, in time to "come, ſo always that the mothers of ſuch children do paſs the "ſea by the licence and wills of their huſbands."

Cro. Car. 601, 602. Bacon v. Bacon, adjudged. Lit. Rep. 22. 24. S. C. Sid. 198. S. C. cited. Vent. 427. S. C. cited; but it was holden, that if baron and feme *Engliſh* go beyond ſea without licence, or ſtay there beyond the time limited by the licence, and have iſſue, ſuch iſſue is an alien, and not inheritable. Cro. Eliz. 3. Hyde v. Hill; *tamen quære & vide* Lit. Rep. 27. and Bro. tit. *Denizen*, 6. and ſee *infra*. If an *Engliſh* merchant goes beyond ſea, and takes an alien wife, the iſſue ſhall inherit him; ſo it is if an *Engliſh* woman goes beyond ſea and takes an alien huſband, the children then born ſhall inherit her; for though the ſtatute be in the conjunctive (*b*), yet it hath been conſtrued in the disjunctive to hinder this diſability; and the word *and* taken inſtead of *or*, as ſometimes it is, it being not reaſonable that the child ſhould not inherit the parent that is of ability, for the defect of the other that is not.

[(*b*) But Q. Whether the caſes referred to warrant this conſtruction; and ſee the caſe of Doe ex d. Count Duroure v. Jones, where it was determined, that the ſon of an alien, father of an *Engliſh* mother born out of the king's dominions, cannot inherit an eſtate in right of his mother. The judgment of the Court went upon the ſtatutes of 4 *Geo.* 2. *c.* 21. and 13 *G.* 3. *c.* 21. which confine the privi-

privilege to the paternal heirs, and were conceived to be parliamentary expositions of the 25 E. 3. 4 Ter. Rep. 300.]

Husband and wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*, where the wife was delivered of a son; the issue adjudged a denizen, because his parents were born in *Calais*, then reckoned part of the king's dominions, and because he himself was begotten there, though to avoid the rage of enemies born in another prince's territories. Dyer, 224. in Margine.

" By the 7 *Ann. cap.* 5. *sect.* 3. it is enacted, That the chil- 7 An. c. 5.
" dren of all natural-born subjects, born out of the ligeance of
" her Majesty, her heirs and successors, shall be deemed, judged
" and taken to be natural-born subjects of this kingdom, to all
" intents, constructions, and purposes whatsoever.

" By the 4 *Geo.* 2. *c.* 21. the above clause is confirmed (*a*) 4 Geo. 2.
" with the following proviso, That it shall not extend to any c. 21.
" children, so as to make them natural-born subjects of *Great*
" *Britain*, whose fathers, at the time of the birth of such chil-
" dren respectively, were or shall be attainted of high treason, by
" judgment, outlawry or otherwise, either in this kingdom or in
" *Ireland*, or whose fathers at the time of the birth of such chil-
" dren respectively, by any law or laws made in this kingdom, or
" in *Ireland*, were or shall be liable to the penalties of high trea-
" son or felony, in case of their returning into this kingdom
" or into *Ireland*, without the licence of his majesty, his heirs
" or successors, or any of his majesty's royal predecessors, or
" whose fathers, at the time of the birth of such children re-
" spectively, were or shall be in the actual service of any foreign
" prince or state, then in enmity with the crown of *England*;
" but that all such children are, were, and shall be and remain
" in the same state, plight, and condition, to all intents, con-
" structions, and purposes whatsoever, as they would have been
" in if the said act of the seventh year of her said late majesty's
" reign, or this present act, had never been made; but out of
" this proviso are excepted (other than the children of such per-
" sons who went out of *Ireland* in pursuance of the articles
" of *Limerick*) the child of every such person before described,
" who at any time between the sixteenth day of *November* 1708,
" and the twenty-fifth day of *March* 1731, hath come into
" *Great Britain* or *Ireland*, &c. and hath continued to reside in
" any of those places for the space of two years, and during
" such residence hath professed the protestant religion; also every
" child whose father came into *Great Britain* or *Ireland*, &c. and
" professed the protestant religion, and died there between the
" times aforesaid; also every child whose father continued in
" the actual possession or receipt of the rents and profits of any
" lands, &c. for the space of one whole year, at any time be-
" tween the aforesaid times, or hath *bonâ fide*, and for valuable
" consideration, sold, conveyed or settled any lands, &c. in
" *Great Britain* or *Ireland*; and any person claiming title there-
" to under such sale, &c. who hath been or continued in the
" actual

[(*a*) The confirmatory clause here alluded to, differs from the statute of Ann. in this respect, that it restricts the privilege to the paternal line. The words are, " That all children born out of the ligeance, &c. whose *fathers* shall be natural-born subjects, &c."]

" actual poſſeſſion or receipt of the rents and profits thereof,
" for the ſpace of ſix months, between the times aforeſaid,
" then, *&c.*

[" By the 13 *Geo.* 3. *c.* 21. the proviſions of the above acts are
" extended to grand-children, ſtill however adhering to the pater-
" nal line, with proviſos that nothing in that act ſhall be conſtrued
" to affect any of the limitations or reſtrictions of the act of
" 4 *Geo.* 2. *c.* 21. or to repeal or alter the act of 5 *Geo.* 1. *c.* 27.
" hereafter mentioned; or to repeal or alter any law or cuſtom
" concerning aliens' duties, cuſtoms, and impoſitions, or to cauſe
" any privilege, exemption, or abatement relating thereto, in
" favour of any perſon naturalized by virtue of that act, unleſs
" ſuch perſon ſhall come into this realm, and there inhabit and
" reſide, and ſhall take and ſubſcribe the oaths, and make, re-
" peat, and ſubſcribe the declaration appointed by the act of
" 1 *Geo.* 1. *c.* 13. entitled, an act for the further ſecurity, *&c.* at
" the places and times, and in the manner directed by that act,
" and alſo receive the ſacrament of the Lord's ſupper according
" to the uſage of the church of *England*, or in ſome proteſtant
" or reformed congregation within the kingdom of *Great Britain*,
" within three months before his taking the oaths in the ſaid
" act mentioned, and ſhall, at the time and place of taking ſuch
" oaths, and of making, repeating, and ſubſcribing the ſaid de-
" claration, produce a certificate ſigned by the perſon adminiſter-
" ing the ſaid ſacrament, and ſigned by two credible witneſſes,
" whereof an entry ſhall be made of record in the court and
" courts reſpectively wherein ſuch oaths ſhall have been made
" and ſubſcribed, without any fee or reward. And it is further
" provided, that no perſon ſhall be by this act enabled to defeat
" any eſtate, right or intereſt, which on the laſt day of that ſeſ-
" ſion ſhould be had or veſted in any other perſon, or to claim or
" demand any eſtate or intereſt which ſhall hereafter accrue, ſo
" as ſuch claim or demand ſhall be made within five years after
" the ſame ſhall accrue."

By ſtat. 14 and 15 *H.* 8. *c.* 4. it is enacted, That if an *Engliſh* ſubject go beyond the ſeas, and there become a ſworn ſubject to any foreign prince or ſtate, he ſhall, during his reſidence abroad, pay ſuch impoſitions as aliens do: with a proviſo, that if he returns, and lives here, he ſhall be reſtored to his liberties and privileges.]

5 Geo. 1. c. 27. " By the 5 *Geo.* 1. *cap.* 27. it is enacted, that if any manu-
" facturer or artificer of or in wool, iron, ſteel, braſs, or any
" other metal, clock-maker, watch-maker, or any other artificer
" or manufacturer of *Great Britain*, ſhall at any time after the
" firſt day of *May* 1719, go into any country out of his ma-
" jeſty's dominions, there to uſe or exerciſe, or teach any of the
" ſaid trades or manufactories to foreigners; or in caſe any of
" his majeſty's ſubjects now being, or who hereafter ſhall be in
" any ſuch foreign country out of his majeſty's dominions as
" aforeſaid, and there uſing or exerciſing any of the ſaid trades
" or manufactories herein before-mentioned, ſhall not return
" into

" into this realm within ſix months next after warning ſhall be " given to him by the ambaſſador, envoy, reſident, miniſter, or " conſul of the crown of *Great Britain*, in the country in which " ſuch artificer ſhall be, or by any perſon authorized by ſuch " ambaſſador, *&c.* or by one of his majeſty's ſecretaries of ſtate " for the time being, and from thenceforth continually inhabit " and dwell within this realm; then and in ſuch caſe every " ſuch perſon ſhall be deemed an alien."

[It ſhould here be obſerved, that the duty of allegiance ariſing from birth is perpetual and unalienable, and that it is not in the power of any private ſubject to ſhake off his allegiance, and transfer it to a foreign prince; nor is it in the power of any foreign prince by naturalizing or employing a ſubject of *Great Britain*, to diſſolve the bond of allegiance between that ſubject and the crown. But when, by treaty, eſpecially if ratified by act of parliament, our ſovereign cedes any iſland or region to another ſtate, the inhabitants of ſuch ceded territory, though born under the allegiance of our king, or being under his protection whilſt it appertained to his crown and authority, become effectually, aliens, or liable to the diſabilities of alienage, in reſpect of their future concerns with this country. And ſimilar to this ſeems the condition of the revolted Americans, ſince the recognition of their independent commonwealths.]

Foſt. Cr. L. 59. Dy. 298. b. 300. b.

1 Wooddeſ. 382.

(B) Of Naturalization and Denization, the Difference and Effect of them.

ALIEN born may become a ſubject of *England* two ways, by denization and by naturalization: denization is by the king's letters patent; it receives him into the ſociety as a new man, and makes him capable to purchaſe and to (*a*) tranſmit lands by deſcent, but not inheritable to any other relation; for though the king by his charter may admit him into the ſociety, yet he cannot alter the law, which denied him to inherit any relations: but if he be naturalized by act of parliament, then he in all things inherits like a natural-born ſubject, becauſe in an act of parliament every man's conſent is included.

1 Inſt. 8. a. 129. a. Palm. 13. Godfrey and Dixon. Cro. Jac. 539.

(*a*) His children born after ſuch denization ſhall inherit, but not thoſe born before, but all the children of one naturalized ſhall inherit, as well thoſe born before as after. Co. Lit. 8. Style's Rep. 139.

A man may be made a denizen in tail, for life, years, or upon condition: ſo the king may make a particular denization, as if he grants to an alien *quod in quibuſdam curiis ſuis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem quod eſt alienigena.*

2 Jones 12. Cro. Jac 539. Co. Lit. 129. a.

But one cannot be naturalized, either with limitation for years, life, or in tail, or upon condition, for it is againſt the abſoluteneſs, purity, and indelibility of natural allegiance.

Co. Lit. 129. a. 2 Roll. Rep. 95.

If a man is naturalized in *Ireland* by the parliament there, this is no naturalization as to *England*, for the parliament of *Ireland*

Carter, 185. 2 Keb. 601. 2 Jones, 12.

2 Vent. 2. But a naturalization in *England* makes a

hath no direct or conſequential power of binding *England*; and naturalization is but a fiction, which can only bind thoſe that conſent to it.

man a natural-born ſubject of *Ireland*. Vaugh. 291. He is here made a natural ſubject of the *Britiſh* dominions. [But Q. ſince the ſtatute of 23 Geo. 3. c. 28.]

Roll. Abr. 195. Manning's caſe. Lane, 58. S. C.

If an alien be made a denizen, and the letters of denization have a *proviſo* (uſual in ſuch charters (*a*)) that the denizen ſhall do his liege homage, and that he ſhall be obedient, and obſerve the laws of this realm; this *proviſo* is not any condition, for though he never doth his liege homage, nor is obedient to all the laws of this realm, yet this will not make the denization void; for if he doth not obſerve the laws, he ſhall forfeit the penalties appointed by them.

[(*a*) This proviſo is required by St. 32 H. 8. c. 16. ſ. 7.]

7 J. 1. c. 2.

" By the 7 *Jac.* 1. *cap.* 2. it is enacted, That no perſon or " perſons of what quality, condition, or place ſoever, being of " the age of eighteen years or above, ſhall be naturalized or re- " ſtored in blood, unleſs the ſaid perſon or perſons have received " the ſacrament of the Lord's ſupper within one month before " any bill exhibited for the purpoſe; and alſo ſhall take the oath " of ſupremacy and the oath of allegiance in the parliament " houſe, before his or her bill be twice read; which oath the " lord chancellor, or lord keeper, and the ſpeaker of the houſe of " commons, have authority to adminiſter."

Molloy, Bk. 3. c. 3. ſ. 14.

A denizen is not capable of nobility, or to ſit in parliament; for that to have a power of making laws, it is neceſſary he ſhould be totally received into the ſociety, which he cannot be without the conſent of parliament.

[Co. Litt. 278. b.]

[If an alien be a diſſeiſor, and obtain letters of denization, and then the deſſeiſee releaſe unto him, the king ſhall not have the land; for the releaſe hath altered the eſtate, and it is, as it were, a new purchaſe: otherwiſe it is, if the alien had been feoffee of the diſſeiſee.]

" By the 12 & 13 *W.* 3. *cap.* 2. it is enacted, That no perſon " born out of theſe kingdoms, (although he be naturalized or " made a denizen,) except ſuch as are born of *Engliſh* parents, " ſhall be capable to be of the privy council, or a member of " either houſe of parliament, or to enjoy any office or place of " truſt, either civil or military; or to have any grant of lands, " tenements, or hereditaments from the crown to himſelf, or " to any other or others in truſt for him.

" But this ſtatute by the 1 *Geo.* 1. *ſtat.* 2. *cap.* 4. is explained " ſo as not to extend to diſable or incapacitate any perſon, who " at or before his majeſty's acceſſion to the crown was naturalized, to be of the privy council, or a member of either houſe " of parliament, &c.; and by this ſtatute it is enacted, That no " perſon ſhall hereafter be naturalized, unleſs in the bill exhi- " bited for that purpoſe there be a clauſe, or particular words " inſerted, to declare that ſuch perſon ſhall not thereby be en- " abled to be of the privy council, or a member of either houſe " of parliament; or to take any office or place of *truſt* (*b*) either " civil

[(*b*) A naturalized

" civil or military, or to have any grant of lands, tenements, " or hereditaments from the crown, to himſelf, or any other " in truſt for him; and that no bill of naturalization ſhall here- " after be received in either houſe of parliament, unleſs ſuch " clauſe or words be firſt inſerted or contained therein (*a*)."

perſon is not eligible to the office of conſtable. 5 Burr. 2788.

(*a*) When any foreigner, diſtinguiſhed by eminent rank or ſervices, is naturalized, it is uſual firſt to paſs an act for the repeal of theſe ſtatutes in his favour, and then to paſs an act of naturalization without any exception. 4 Ann. c. 1. 7 Geo. 2. c. 3.]

[And by 14 *Geo.* 3. *c.* 84, it is enacted, " That no naturaliza- " tion bill ſhall in future be received, unleſs there ſhall be a " clauſe in it, declaring, that the perſon to be naturalized ſhall " not thereby obtain, or become entitled to claim within any " foreign country, any of the immunities or indulgences in trade, " which are or may be enjoyed or claimed therein by natural- " born *Britiſh* ſubjects, by virtue of any treaty or otherwiſe, " unleſs ſuch perſon ſhall have inhabited or reſided within *Great* " *Britain*, or the dominions thereto belonging, for the ſpace of " ſeven years ſubſequent to the firſt day of the ſeſſion of parlia- " ment in which the ſaid bill of naturalization ſhall have paſſed; " and ſhall not have been abſent out of the ſame for a longer " ſpace than two months at any one time during the ſaid ſeven " years (*b*)."

[(*b*) It was uſual to inſert a clauſe to this effect in naturalization bills before the paſſing of this act. The practice had obtained ever ſince the year 1752, in conſequence of a petition to parliament at that time from the City of London, complaining of the great abuſe of the privileges of naturalization in this reſpect. Debrett's Deb. 3 vol. 124.]

By ſtatute 13 *Geo.* 2. *c.* 3. every foreign ſeaman, who in time of war ſerves two years on board an *Engliſh* ſhip by virtue of the king's proclamation, is *ipſo facto* naturalized under the like reſtrictions as in 12 *W.* 3. *c.* 2.; and by ſtatute 13 *Geo.* 2. *c.* 7. 20 *Geo.* 2. *c.* 44. 22 *Geo.* 2. *c.* 45. 2 *Geo.* 3. *c.* 25. and 13 *Geo.* 3. *c.* 25. all foreign Proteſtants, and Jews, upon their reſiding ſeven years in any of the *American* colonies, without being abſent above two months at a time, and all foreign Proteſtants ſerving two years in a military capacity there, or being three years employed in the whale-fiſhery, without afterwards abſenting themſelves from the king's dominions for more than one year, and none of them falling within the incapacities declared by ſtatute 4 *Geo.* 2. *c.* 21. ſhall be upon taking the oaths of allegiance and ſupremacy, or, in ſome caſes, making an affirmation to the ſame effect) naturalized to all intents and purpoſes, as if they had been born in this kingdom; except as to ſitting in parliament or being of the privy council, and holding offices or grants of land, &c. from the crown within the kingdoms of *Great Britain* and *Ireland*. By ſtatute 26 *Geo.* 3. c. 30. *ſ.* 24. 27, 28. and 28 *Geo.* 3. *c.* 20. *ſ.* 15. every foreigner who has eſtabliſhed himſelf and family in *Great Britain*, and carried on the ſouthern whale-fiſhery, and imported the produce thereof for the ſpace of five years ſucceſſively, is declared to be entitled to all the privileges of a natural-born ſubject.]

(C) Of the Diſadvantages which Aliens lie under.

Vaugh. 227. 291. 7 Co. 16. Dyer, 2. pl. 8.

AN alien cannot purchaſe (*d*) or inherit any lands [in this country, becauſe an intereſt in the ſoil requireth a permanent allegiance, which would probably be inconſiſtent with that which he oweth to his own natural liege lord.]

[Some have thought that the laws againſt aliens were introduced in the time of Hen. 2. when a law was made at the parliament of Wallingford for the expulſion of ſtrangers, in order to draw away the *Flemings* and *Picards* who were brought into the kingdom by the wars of King Stephen. Daniel, 67. Others have thought that the original of this law was far more ancient; and that it is an original branch of the feudal law; for, by that law, no man can purchaſe any lands without being obliged to fealty to the lords of whom they are holden; ſo that an alien, who owed a previous faith to another prince, could not take an oath of fidelity in another ſovereign's dominions. Spelm. tit. *Ligeantia*, 368. Cuſtumer, c. 43. Some reſtraints have been laid upon aliens by the laws of almoſt all countries. Among the *Romans*, the *cives Romani* only were at firſt eſteemed freemen; afterwards, when their territories increaſed, all the *Italians* were made free, under the name of *Latins*, only they had not the privilege of wearing gold rings, which was altered by Juſtinian; at laſt, all born within the pale of the empire were citizens, *in orbe Romano qui ſunt, ex conſtitutione Imperatoris Antonini cives Romani effecti ſunt.* Vicinius, 27. Dig. Lib. 1. tit. 5. fo. 16. Dio Caſſius relates the occaſion of this conſtitution being made, in Excerpt. Valeſ. p. 751. The *Orbis Romanus* of Spanheim is a complete hiſtory of the progreſſive admiſſion of *Latium*, *Italy*, and the provinces, to the freedom of *Rome*. Lord C. J. Hale ſaith, that the law of *England* rather contracts than extends the diſability of aliens, becauſe the ſhutting out of aliens tends to the loſs of people, who, when laboriouſly employed, are the true riches of any country. Ventr. 427. 2 Roll. Rep. 94. (*d*) He may purchaſe, but cannot hold. Co. Lit. 2. b. Therefore, if tenant in tail, he may ſuffer a recovery, and dock the remainders. Goldſm. 102. 4 Leon, 82. Br. tit. *Denizen* and *Alien*, 17. On a covenant to ſtand ſeiſed, an uſe will ariſe for an alien. Godb. 275. But by act of law, he cannot take, as by deſcent, courteſy, dower, guardianſhip. Ventr. 417. Molloy, 464. 7 Co. 25. By a ſpecial act of parliament, not printed, Rot. Parl. 8 H. 5. n. 15. women aliens marrying Engliſhmen, with the king's licence, were allowed in future to demand dower. But this act not extending to thoſe married before, therefore, in Rot. Parl. 9 H. 5. n. 9. there is a ſpecial act of parliament to enable Beatrice Counteſs of Arundel, born in *Portugal*, to demand her dower. Hal. MSS. Hargr. Co. Lit. 31. b. n. 9. See acc. Roll. Abr. 675. The diſability of an alien to hold lands for his own benefit is not to be conſidered as a penalty or forfeiture; but ariſeth merely from the policy of the law; and therefore, it hath been adjudged in equity, that he cannot demur to a diſcovery of any circumſtances neceſſary to eſtabliſh the fact of alienage. Attorney General v. Duplefſis, Parker, 144. 5 Br. P. C. 91.]

Sid. 193. 198. Vent. 413 to 429. Collingwood v. Pace. Hard. 224. Co. Lit. 8. *cont.*

And as an alien cannot inherit himſelf, ſo he cannot be inherited; the grandfather born in *England*, the ſon an alien, the grandſon born in *England*, the grandſon ſhall not inherit the grandfather, becauſe he muſt then repreſent the father, who cannot be repreſented; but if the father be an alien, and two brothers born in *England*, they may inherit each other, becauſe the deſcent is immediate, and they do not take by repreſentation of the father.

Vent. 417. 1 Inſt. 8. a. Sid. 195. [The father being a natural-born ſubject, the ſon would be ſo now by force of the ſtatutes of 7 Ann. c. 5. and 4 G. 2. c. 21.]

If the eldeſt ſon be an alien, the younger brother born in *England* ſhall inherit the father; otherwiſe it were if the eldeſt ſon were attainted, becauſe the eldeſt ſon and all his deſcendants are before the younger brother, and the younger brother cannot inherit before that line is extinct; and it is a foreign preſumption, to ſuppoſe that any of that line ſhould come over and have children in *England*; but the perſon attainted is ſuppoſed to have all his children reſiding in the kingdom under the king's allegiance, therefore there is a line continuing before that of the younger brother.

Hard. 224.

For the ſame reaſon, if an alien hath four ſons, the two eldeſt aliens, and the two younger naturalized, and one of the younger ſons purchaſeth lands and dies, the eldeſt brother having iſſue born within the realm, the younger brother, and not the iſſue of the eldeſt, ſhall inherit.

If an alien hath a ſon alien, and afterwards is made a denizen, and hath a ſecond ſon, the ſecond ſon ſhall inherit, though the eldeſt ſon be alive. Cro. Jac. 539. and ſo is 1 Inſt. 8. a. to be underſtood. Palm. 3.

If an alien hath iſſue two ſons, *A.* born beyond ſeas, and *B.* born in *England*, and *A.* is naturalized, he ſhall inherit *B.* Cro. Jac. 539. Godfrey v. Dixon.

And now by the 11 & 12 *W.* 3. *cap.* 6. it is enacted, "That "all and every perſon or perſons, being the king's natural-born "ſubject or ſubjects, within any of the king's realms or domi-"nions, ſhall and may hereafter lawfully inherit and be inherit-"able, as heir or heirs to any honours, manors, lands, tene-"ments, or hereditaments, and make their pedigrees and titles "by deſcent from any of their anceſtors, lineal or collateral, al-"though the father and mother, or fathers or mothers, or other "anceſtor of ſuch perſon or perſons, by, from, through or "under whom he, ſhe or they ſhall or may make or derive their "title or pedigree, were or was, or is or are, or ſhall be born "out of the king's allegiance, and out of his majeſty's realms "and dominions, as freely, fully and effectually to all intents "and purpoſes, as if ſuch father or mother, or fathers or mo-"thers, or other anceſtor or anceſtors, by, from, through or "under whom he, ſhe or they ſhall or may make or derive "their title or pedigree, had been naturalized, or natural-born "ſubjects." [The reaſon why lands deſcending to an alien could not be taken by him, was, that the king could not oblige his perſon and ſervices. But, as it ſeemed hard, that ſubjects within the allegiance, who claimed under him, ſhould be diſabled from conveying deſcent, by the operation of a reaſon of which the very reverſe was true as to themſelves, therefore this ſtatute was made. Law of Forfeit. 84.] See 25 G. 2. c. 39. which obviates ſome doubts that may ariſe therein, and confines the benefit of this ſtatute to ſuch heirs as ſhall be living, and capable of taking the eſtate at the death of the perſon laſt dying ſeiſed. But in caſe the deſcent ſhall be caſt upon a daughter, and there ſhall be afterwards a ſon born, or one or more daughter or daughters, the deſcent ſo caſt upon the daughter ſhall, in the one caſe, be entirely diveſted in favour of the ſon, and the after-born daughter or daughters ſhall, in the other caſe, inherit in coparcenery with her.

If an alien purchaſes land, the king ſhall have it upon office found; for ſince the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be deveſted out of him but by ſome notorious act, by which it may appear that the freehold is in another: but if an alien purchaſes lands and dies, then the freehold is in the king without office found, becauſe no man can take it as heir to the alien, therefore the freehold is caſt upon the king; but if an alien purchaſes, and afterwards is made a denizen, and then hath iſſue, and dies, the iſſue ſhall inherit till office found, becauſe there is a perſon in being to take as heir to the denizen, upon whom the law caſts the freehold, which is not to be deveſted out of him without the ſolemnity of an office. Co. Lit. 2. b. n. 1. 2. 3. 14th Ed. Leon. pl. 61.

If an alien and a ſubject purchaſe lands to them and their heirs, the ſurvivorſhip ſhall take place till office found, but the office found entitles the king, and ſevers the jointenancy; for the freehold is in the alien by the ſolemnity of livery, till it is deveſted out of him by ſolemn office found; and every perſon, who is reſident in the kingdom, is ſuppoſed a natural-born ſubject, till the contrary be found by office. Goldſb. 29. pl. 4. Leo. 47. pl. 61. Dyer, 283. pl. 31. Note; There are two ſorts of offices, an office of enquiry, which is under the great ſeal; and an office of inſtruction, which is under the ſeal of the Exchequer;

chequer; the office of entitling is an inqueſt, which gives the king a title, as here in the caſe of aliens, &c. 5 Co. 52. Page's caſe. See Gilb. Hiſt. View of the Exchequer, 132, 133, 134. Gilb. Hiſt. Chan. 12. [The king has a title before office found; the office veſts the poſſeſſion. 5 Co. 52. Hob. 153. Parker, 152. Choſes in action belonging to an alien enemy are forfeitable to the crown, but there muſt be an inquiſition to entitle the king; and if a peace be made before the inquiſition is taken, the cauſe of forfeiture is diſcharged. Attorney-General v. Weeden and Shales, Parker, 267.]

Roll. Abr. 191. Hob. 214. Cro. Ja. 512. Allen, 14. Stile, 20, 21. 41. 76. Parker, 156.

If an alien purchaſes a copyhold in fee in the name of *J. S.* in truſt for him and his heirs, though it be found that the copyhold was in truſt for the alien, and that *J. S.* had the legal eſtate, yet the king muſt ſue in Chancery to have the truſt executed for his benefit.

[St. 13 and 14 Car. 2. c. 11. ſ. 10.

[An alien infant, under the age of 21 years, cannot be a merchant trader within this realm, nor can he enter any goods in his own name at the cuſtom-houſe.]

[Merchant ſtrangers were firſt permitted to rent houſes, and to buy and ſell their own commodities themſelves, without any interruption from the citizens, about

An alien cannot purchaſe a leaſe for years of lands, but he may, if he be (*a*) a merchant, take a leaſe of a houſe for his habitation, for years only, and this is for the encouragement of commerce; for if an alien trade he muſt have an abode among us; but if he (*b*) depart the kingdom, or die, it goes to the king, not to his executors or adminiſtrators; becauſe it was only a perſonal privilege annexed to the alien, as a merchant, for the encouragement of commerce, and conſequently muſt expire with him, without going to his executors or adminiſtrators.

the year 1284; for before that time they hired lodgings, and their landlords were the brokers, who ſold all their goods and merchandiſes for them. Rapin, 361. note 9. Fab. Chron. This indulgence, together with the loſs of their brokerage, ſeems to have provoked the reſentment of the citizens; for, in the Parliament Roll, in the 18th year of Edward 1ſt, (*viz.* A. D. 1289) we find the following petition, and anſwer: "*Cives London petunt quod alienigenæ mercatores expelluntur a civitate, quia dicitur ad depauperationem civium, &c.*"—Reſponſio: "*Rex intendit quod mercatores extranei ſunt ideo et utiles magnatibus, &c. et non habet concilium eos expellendi.*" 2 Inſt. 741.] (*a*) Poph. 36. Co. Lit. 2. b. and the notes in 14th ed. Roll. Abr. 194. muſt be a merchant. (*b*) Not if he goes beyond ſea, and leaves ſervants in his houſe during his abſence. Dyer, 2. b.

[Sir W. Blackſtone (1 Bl. Comm. 372.) ſays, that the ſtatutes, prohibiting alien artificers to work for themſelves,

But by the 32 *H.* 8. *cap.* 16. *paragr.* 13. it is enacted, "That "all leaſes of any dwelling-houſe or ſhop within this realm, or "any of the king's dominions, made to any ſtranger artificer, or "handicraftman born out of the king's obeiſance, not being de"nizen, ſhall be void, and of no effect; and the perſon "taking ſuch leaſe forfeits 100*l.* and the perſon letting 100 "more; one moiety to the king, and the other to him that will "ſue for the ſame."

are generally held to be virtually repealed by the ſtat. 5 Eliz. c. 7. but there doth not appear to be any other authority to that effect. 1 Wooddeſ. 373. note.]

Sand. 1, to 10. Sid. 368. S. C. 2 Keb. 102. 116. S. C. 2 Show. Rep. 135. S. C. cited, and agreed to be good law.

[In this caſe

Upon this ſtatute the caſe was, an action of debt was brought upon an obligation, and upon *oyer* demanded of the condition, it was recited, and it referred to indentures, which indentures were likewiſe recited *in hæc verba*: the indentures were upon a leaſe of a houſe in *Weſtminſter*, reſerving rent with covenant &c. the defendant pleaded 32 *H.* 8. *cap.* 16. and that he was an alien, &c. and ſo would avoid the leaſe and the rent, and all the ſecurity; divers exceptions were taken to this plea. 1. He

not ſaid where he was an artificer, but this was over-ruled; for it is a perſonal quality, and ſhall follow the perſon, and is univerſal. 2. The defendant ought to have ſet forth and pleaded the indenture; but *per Cur'*, ſince the plaintiff has brought it into court, as muſt be intended, and ſet it forth, the defendant may plead upon it without ſetting it forth again. 3. The plea is, that *indentura prædicta vacua exiſtit*, and this was likewiſe over-ruled; for the law is, that the indenture and bond make but one ſecurity, and if the covenant be releaſed before breach, the bond will ſignify nothing. 4. This appears to be a meſſuage or tenement, but he has not averred it to be a manſion-houſe or ſhop, according to the ſtatute; and upon this point the Court at firſt were divided. *Keyling* held, that *meſſuagium* is *manſum, & quod clare conſtat non debet verificare. Morton:* Though *meſſuagium* be a word of art, and may be applied to other things by a large ſenſe, as to a barn or chapel; yet in propriety it is a manſion-houſe, and ſhall be intended ſo. *Twiſden* and *Wyndham*, that it ought to have been averred; for he muſt bring himſelf preciſely within the ſtatute, eſpecially in ſuch a caſe as this, where he would avoid his own contract; but afterwards the defendant had judgment.

two actions were brought; the one, debt for rent; the other, the action here mentioned. In both, the ſtatute was pleaded; it was in the firſt that the objection here made, for the want of the averment, was taken; for the other ſtood clear of that exception. The opinion of the Court was not finally given on the ſubmitted.]

point; for the defendant, believing that judgment would be pronounced againſt him,

A ſpecial verdict found, that the plaintiff made a leaſe of a houſe to the defendant, who was found to be an alien artificer, and that this leaſe was made by indenture between the plaintiff and defendant, and that there was no other ſecurity or promiſe made by the defendant; and that the defendant entered, and enjoyed ſo long, for which the plaintiff brought a *quantum meruit*; to which the defendant pleaded *non aſſumpſit*; and the matter being found *ut ſupra*, the Court held, that an *aſſumpſit* would not lie. 1. Becauſe this (*a*) would evade the ſtatute. 2. A promiſe in law (*b*) never takes place where there is an actual agreement.

2 Show. Rep. 135. Pilkington v. Peach, but no judgment.

(*a*) But *per Cur'*, there are other ways to evade it; as, to make an agreement for as long as you and I houſe for ſo

pleaſe, at the rate of 20 l. *per ann.* for an aſſumpſit will lie thereon; or, you ſhall have my long as you and I pleaſe, for ſo much as it is worth. (*b*) No ſuch thing. 6 Mod. 131.

Debt upon an obligation for performance of covenants in a leaſe of a houſe, *&c.* the defendant pleaded the ſtatute of 32 *H.* 8. *cap.* 16. and ſet forth that he was a vintner, and alien artificer; and upon demurrer it was inſiſted upon for him, that a vintner is as much an artificer, and within the meaning of the ſtatute, as a mercer, draper, or grocer. Ch. Juſt. This ſtatute refers to another made 1 *R.* 3. *cap.* 9. *which prohibits alien artificers to exerciſe any handicraft in* England, *unleſs as ſervant to a ſubject ſkilful in the ſame art, upon pain of forfeiture of his goods*; now the myſtery of a vintner chiefly conſiſts in mingling wines, and that is not properly an art, but a cheat; ſo the plaintiff had judgment.

3 Mod. 94. Hil. 1 Jac. 2. Bridgham and Frontee.

If a woman alien, be ſhe friend or enemy, marry a ſubject, ſhe ſhall not be endowed, becauſe, by the policy of the common

7 Co. 25. Co. Lit. 31. a. b. n. 9.

law, all aliens are disabled from acquiring any freehold amongst us: dower too is an estate created by act of law, and therefore the law, which *nil frustra agit*, shall not transfer an estate to one who cannot keep it, but must immediately, in respect of her legal disability, give title to another: and there is a diversity between such acts of law and the acts of the party himself; as if an alien makes an actual purchase, &c, so aliens shall not be tenants by the courtesy, by the same reason.

Vent. 417. But by the law of the crown, if the king marry an alien, she shall be endowed, because princes cannot marry according to their dignity, unless to persons abroad; and now, by a special act of parliament, not printed, 8 *H.* 5. 32. 15. women aliens who marry with the king's licence, to *Englishmen*, shall be endowed; so of *English* women who marry aliens by the same licence: but this latter part can only be meant where the alien husbands are after made denizens, that their wives shall have dower of lands purchased before; for otherwise they, having no capacity at all to hold any lands of any estate of freehold, can derive no title of freehold to their wives, and this act never intended to put them in a better condition for that purpose than they were before; but it must be intended of land purchased before their denization; since as to land purchased after, they would not want the assistance of an act of parliament, being by the common law dowable of these. Roll Abr. 675. If one marries a woman alien without such licence, and then sells his lands, and after the wife is made a denizen, she shall not be endowed, because her capacity began by the denization, and she was before absolutely disabled to hold any land; but if this marriage were by the king's licence, then it seems the wife may be endowed, because being married conformable to that act, her title to dower began presently, and cannot be defeated by any after-act of the husband's. Co. Lit. 33. a. 13 Co. 23.

Aliens seem not incapable [of the superior ecclesiastical preferments *,] and though this practice, says *Watson*, has always prevailed, yet, says he, it proceeded rather from the pope's usurpation, and a submission to his pretended authority in church matters, than from any nice distinctions made use of between spiritual and laymen, that the former would less discover the secrets of the realm, or transport the treasure thereof to nourish the king's enemies, than the latter.

Comp. Incumb. 213, 214. Hughes's Parson's Law. C. 10. 2 Roll. Abr. 348. 4 Inst. 338. Cotton. 41. 1 Wooddes. 377. 388.

* Aliens prohibited to take benefices without the king's licence. 3 R. 2. c. 3. 7 R. 2. c. 12. 1 H. 5. c. 7. [To the first of these statutes, it is said in the old abridgement, that the Lords Spiritual did not assent.]

[By the statute of 24 *Geo.* 3. *c.* 35. the bishop of London, or any bishop appointed by him, is enabled to ordain aliens either as priests or deacons without requiring them to take the oath of allegiance, provided that they do not officiate in any place within the king's dominions; and further that in the letters testimonial of such orders the name of the person so ordained be inserted, with the addition of the country to which he belongs, and the further description of his not having taken the oath of allegiance, being exempted from so doing by this act.]

[(C 2.) How far the Laws of this Country attach upon Aliens.

1 Wooddes. 379. Fost. Cr. L. 185. 1 Hawk. P. C. c. 17. s. 5. St. 9 Ann. c. 16.

AN alien, whilst he resides here, is generally subject to our laws, and owes a local and temporary allegiance to the sovereign, by whose authority those laws are administered, and by whom his person and property are protected; consequently, if during such residence he commit an offence, which in the case of

of a natural-born ſubject would amount to treaſon, he may be dealt with as a traitor; and this whether his ſovereign be in amity or at enmity with us. My Lord *Coke*'s poſition, therefore, that an alien enemy cannot be guilty of treaſon, muſt be taken with this reſtriction, namely, where he invades this country, and is taken in war: in which caſe indeed he is not puniſhable at all, according to the courſe or by the rules of the municipal inſtitutions, but is to be dealt with according to the law of nations in martial affairs. Hob. 271. 3 Inſt. 4, 5.

It is declared by ſtatute 32 *H.* 8. *c.* 16. *ſ.* 9. That every alien, coming into the king's dominions, ſhall be bounden by and unto the laws and ſtatutes of this realm.

But a *French* priſoner of war, being indicted for privately ſtealing in the ſhop of a goldſmith and jeweller, a diamond ring, which by ſtatute 10 & 11 *W.* 3. *c.* 23. is an offence puniſhable with death, the judge who tried him thought it improper to proceed capitally upon a local inſtitution, and therefore adviſed the jury to acquit him of the circumſtance of ſtealing in the ſhop, and to find him guilty of ſimple larceny to the value laid in the indictment. Foſt. Cr. L. 188. note. Moliere's caſe. In this caſe, a learned writer obſerves, the humanity of the judge was at leaſt more conſpicuous than the ſoundneſs of the principle, as a point of mere law. 1 Wooddeſ. 382.

Aliens are comprehended within the ſtatute 25 *E.* 3. *c.* 4. for extending the benefit of clergy, according to a very old interpretation of that law. 2 Hawk. P. C. c. 33. ſ. 5. Br. tit. *Clergy*, p. 20.

A *reſident* alien, it hath been adjudged, is entitled to the benefit of a general pardon; but, if he is not in the kingdom at the time of the promulgation of the pardon, he is not within the benefit of it, for he is no otherwiſe a ſubject, but *by his reſidence here*. Courteen's caſe, Hob. 270.

Aliens are ſubject to, and ſhall have advantage of the ſtatutes againſt bankrupts. St. 21 Ja. 1. c. 19. ſ. 15.

The property of an alien, reſident abroad, conſiſting of ſtock in the publick funds, or other perſonal effects in this country, is ſubject to the controul of the Court of Chancery. 1 Atk. 19.

But if an alien, reſident abroad, dies inteſtate, his whole property here is diſtributable according to the laws of the country where he ſo reſided: but the reſidence muſt be ſtationary, not occaſional, elſe the municipal inſtitutions will not attach upon the property.] Pipen v. Pipen, Ambl. 25. Burn v. Cole, Id. 415.

(D) What Actions Aliens may maintain; and therein of the Difference between an Alien Friend, and one whoſe King is at Enmity with ours.

AN alien friend may have perſonal actions (*a*), but not real; an alien enemy ſhall not have real, perſonal, or mixed action. The reaſon why an alien friend is allowed to maintain perſonal actions Co. Lit. 129. b. Anderſ. 25. Dyer, 2. b.

actions is, becauſe he would otherwiſe be incapacitated to merchandize, which may be as much to our prejudice as his; but, as to the allowing of him to maintain real actions, there is no reaſon for it, becauſe there is no neceſſity that he ſhould ſettle amongſt us: an (*b*) alien enemy is diſabled, from the prejudice that may accrue to the king and kingdom, if he were allowed to maintain any action.

[(*a*) And this, though reſident abroad. Dy. 2. b. But in ſuch caſe the Courts of K. B. and C. P. require ſecurity for coſts: not, however, until bail is put in. 1 Term Rep. 267. 362. 2 H. Bl. Rep. 118. 4 Term Rep. 697.] (*b*) But who ſhall be ſaid an alien enemy, and how it ſhall be tried, *vide* 9 Co. 31. a. That it ſhall be tried by the record in Chancery, whether his prince is at peace or enmity with ours, for every league is of record; and Cro. El. 142. Owen, 45. That open acts done by his prince are ſufficient, and that it is not neceſſary that a war be proclaimed. *Turks* and Infidels are not *perpetui inimici*, nor is there a particular enmity between them and us; for the difference between their religion and ours does not oblige us to be enemies to their perſons. Salk. 46. pl. 2. ſaid to be the words of L. K. *Littleton*. 1 Atk. 51. *Vide* Skin. 167. 204.

Yelv. 108. Tuerlcote and Moriſon. Bulſt. 134. S. C.

A merchant ſtranger ſhall have an action for ſaying he is a bankrupt, for by law he may have perſonal actions, and theſe words tend to impair his credit in his trade.

[By an expreſs law, *viz.* St. 31 H. 6. c. 4. redreſs is provided for aliens who are injured by the king's ſubjects on the ſea, or in any part of the realm. 2 R. 2. ſ. 2. 3 Bulſtr. 28.]

11 Ed. 3. Rot. 87. Dyer, 2. b. in margin.

An alien friend, merchant, may upon a ſtatute extend lands, which the king ſhall not have upon office, and for which he ſhall have an aſſize in caſe of ouſter; for the main end and deſign of both the ſtatute-ſtaple and merchant was to promote and encourage trade, by providing a ſure and ſpeedy remedy for merchant ſtrangers, as well as natives, to recover their debts at the day aſſigned for payment.

Co. Lit. 129. a. b. Palm. 13. S. P. Molloy, 270. S. P.

An abbot, prior, or prioreſs alien ſhall have action real, perſonal, or mixed, for any thing concerning the poſſeſſions or goods of their monaſtery here in *England*, becauſe they ſue in their corporate capacity, and not in their own right to carry the effects out of the kingdom (*d*).

[(*d*) Upon the ſame principle it hath been holden, notwithſtanding the ſtatutes of 3 R. 2. c. 3. 7 R. 2. c. 12. and 1 H. 5. c. 7. that an alien, incumbent on an eccleſiaſtical benefice, may maintain an action concerning the glebe, tithes, &c. Hughes's Parſon's Law, c. 10. cites Dr. Seaton's caſe, M. 8 J. 1. C. B.]

Cro. Car. 8. Sir Upwell Caroon's caſe. Vent. 417. S. C. cited.

So an alien friend may be an adminiſtrator, and ſhall have adminiſtration of leaſes, as well as perſonal things, becauſe he hath them in another's right, and not to his own uſe.

Cro. El. 142. Owen, 45. Wentworth's Office of Executors, 25.

Molloy, 870. Cro. El. 683. Mo. 431. Carter, 49.

But it has been long doubted, whether an alien enemy may maintain an action as executor; for on the one hand it is ſaid, that by the policy of the law, alien enemies ſhall not be permitted to bring actions for the recovery of effects which may be carried out of the kingdom, to the impoveriſhment of ourſelves, and enriching of the enemy; and therefore public utility muſt be preferred to private convenience: but on the other hand it is ſaid, that theſe effects of the teſtator are not forfeited to the king by way of repriſal, becauſe they are not the alien enemy's, he being to recover them for others; and if the law allows an alien enemy

to poſſeſs the effects as well as an alien friend, it muſt allow him power to recover them; and if it were otherwiſe, it would be a prejudice to the king's ſubjects, who could not recover their debts from the alien executor, by his not being able to get in the aſſets of the teſtator. 191. Skin. 370. *Vide ſupra*, tit. *Abatement*, B. 3.

If an alien enemy comes here *ſub ſalvo conductu*, he may maintain an action; ſo if an alien amy comes here in time of peace *per licentiam domini regis*, as the *French* proteſtants did, and lives here *ſub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for ſuing is but a conſequential right of (*a*) protection; and therefore an alien enemy, who is here in peace under protection, may ſue a bond; *aliter* of one commorant in his own country. Salk. 46. pl. 1. Wells and Williams, Ld. Raym. 282. Foſt. Cr. Law, 186. Br. tit. *Propertie*, p. 38.

(*a*) But an alien enemy, who has ſuch protection, muſt plead it. Fareſl. 150. Sylveſter's caſe. Ld. Raym. 283. [But if alienage ſimply be pleaded, it is not neceſſary to reply, that the plaintiff is not an alien enemy. 2 Str. 1082.]

[It hath been heretofore holden, that an alien enemy may maintain an action in this country for the recovery of a right claimed to be acquired in actual war; but that opinion hath been ſince over-ruled, and it hath been determined in the Exchequer chamber, that by the municipal law of this country no ſuch ſuit can be ſupported. [Record v. Bettenham, 3 Burr. 1734. 1 Bl. Rep. 563. Cornu v. Blackburn, Dougl. 619

Anthon v. Fiſher, Dougl. Ad. 30.

An alien enemy, priſoner of war, is not entitled, under any circumſtances, to his diſcharge upon a *habeas corpus*. Anon. 2 Bl. Rep. 1324.

A foreigner is allowed to put in his anſwer to a bill in equity in his own language, but a ſworn tranſlation muſt be alſo filed with it. Simmonds v. Du Barre, 3 Br. Ch. Rep. 263.

Interrogatories for the examination of witneſſes who are foreigners muſt be in *Engliſh*, and being afterwards tranſlated, their anſwers muſt be tranſlated by ſworn interpreters.] Lord Belmore v. Anderſon, 4 Br. Ch. Rep. 90.]

(E) Of pleading Alienage.

IF one born in *Jerſey*, or elſewhere within the king's obedience, brings a real action, and the tenant pleads that the demandant is an alien born under the obedience of the *French* king, and out of the ligeance of, *&c.* the demandant may reply, that he was born at ſuch a place in *England*, within the king's allegiance, *&c.* and ſuch hath ever been the manner of pleading in ſuch caſe *. Co. Lit. 129. b. 7 Co. 26. 6 Co. 47. 2 Keb. 98. Leon. 78, 79. Carter, 50. Raſt. Ent. 605. *quod vid.*

* *Qu.* If the beſt method would not be, to ſay, born within the king's obedience, *viz.* at, *&c.* the venue laid by the plaintiff in his declaration?

In an aſſiſe *tempore Jac.* 1. the defendant pleaded, that the plaintiff was born *apud E. infra regnum Scotiæ ac intra ligeantiam dicti domini regis regni ſui Scotiæ, ac extra ligeantiam dicti domini regis regni ſui Angliæ*; and this was holden no good plea, becauſe it referred ligeance and faith to *England*, and not to the king. 7 Co. 1. 9. Lit. Rep. 26.

In

Sid. 357. Freeman v. King.

In debt on an obligation, which was for payment of rent reſerved by leaſe for years; the defendant pleaded the 32 *H.* 8. *c.* 16. and that he was an alien artificer, &c. the plaintiff replied that he was no alien artificer; but having laid no place where he was born, the replication was held bad.

Carth. 302. Nicholas v. Powlet. But ſee Raſt. Ent. 252. Hern. 361. Aſht. 11. the like replications. If the plaintiff had concluded his replication with an averment only, the negative clauſe, *non alienigena*, had been only ſurpluſage, and helped upon a general demurrer; ſo reſolved, Carth. 265. Brodeck v. Briggs. *Vide* Comb. 212.

The defendant pleaded in abatement, that the plaintiff was an alien enemy, born in ſuch a place in *France;* the plaintiff replied that he is *indigena*, and born at ſuch a place in the kingdom of *England*, *& non alienigena modo & formâ prout*, &c. *& hoc petit quod inquiratur per patriam;* upon demurrer to this replication it was holden to be ill, for that the plaintiff did not rely upon the firſt part of it, that he was born in *England*, and ſo conclude with an averment, that an iſſue might be taken by the other ſide, *viz.* that he was not born in *England*, and that this matter might be triable by a proper *viſne;* but here he hath put *alien* or *not alien* in iſſue, *viz. non alienigena modo & formâ*, which cannot be tried for want of a *viſne;* and therefore judgment was given that the bill ſhould abate.

Comb. 394. Forteſ. 222. *per* Holt Ch. Juſt.

Where alienage is pleaded in abatement, and the plaintiff replies *indigena*, he may either take iſſue, or conclude *& hoc paratus eſt verificare;* but, if in bar, he muſt take iſſue; and this is the reaſon of the difference in the two precedents in *Raſtal.*

Bro. tit. *Denizen*, 3. 10. Raſt. Ent. 252. 605. Cart. 49. Co. Lit. 129. a, b.

If alienage be pleaded to an alien in league, it muſt be pleaded in abatement or diſability of the plaintiff; but if it be to an alien enemy, it may be pleaded either in abatement or in bar to the action, becauſe it is forfeited to the king as a repriſal for the damages committed by the dominion in enmity with him (*a*).

(*a*) Not to be pleaded to a perſonal action, without alleging the plaintiff to be an enemy. 2 Stra. 1082. See 12 Mod. 125. [In an action by an alien enemy for a right acquired in actual war, the defendant, it ſeems, may avail himſelf of the objection of alienage without ſpecially pleading it. Anthon v. Fiſher, Dougl. Ad. 30.]

[Weſt v. Sutton, 2 Ld. Raym. 853.]

[Alienage cannot be pleaded to a *ſcire facias* on a judgment; for the plaintiff having been admitted to be able to recover judgment, cannot be diſabled from having execution upon it by matter which was precedent to it.]

Ambaſſadors.

AN (*a*) ambaſſador is a perſon ſent by one (*b*) ſovereign prince to another, to tranſact in the place of his ſovereign ſuch matters as relate to both ſtates. The manner of appointing and receiving publick miniſters, their duty, power, and privileges, *&c.* being chiefly regulated by the civil law, or law of nations, I muſt refer to other books for thoſe matters, and ſhall here only inſert what ſeems moſt worthy of notice in our law books; obſerving that our law herein pays the greateſt regard to rules preſcribed by the civil law and the law of nations.

(*a*) Difference between ambaſſador ordinary and extraordinary. Molloy, Bk. 1. c. 10. An agent repreſents the affairs only; but an ambaſſador the grandeur of his maſter. Molloy, *ibid.* (*b*) By the law of nations, none under the quality of a ſovereign prince can ſend ambaſſadors. *Ibid.* And it is ſaid by Lord *Coke*, that there can be no ambaſſador without letters of credence from his ſovereign to another that hath a ſovereign authority. 4 Inſt. 153. But the electors and princes of the empire ſend or receive ambaſſadors, touching matters which concern their own territories. Molloy, *ibid.* And ſo the *Hans* towns, being free imperial cities, have the ſame *regalia* by preſcription or grant. *Ibid.* But a king deprived of his kingdom and royalty, hath loſt his right of legation. Molloy, Bk. 1. c. 10. ſ. 5. *in margin.* If ſent from a king or abſolute potentate, though in his letters of credence he is termed an agent or *nuncius*, yet he is an ambaſſador or legate. 4 Inſt. 153. Ambaſſadors were ſent to the pope, being a temporal prince, and alſo his ambaſſadors received here, who were ſworn not to attempt any thing prejudicial to the king or kingdom. 4 Inſt. 156.

An ambaſſador cannot, as procurator, exhibit a bill in our courts for a certain number of his fellow ſubjects, without an authority from them; for every procurator muſt ſue in the name of the principal, and cannot be ſuch without his allowance; nay, the king cannot make a procurator for all his ſubjects, without their conſent, nor would a releaſe, ſentence or diſcharge againſt ſuch a one be a diſcharge againſt the principal: alſo the office of an ambaſſador doth not imply a private procuration, but for the publick; and not for a particular ſubject, otherwiſe than it concerns the king and his miniſters to protect him in foreign kingdoms in nature of a negociation of ſtate; and therefore, though he may proſecute and defend for a private ſubject at the council-table, which is a court of ſtate, yet when he comes to ſettled courts he muſt obſerve the eſſential parts of their proceedings.

Hob. 78. 113, 114. Don Diego Servienti de Acuna, the *Spaniſh* ambaſſador, and Sir Richard Bingley.

In the Biſhop of *Roſs*'s caſe, *ann.* 13 *Eliz.* the queſtion being *an legatus, qui rebellionem contra principem ad quem legatus concitat, legati privilegiis gaudeat, & non ut hoſtis pœnis ſubjaceat*, it was reſolved he had loſt the privilege of an ambaſſador, and was ſubject to puniſhment.

4 Inſt. 152. Molloy, Bk. 1. c. 10. ſ. 9. S. C. cited, and ſaid, that ambaſſadors cannot, by the law of nations, be defended when they act againſt the ſtate, or perſon of the king with whom they reſide; and *vide* 3 Bulſt. 28. and Roll. Rep. 185. in which laſt book, the king's attorney makes a difference between a conſpiracy to kill the king and other treaſons committed by an ambaſſador.

If *A.* is ſent as ambaſſador of the king of *Morocco* to the *States*, and by them accepted as an agent, and there being war between the

4 Inſt. 152. Reſolved in Palache's caſe, by the

Ch. Juſt. Maſter of the Rolls, and the Judge of the Admiralty, upon a reference to them by the Lords of the Council upon the prayer of the *Spaniſh* ambaſſador, to proceed againſt him as a pirate upon the ſtatute 28 H. 8. cap. 15. Roll. Rep. 175. S. C. cited. 3 Bulſt. 27, 28. S. C. cited. (*a*) But *per* Roll. Rep. it was agreed by the civilians, that he ought to proceed *civiliter* for the goods, becauſe *in ſolo amici*; and 3 Bulſt. 29. A ſuit being in the court of Admiralty againſt ſeveral merchants that had bought goods, the civilians held, becauſe they were bought *in ſolo amici*, proceeding might be for them in the court of Admiralty; and it is ſaid, that accordingly the Court denied a prohibition: But, *per* 4 Inſt. 154. though this was the opinion of ſome of the civilians in Palache's caſe, yet the contrary had been reſolved, 2 Jac. 1.

the king of *Morocco* and the king of *Spain*, the king of *Morocco* makes a commiſſion to *A.* to take *Spaniards*, and their goods; and the king of *England* grants him letters of ſafe conduct as a publick miniſter, and the *States* licenſe him to levy men, to furniſh ſhips, *&c.*; and there being a league between *England* and *Spain*, and *England* and the *States*, and war between *Spain* and the *States*, *A.* takes at the *Canaries* a *Spaniſh* ſhip laden with goods, and by ſtreſs of weather is driven to *Plymouth*, he ſhall not be tried as a (*a*) pirate here; for by the law of nations an ambaſſador ought to be ſafe and ſure in every place.

4 Inſt. 153. If a man that is baniſhed is ſent ambaſſador to the place from which he is baniſhed, he cannot be detained or offended there.

2 Vern. 317. Pilkington v. Stanhope. Formerly it was held treaſon to kill the king's ambaſſador. *Vide* 3 Inſt. 8. *Vide* Co. Lit. 130. A bill was exhibited in Chancery againſt one, then ambaſſador at the court of *Spain*; an order was obtained, that all proceedings ſhould ceaſe until his return from his embaſſy; and, on motion to diſcharge the order, it was agreed on debate, that a protection lies for an ambaſſador, *quia profecturus*, or *quia moraturus*, and that at law he may caſt an eſſoin for a year and a day, and may afterwards renew it if occaſion continues; and the Court ordered the proceedings to ſtay for a year and a day, unleſs the defendant ſhould ſooner return into *England*.

4 Inſt. 153. Molloy, Bk. 1. c. 10. ſ. 12. Same rule cited. Roll. Rep. 175. Same rule agreed by the civilians. So, 3 Bulſt. 28. Hawk. P. C. 51. S. P. Foſt. Cr. L. 187, 188. [In the caſe of the King againſt Guerchy, the Attorney General, under the direction of the Court of K. B., granted a *noli proſequi*, on an indictment againſt the *French* ambaſſador for an attempt to aſſaſſinate M. D'Eon. It does not appear, from the report, whether this direction was given upon the naked ground of the defendant's protection from his character as ambaſſador, or whether the judgment of the Court were not influenced by the ſpecial circumſtances of the caſe, which induced a ſuſpicion that the proſecution was a groſs calumny upon the defendant, and inſtituted and kept on foot merely for the purpoſe of defaming him. 1 Bl. Rep. 545.] If a foreign ambaſſador (being *pro-rex*) committeth a crime which is *contra jus gentium*, as treaſon, felony, adultery, *&c.* he loſes the privilege and dignity of an ambaſſador, and may be puniſhed here as any other private alien, and is not to be remanded to his ſovereign but of courteſy.

4 Inſt. 153. But, in Molloy, Bk. 1. c. 10. ſ. 16. it is ſaid, that moſt certainly by the civil law, his moveables, which are accounted an acceſſion to his perſon, cannot be ſeized on as a pledge, or for payment of debt, though by leave of the king or ſtate where he reſides; for all coercion ought to be far from an ambaſſador, as well that which touches his neceſſaries as his perſon; if therefore he hath contracted a debt, he is to be called upon kindly; and if he refuſes payment, letters of requeſt are to go to his maſter, ſo that the ſame courſe may be taken with him as with debtors in another territory; and notice is taken of the opinion of my Lord Coke, which ſeems to the contrary; and 3 Bulſt. 28. it is agreed by the civilians, that the perſon of an ambaſſador cannot be arreſted. [An ejectment brought, and lett at the houſe of the ambaſſador, conceived no breach of privilege in the caſe of Monſ. Colbert for York-houſe. M. 28 Car. 2. B. R. Molloy, Bk. 1. c. 10. ſ. 15. in marg.] So, upon contracts which are good *jure gentium*, he muſt anſwer.

4 Inſt. 153. Molloy, Bk. 1. c. 10. But if a thing be only *malum prohibitum* by act of parliament, private law or cuſtom of the realm, and not *malum in ſe jure gen-*

ti. m,

tium, nec contra jus gentium, an ambaſſador reſiding here ſhall not be bound by it. f. 13. Same rule cited.

Roll. Rep. 175. The ſame rule agreed by the civilians.

And now by the 7 *Ann. c.* 12. it is declared, " That all writs " and proceſſes that ſhall at any time be ſued forth or proſecuted, " whereby the perſon of any ambaſſador, or other publick mi- " niſter of any foreign prince or ſtate, authorized and received as " ſuch by her majeſty, her heirs or ſucceſſors, or the domeſtick (*a*) " ſervant of any ſuch ambaſſador, or other publick miniſter, " may be arreſted or impriſoned, or his or their goods or chat- " tels may be diſtrained, ſeized or attached, ſhall be deemed " and adjudged to be utterly null and void.

(*a*) A certificate that the perſon was a *menial* ſervant, not good. Barnes, 370. On motion to ſuperſede a proceſs on this ſtatute, the Court held, that it was not neceſſary to ſhew that he actually lived in the houſe, but that he muſt ſhew the nature of his office, that the Court may judge of it; alſo that he is not ſuch a one as comes within the deſcription of any of the ſtatutes againſt bankrupts. Fitzgib. 200. 2 Str. 797. Ld. Raym. 1524. Ca. Tem. Hardw. 3, 4. 3 Burr. 1677. See 10 Mod. 4, 5. [He muſt alſo ſwear to the actual performance of the ſervice. 3 Burr. 1731. But where one ſwore poſitively to an actual engagement as *Engliſh* ſecretary to the *Bavarian* miniſter, and to the actual performance of that employment, the Court of King's Bench thought themſelves bound to allow his privilege, though it appeared that he had formerly been a trader, and there were ſeveral other ſuſpicious circumſtances. 3 Burr. 1478. Lord Mansfield was clear, that an officiating land-waiter at the cuſtom-houſe could never be eſteemed a *bonâ fide* domeſtick of a foreign miniſter. 1 Burr. 401. Nor can a purſer of a man of war. 3 Wilſ. 33. Nor a trader reſiding at his own houſe, his ſuppoſed maſter being abroad. Barnes, 374. Nor can an ambaſſador take one into his ſervice for the purpoſe of ſcreening him from his creditors. 3 Burr. 1676. Therefore, the perſon claiming privilege muſt ſwear that he was in the ſervice at the time of the arreſt. 4 Burr. 2015. Q. Whether an ambaſſador can retain one in the character of phyſician? *Ibid.* A ſecretary to a foreign miniſter is privileged, though his name be not regiſtered in the office of either of the ſecretaries of ſtate, the ſtatute requiring that only for the purpoſe of proceeding againſt the parties criminally. 3 Ter. Rep. 79. 4 Burr. 2017. S. P. Therefore, though his name be not regiſtered, the ſheriff muſt execute the proceſs, notwithſtanding the production of a certificate. 1 Wilſ. 20.]

" Provided, that no merchant or other trader whatſoever " within the deſcription of any of the ſtatutes againſt bankrupts, " who hath or ſhall put himſelf into the ſervice of any ſuch " ambaſſador or publick miniſter, ſhall have or take any manner " of benefit; and that no perſon ſhall be proceeded againſt " as having arreſted the ſervant of an ambaſſador or publick mi- " niſter, by virtue of this act, unleſs the name of ſuch ſervant " be firſt regiſtered (*b*) in the office of one of the principal ſecreta- " ries of ſtate, and by ſuch ſecretary tranſmitted to the ſheriffs " of *London* and *Middleſex* for the time being, or their under- " ſheriffs or deputies; who ſhall, upon the receipt thereof, hang " up the ſame in ſome publick place in their offices, whereto " all perſons may reſort and take copies thereof without fee or " reward.

[(*b*) If not actually a ſervant, though his name be regiſtered, he is not within the act. Fitzg. 200.]

" The perſons who by ſuing out writs, *&c.* violate this law, " which is declared a publick act, to be puniſhed at the diſcre- " tion of the two chief juſtices and lord chancellor, or any two " of them."

One protected by the *Genoeſe* ambaſſador brought a bill in Chancery, and was ordered, though after (*c*) anſwer put in, to give (*d*) ſecurity to anſwer the coſts, in the ſame manner as if he were a foreigner; becauſe by the above ſtatute all proceſſes againſt ambaſſadors and their ſervants are made void; ſo that if

Abr. Eq. 350. pl. 4. Goodwin and Archer, Paſch. 1729. 2 Wil. Rep. 452. And

a like order ſaid to be made by my Lord Cowper, after anſwer put in, Trin. 1709. between Barret and Buck. (c) But it has been denied in the Exchequer, even before anſwer, where the bill was for an injunction to ſtay the defendant's proceedings at law in ejectment, becauſe the plaintiff was in a manner forced into this court, (viz. the Exchequer,) and did not come in originally. Bunb. Rep. 272. pl. 349. If the motion be before anſwer, the defendant will not be obliged to put one in, until the plaintiff give bond with a ſurety to the ſenior ſix clerk not towards the cauſe in 40l. penalty for anſwering coſts. 2 Will. 452. pl. 142. Moſely, 175. pl. 89. (d) A depoſit in money will not be permitted inſtead thereof. Bunb. Rep. 35. pl. 53.

if the bill ſhould be diſmiſſed, no proceſs could iſſue againſt him.

[Barbuit's caſe, Ca. Tem. Talb. 281. Ibid.]

[A conſul, or any perſon acting in an office of that kind, it ſeems, is not entitled to privilege.

The privilege of a publick miniſter is annexed to his ſituation; it is the privilege of the ſtate that ſends him, and not that of the individual: he cannot therefore wave it, or forfeit it by becoming a trader, &c.]

Amendment and Jeofail.

I Chap. X of Gilb. Comm. P. I. incorporated into this title. Indeed the first division & other parts are taken literally the same, & I Blackamore's case 8. Co. 156. & a Reading case on Amendments containing the history of the ſtatutes.

(A) Of Amendments at Common Law.

(B) The ſeveral Statutes of Amendment and Jeofail.

(C) Whether the Statutes of Amendment extend to the King, or to any Criminal Proceedings.

(D) In what Caſes the Proceedings in Civil Cauſes are amendable, and the Manner thereof, as by amending one Part of the Record by another: And herein

1. Of the Original Writ and Proceſs.
2. Of the Imparlance Roll.
3. Of the Plea Roll.
4. Of the Jury, Proceſs, and *Niſi Prius* Roll.
5. Of the Verdict.

(E) What Defects may be amended, or are aided after Verdict: And herein

1. Of the Want of ſufficient Certainty in the Plaintiff's Declaration in not ſetting forth his Cauſe.
2. Of Repugnancy and Surpluſage.
3. Of Inſufficiency in the Defendant's Bar.
4. Of immaterial and informal Iſſues.

(F) Of

(F) Of amending the Judgment.

(G) At what Time the Amendment muſt be made; and therein of Records removed out of inferior Courts, and the paying of Coſts.

(H) Where Records defaced by Deſign or Accident will be ſet right and amended.

[(I) Of Amendments in Equity.]

(A) Of Amendments at Common Law.

In Gilb. Common L. chap. X. from whence this division is almost literally taken.

AT common law there was but little room for amendments, as appears by the ſeveral ſtatutes of *amendments and jeofails*, and likewiſe by the conſtitution of the courts; for ſays *Britton*, the judges are to record the parols deduced before them in judgment; alſo, ſays he, *E.* 1. (*a*) granted to his juſtices to record the pleas pleaded before them, but they are not to eraſe their records, nor amend them, nor record againſt their enrolment, nor any way ſuffer their records to be a warrant to juſtify their own miſdoings. Britt. 2. 8 Co. 156. (*a*) This ordinance of E. 1. was ſo ſtrictly obſerved, that when Ch. Juſt. Ingham, in his reign, moved with compaſſion for the circumſtances of a poor man who was fined 13 s. 4 d. eraſed the record, and made it 6 s. 8 d. he was fined 800 marks. 4 Inſt. 255.

Hence it appears, that regularly at common law, neither falſe *Latin*, the omiſſion of a word, ſyllable or letter, or other defect or variance from the approved and legal forms, were amendable. 9 H. 7. 16. b. 4 H. 6. 16. b. 8 Co. 157. 2 Hawk. P. C. 192.

But out of this general rule there are the following exceptions: 1. All miſtakes were amendable the ſame term, becauſe it is a roll of that term, and ſo in the breaſt of the court during the whole term, and then a new roll might be brought in the cauſe, and conſequently the ſame roll may be amended. 8 Co. 157. Blackmore's caſe.

2. That part of the count which records the writ was amendable at common law, though of a ſubſequent term; becauſe the recording of the writ was ſurpluſage, and the judges were not to record againſt a former record. 8 Co. 156. b. 7 H. 6. 45. *Vide* Cro. Car. 144. Sand. 317. [In penal actions, while the proceedings are in paper, miſtakes are amendable at common law; and it has been done where ſeveral terms had elapſed ſince the commencement of the ſuit, and iſſue had been joined. 2 Burr. 1099. So where the record had gone down to trial, and been afterwards withdrawn. 3 Burr. 2833. But this is a matter of diſcretion in the Court, and a ſimilar application has been refuſed. 2 Term Rep. 707.]

3. An eſſoin, if the plaintiff's name were miſtaken, or if it was made as guardian, when there was no guardian in the writ, was amendable at common law, becauſe ſuch an eſſoin was contrary to the writ, and conſequently an enrolment of it would contradict a former writ. 2 H. 4. 4. Fitz. Amendment, 7. 61. Bro. Amendment, 26.

8 Co. 156. b. Roll. Abr. 899. *Vide* for this Cro. Eliz. 619. Stile, 339. Yelv. 155. 2 Mod. 316. 12 Mod. 8. 684. Stra. 139.

4. Continuances could be amended at common law; as where *A.* brought a bill againſt *B.* who vouched *C.* who entered into warranty, and pleaded to iſſue; a *venire facias*, and a *jurat' inter A.* and *B.* was put in, which *jurat'* ought to have been between *A.* and *C.*; and becauſe it appeared by the record of the iſſue, and the award of the *venire facias*, and the *venire* itſelf, that the *jurat'* ought to have been between *A.* and *C.* this was amended, otherwiſe it would have been an enrolment againſt a former record, 2 Stra. 734.

8 Co. 156. *Vide infra*, letter C.

5. In the caſe of the king the writ was amendable where the fault was in the form, as in a *quare impedit* brought by the king, the writ was *preſentere* inſtead of *preſentare*; and it was amended; for it could not be intended that the original inſtitution of the Court was to deſtroy or leſſen the prerogative of the king.

I ſee an extraordinary inſtance of extending the power of amendm^t in Comp. 241.

(B) The ſeveral Statutes of Amendment and Jeofail.

THE tying down the Courts ſo ſtrictly not to alter their records after the firſt term was found very inconvenient, and many judgments were reverſed by the miſpriſion of clerks, &c. wherefore it was enacted,

(*a*) The judges conſtrued this ſtatute ſo favourably for the ſuitors, that they extended it to a word. 8 Co. 158. a. But they were not agreed whether they could make theſe amendments as well after judgment as before, 8 Co. 157. b. which occaſioned the 9 H. 5. c. 4. by which it is declared, that the judges ſhall have the ſame power as well after as before judgment, as long as the record or proceſs is before them; and this ſtatute is confirmed by 4 H. 6. c. 3. with an exception, that it ſhall not extend to proceſs on outlawry, or to records or proceſſes in *Wales*. But according to 2 Sand. 40. this laſt exception, and the like exception in 8 H. 6. c. 15. ſeem to be annulled by the ſtatute of 27 H. 8. c. 26. by which it is enacted, that the laws of *England* ſhall be uſed, practiſed and executed in *Wales*.

"By 14 *Ed.* 3. *c.* 6. That by the miſpriſion of a clerk in any "place whereſoever it be, no proceſs ſhall be annulled or diſ- "continued by miſtaking in writing (*a*) one ſyllable or one "letter too much or too little; but as ſoon as the thing is per- "ceived by challenge of the party, or in other manner, it ſhall "be haſtily amended in due form, without giving advantage "to the party that challengeth the ſame becauſe of ſuch miſ- "priſion."

8 Co. 157. a. An original, or other writ in nature thereof, not included within the word proceſs. 8 Mod. 314. 12 Mod. 523. Ld. Raym. 565.

Though theſe ſtatutes gave the judges a greater power than they had before, yet it was found that they were too much crampt, having authority to amend nothing but proceſſes, which they did not conſtrue in a large ſignification, ſo as to comprehend the whole proceedings, but confined it to the meſne proceſs and jury proceſs: wherefore to enlarge the authority of the Courts,

"By the 8 *H.* 6. *cap.* 12. it is enacted, That for error aſſigned "in any records, proceſs, or warrant of attorney, original writ "or judicial pannel or return, by razing or interlining, or by ad- "dition, ſubſtraction, or diminution of words, letters, titles, "&c. no judgment or record ſhall be reverſed or annulled, but "the judges, in any record, proceſs, word, plea, warrant of "attorney,

" attorney, writ, pannel or return in affirmance of judgment, may " amend all that which to them ſeems to be the miſpriſion " of the clerk, (except appeals, indictments of treaſon, felony " and outlawries of the ſame, and the ſubſtance of the proper " names, ſurnames and additions left out in originals and exi- " gents, contrary to the 1 *H.* 5. *c.* 5. and other writs containing " proclamation ;) and if certified defective, the parties in affirm- " ance of judgment may allege the variance between the re- " cord and certificate, and if found and certified it ſhall be " amended.

" By the 8 *H.* 6. *cap.* 15. the judges in any records or pro- " ceſſes before them, by error or otherways, or in returns of " ſheriffs, coroners, bailiffs of franchiſes, or others, may amend " the miſpriſion of the clerks of the courts, or of the ſheriffs, " coroners, their clerks and other officers whatſoever, in writing " a letter or ſyllable too much or too little."

As theſe ſtatutes extended only to what the juſtices ſhould interpret the miſpriſion of their clerks and other officers, it was found by experience, that many juſt cauſes were overthrown for want of form, not aided by any of theſe ſtatutes, though they were good in ſubſtance: wherefore for further relief of ſuitors,

The 32 *H.* 8. *cap.* 30. enacts, " That if (*a*) any iſſue be (*b*) " tried (*c*) by the oath of twelve men, for the (*d*) party plaintiff " or demandant, or for the party tenant or defendant, in any " courts of record, judgment ſhall be given, any miſpleading, " lack of colour, inſufficient pleading, or jeofail, any miſcon- " tinuance or (*e*) (*f*) (*g*) (*h*) diſcontinuance or (*i*) miſconveying " of (*k*) (*l*) proceſs, misjoining of the iſſue, (*m*) lack of warrant " of attorney of the party (*n*) againſt whom the iſſue ſhall be " tried, or other negligence of the parties, their counſellors or " attornies, had or made to the contrary thereof notwithſtand- " ing; and the judgment ſhall ſtand according to the ſaid verdict, " without reverſal."

On this ſtatute, a careful and exact collector, has the following notes, *vide* Danv. Abr. 352.

(*a*) But yet an iſſue upon the *vi & armis* is not within the act; but it muſt be one joined upon the ſpecial matter alleged. Cro. Jac. 599. and *vide* Sand. 81, 82. (*b*) But if in replevin the plaintiff is nonſuit after evidence, and the jury aſſeſs damages for the avowant, this is no trial within the act; for the inquiry of the jury is only in nature of an office of inqueſt. Cro. Eliz. 339. adjudged, 412. adjudged, and *vide* Goulſ. 49. Hob. 69. (*c*) So that an iſſue upon *nul tiel record* is not within the act. 11 Co. 8. a. Cro. Jac. 304. (*d*) In treſpaſs againſt *A.* and *B.*, *A.* pleads not guilty, and *B.* confeſſes the action, and a writ of inquiry is awarded upon the roll, but after *quoad B.* there is no continuance entered, and after the iſſue is found for the plaintiff, admitting there is a diſcontinuance *quoad B.* yet it is aided by the ſtatute; for *B.* was party to the original, and is privy to the verdict, being liable to the damages. Sir John Haydon's caſe, 11 Co. 6. b. adjudged. Roll. Rep. 31. adjudged, and *vide* Cro. Jac. 304. and *vide* Cro. Car. 313.—But an iſſue between the demandant and vouchee, is not within the act. And Kelw. 207. b. 5 Co. 36. b. 11 Co. 6. b. but *per* Hob. 281. this opinion is queſtioned, it not being ſaid party to the original. (*e*) If as to part the defendant joins iſſue, but ſays nothing as to the reſt, and this iſſue is found for the plaintiff, he ſhall have judgment. Gomerſal and Gomerſal, 11 Co. 6. b. 2 Leon. 194. Godb. 55. So 2 Roll. Rep. 161. Cro. Jac. 353. Hob. 187. 3 Lev. 39. and *vide* Goulſ. 109. Bulſt. 25. Cart. 51.—But if the matter is pleaded to the whole, though in fact but in anſwer to part, this is a bad plea, and not helped by the ſtatute. Hard. 331. (*f*) This extends as well to thoſe on the part of the plaintiff as on the part of the defendant. 2 Roll. Rep. 161. (*g*) Diſcontinuances after, as well as thoſe before verdict, are within this act. Cro. Eliz. 489. Cro. Jac. 528. and *vide* Cro. Car. 236. Cro. Jac. 211. Cro. El. 320. (*h*) Diſcontinuances are helped by the ſtatute, but not imperfect verdicts. 2 Leon. 196. Cro. El. 133. Godb. 57. 3 Lev. 55. (*i*) But if upon an information of uſury the Court awards a *ſubpœna* againſt the defendant, this is not a miſconveying, but a diſorderly proceſs, and not aided by the ſtatute. Topliff and Waller, And. 48. adjudged,

adjudged. Kelw. 214. adjudged, and there ſaid this is no more helped by the ſtatute, than if in *ejectment* the Court ſhould award a *petit cape*, or in a real action a diſtreſs or attachment; for ſuch diſorders were never intended to be redreſſed by the ſtatute, and *vide* Cro. Jac. 89. where one proceſs does not warrant the other.—So when a *venire* is awarded to a wrong officer, and he returns it, and thereupon a trial is had, this is a miſ-trial, and not helped. Brownl. 134. Cro. El. 574. 586. Moor, 356. pl. 482. Yelv. 15. 5 Co. 36. b.—But that miſ-trials, as where the *venue* was awarded of a wrong place, *&c.* were not aided by this ſtatute, *vide* Cro. El. 468. Goulſ. 38. Winch. 69. 4 Leon. 85. Cro. Jac. 647. Lit. Rep. 365. Moor, 91. pl. 212. Kelw. 212. 5 Co. 36 b. (*k*) But if there be any defect in an original, or in the return thereof, it is not helped by this act. Kelw. 207. And. 27. (*l*) As if a *diſtringas* is awarded where it ſhould be an *habeas corpora*. Savil. 37. (*m*) *Vide* Leon. 175. Cro. El. 145. 153. where the entry was, that the defendant *obtulit ſe per Higgens attor' ſuum*, without ſhewing his chriſtian name; and it was argued that it was helped by this ſtatute; and in Cro. El. 253. it was ſaid, that if there were any warrant of attorney, and his name appears, then it may be amended by it; but for this *vide* Roll. Abr. 289. Leon. 175. and *vide* 18 El. c. 14. by which a proviſion is made againſt the want of any warrant of attorney. (*n*) But if the judgment is not given upon the verdict, it is not within the act; as in debt againſt an heir upon the bond of his anceſtor, he pleads *riens per deſcent*, except twenty acres in *D.* and the plaintiff replies he hath more in *S.* upon which they are at iſſue; and it is found for the defendant, but the plaintiff takes judgment upon the confeſſion of the aſſets. Mollineux and Mollineux, Yelv. 169. reverſed by reaſon of a diſcontinuance; Cro. Jac. 236. reverſed accordingly, and ſaid the ſtatute muſt be intended where the verdict is the occaſion of the judgment, and *vide* Cro. Jac. 211. Cro. El. 339. 412. [*N. B.* This laſt point was determined on the ſtat. of 18 El. c. 14.]

This ſtatute, though much more extenſive than the others, and though it very much enlarged the authority of the judges in amendments in miſtakes, yet it remedied no omiſſion but one, which was the party's own neglect in not filing his warrant, which ſhould not after verdict prejudice the right of the party that had prevailed; therefore to remedy the omiſſions which the prevailing party might have been guilty of, as well as the other ſide,

By the 18 *Eliz. cap.* 14. it is enacted, "That after verdict "given in any action, ſuit, bill, plaint or demand in any court "of record, judgment (*a*) thereupon ſhall not be ſtayed or re- "verſed for want of form touching falſe *Latin* or variance from "the *regiſter*, or (*b*) other faults in form, in any writ original "or judicial, count, declaration, plaint, bill, ſuit or demand; "or for (*c*) (*d*) want of any writ (*e*) original or judicial, or by "reaſon of (*f*) any (*g*) imperfect or (*h*) inſufficient (*i*) return of "any ſheriff or other officer, or for want of any warrant of at- "torney, or for any fault in proceſs, upon or after any aid prier "and voucher."

(*a*) But if in treſpaſs againſt *A. B.* and *C. A.* pleads not guilty, and it is found for him, but againſt the other two, there is judgment by default, the want of an original may be aſſigned for error; for the verdict being found for *A.* he is out of the caſe, and it is as if the action had been brought againſt the other two only; but if the verdict had been for the plaintiff, the want of the original *quoad* the other had been cured. 1 Lev. 210. (*b*) But the omiſſion of *vi & armis* in a declaration of treſpaſs is ſubſtance, becauſe that is the inducement for the king's fine. Cro. Car. 407. March, 140. Cro. Jac. 443. 526. 536. but *vide* Cro. Jac. 130. 2 Roll. Rep. 285.—So is the aſſignment of a breach upon a recognizance for good behaviour. Cro. Jac. 412. (*c*) Leon. 30, 31. *Vide* where the original was determined and not revived. (*d*) An ill writ in ſubſtance, or a good writ which warrants not the declaration, is not aided by the ſtatute. Cro. El. 722. Goulſ. 126. Yelv. 108. 209. Sid. 84. 5 Co. 37. b. 3 Buſt. 224. Roll. Rep. 432.—When the variance is ſuch that it ſhall be taken as no original. Cro. El. 204. Hob. 251. Cro. Jac. 654, 655. Cro. Car. 327. Cro. El. 286. 3 Mod. 136. 10 Mod. 318. 368. 11 Mod. 68. pl. 3. 171. 230. 240. 12 Mod. 235. Fitzg. 96. 2 Roll. Rep. 382. 5 Co. 37. b.—But not ſo where the vitious writ is certified to be the writ upon which the proceedings were, and that there is no other. Cro. Jac. 185. 479. 664. 675. Palm. 428. Brownl. 96, 97. Cro. Car. 272. 281. Jones, 304. Latch. 116. Yelv. 109.—But where it appears there was a good original, no averment ſhall be taken that the proceedings were on the vitious one. Cro. Jac. 597. Palm. 428.—And in *ejectment*, where the declaration recited the original to be *ſummonitus eſt*, there being none upon the file, the Court would not intend a vitious one; but that there was a good one, which is loſt; and that the plaintiff's clerk miſtook in the recital thereof. Redman and Edolph, Sand. 317.—So the want of a *venire*, *diſtringas*, *&c.* is aided, but not a vitious one; and where a vitious one ſhall be taken as one, *vide* Cro. El. 467. Owen, 59. Moor, 465. Noy, 57. Moor,

Moor, 684. pl. 944. and *vide* Cro. El. 215. 257. 259. 422. 433. 781. Cro. Jac. 65. 162. 396. Cro. Car. 90. Moor, 402. pl. 535. 623. pl. 852. 696. pl. 967. Godb. 194. Leon. 329. Bulſt. 130, 131. 3 Bulſt. 180. Brownl. 78. 97. Yelv. 69. Roll. Rep. 22. Stile, 8. 483. March, 26. 2 Roll. Rep. 285. (*e*) The want of a bill on the file, which is in the nature of an original, is aided by the equity of this act. Hob. 130. 134. 264. 282. Jones, 304. Cro. Car. 282. Stile, 91.—and Cro. Jac. 109. to the contrary is not law.—*Quære* of the want of a plaint in inferior courts; but however an erroneous plaint is not helped. Cro. Jac. 108, 109. Stile, 115. Roll. Rep. 338. (*f*) But if there be no return, as if the writ be *album breve*, or the name of the ſheriff not indorſed, this is not helped. Roll. Rep. 295. 5 Co. 41. Cro. El. 310. 509. Yelv. 110. Cro. Jac. 188, 189. (*g*) *Vide* Stile, 91. 2 Roll. Rep. 247. In the return of the *venire*, the words *quilibet juratorum per plegiat'* were wanting; and Cro. Jac. 534. *per Curiam*, it was held not as a blank or no return, but as an inſufficient one, and helped. 2 Roll. Rep. 87. adjudged, becauſe by the appearance of the jurors it was ſalved, and ſaid it was not like Dr. Huſſey's caſe, where pledges were wanting upon an original, which *vide* 3 Bulſt. 275, 276, &c. Roll. Rep. 445, 446, 447. Cro. Jac. 414. where it is ſaid, that not finding pledges upon an original is merely the neglect of the party, and ſo not helped.—If a *venire* is awarded to the coroners, and returned by two of them only; whereas at the time of the award and return thereof, there were two more; this is only a miſ-return, and aided. Lamb and Wiſeman, Cro. Jac. 383. adjudged. Hob. 70. adjudged; and yet if one ſheriff of *London* makes a return without the other, this is not helped, being no return at all; for they make but one officer; and the Court knows that one ſheriff there is two perſons. Hob. 70. Q. Of this reaſon? (*h*) Upon the return of a *venire de medietate linguæ*, it did not appear which were denizens, and which aliens. Cro. El. 841. *per Curiam*. It is an inſufficient return, and aided by the ſtatute.—Upon the *venire* twenty-three only were returned, but the *habeas corpora* was awarded againſt the twenty-three and *A.*, and eleven of the other and *A.* were ſworn, and tried the cauſe. Fines and North, Jones, 302. adjudged, it was not helped; for *A.* was not returned by the ſheriff. Cro. Car. 278. 5 Co. 36. b. 37. a. Cro. El. 194. Brownl. 274. Jones, 357. and *vide* Sid. 66.—So if the trial had been by eleven of the twenty-three, and one of the *tales de circumſtantibus*, Sankill and Stocker, Cro. Car. 223. adjudged *per Curiam cont.* Croke. Jones, 245. but *vide* Brownl. 274. where it was adjudged according to the opinion of Croke, *vide* Latch. 54. but if twenty-five are returned, and the twenty-fifth is ſworn, and tries the cauſe, it is not helped, becauſe a miſ-trial, Cro. Jac. 647. but if tried by twelve of the other, it is helped. Cro. Jac. 647. This was before forty-eight were returned on the pannel. (*i*) In a *ſcire facias* upon a recognizance againſt the heirs and ter-tenants of the conuſor the ſheriff returns *J. S.* ter-tenant, but ſays nothing as to the heir, and *J. S.* pleads to iſſue, and it is found againſt him, Cro. Car. 295. adjudged by three judges againſt Croke, that *quoad* the heir, there being no return, it is not helped by the ſtatute; but *per* Croke, the defendant having pleaded to iſſue, and that being found againſt him, he ſhall not now take advantage of the heir's not being returned ſummoned, and Cro. Car. 312, 313. it was adjudged for the plaintiff, becauſe *quoad* the heir, it was only a diſcontinuance, which is aided by the 32 H. 8. c. 30. Jones, 319. adjudged.

These ſtatutes extended only to the courts above, but the ſubſequent ſtatutes extend to all courts of record, and remedy ſeveral defects and omiſſions not included in the former. 2 Sand. 258.

By the 21 *Jac.* 1. *cap.* 13. it is enacted, "That after verdict for plaintiff or demandant, defendant or tenant, baily in aſſiſe, vouchee, praiee in aid, or tenant by receipt, in any action, ſuit, bill, plaint or demand, in any court of record, judgment thereupon ſhall not be ſtayed or reverſed for any variance, in form only, between the original or bill, and the declaration, plaint and demand, or for (*a*) lack of the averment of any life, ſo it be proved the perſon living, or becauſe the *venire*, *habeas corpora* or *diſtringas* was awarded to a wrong officer upon any inſufficient ſuggeſtion, or (*b*) for that the viſne is in (*c*) ſome part miſ-awarded, or ſued out of more or fewer places (*d*) than it ought to be, ſo as ſome one place be right named, or for miſ-naming any of the jurors in (*e*) ſurname or addition, in any of the writs, or returns thereof, ſo as they be proved to be the ſame as were meant to be returned; or for that there is no return upon any of the writs, ſo as a pannel be returned and annexed thereto; or for that the ſheriff or other officer's name is not ſet to the return of ſuch writ, ſo as it appear by proof the writ was returned by him; or (*f*) for "that

(*a*) Sid. 61. (*b*) Cro. Car. 17. 162. 284. 480. Jones, 395. Stile, 201. 206. Raym. 67. (*c*) This ſtatute aids not, unleſs the venue ariſes from ſeveral places, and one of thoſe places is truly named. Sid. 20.—But if it ariſes from ſeveral places, though in ſeveral counties, and it is tried by

one only, it is helped. 2 Lev. 122. *per* Hale.

" that the plaintiff in ejectment, or other perſonal action, being " under age, appeared by attorney, and the verdict paſſed for " him."

(*d*) By the opinion of the greater part of the judges, where, by particular cuſtom a trial was to be *de vicinet'* of the four wards next adjoining, and the *venire* is awarded *de vicinet'* of two of them only, it is helped by the ſtatute. 2 Sand. 258. But Sanders *dubitavit*, whether it ſhould extend to aid any proceedings except ſuch as were according to the courſe of the common law. (*e*) But this extends not to any miſtake in the chriſtian name. Cro. Car. 202. (*f*) Stile, 216. * 218. *per* Roll. Ch. J. If the party appear by attorney, where he ought to appear by guardian, it is error, and not helped by this ſtatute. Danv. Abr. 2 V. tit. *Error*, fo. 12. pl. 13. and Rolls Abr. 1 V. 747. pl. 13. S. C. where he ſays the judgment was reverſed, becauſe the party plaintiff appeared in perſon. See 2 Sand. 212, 213. It ſeems the general opinion, that when the plaintiff appears by attorney, unleſs it is pleaded in abatement, it is cured after verdict for him, by the ſtat. 21 Jac. 1. c. 13. the words being expreſs. The caſes in the books *contra* (except that in Stiles) were *before* the ſtatute.

The main deſign of this ſtatute was to help any miſtake in the jury proceſs, but there were ſeveral things ſtill to be ſupplied, and ſeveral others to be adjudged form, which were always conſtrued to be matters of ſubſtance, and conſequently not aided by any of the former ſtatutes; wherefore the 16 & 17 *Car.* 2. was made, the act which *Twiſden* called *The Omnipotent Act.*

1 Vent. 200.

By the (*a*) 16 & 17 *Car.* 2. *cap.* 8. it is enacted, " That after " verdict in any action, ſuit, bill or demand, in the courts of " record at *Weſtminſter*, county palatine of *Cheſter* or *Durham*, " or of the great ſeſſions in *Wales*, judgment thereupon ſhall " not be ſtayed or reverſed for want of form or pledges, ſheriff's " name, returned upon the original, or for want of pledges upon " any bill or declaration, or for want of a *profert in curia* of any " deed, or of letters teſtamentary, or of adminiſtration, or for " the omiſſion of *vi & armis*, or *contra pacem*, or for the miſtake " of the chriſtian or ſurname of either party, ſums, day, month " or year, in any bill, declaration and pleading, being right in " any writ, plaint, roll or record preceding, or in the ſame, to " which the plaintiff might have demurred and ſhewed the ſame " for cauſe, or for want of *hoc paratus eſt verificare*, or *hoc para-* " *tus eſt verificare per recordum*, or *prout patet per recordum*; or " for that there is no right venue; ſo as a trial was by a jury of " the (*b*) proper county or place (*c*) where the (*d*) action is laid; " nor ſhall any judgment after verdict, confeſſion by *cognovit* " *actionem* or *relicta verificatione*, be reverſed for want of " *miſericordia* or a *capiatur*, or becauſe one is entered for the " other; nor for that *ideo conceſſum eſt per curiam* is entered for " *ideo conſideratum eſt*, &c. or for that the increaſe of coſts after " verdict in an action, or upon a nonſuit in replevin, are not " entered to be at the requeſt of the party for whom the judg- " ment was given, nor by reaſon that the coſts in any judgment " whatſoever, are not entered to be by conſent of the plaintiff; " and that all ſuch omiſſions, variances and defects, and (*e*) other " matters of like nature, not being againſt the right of the mat- " ter of the ſuit, nor whereby the iſſue or trial are altered, ſhall " be amended where ſuch judgments are or ſhall be removed by " writ of error."

(*a*) This act was only for three years, but is made perpetual *per* 22 & 23 Car. 2. c. 4.

(*b*) But this extends not to any trial in an improper county. Mod. 37. 199. 2 Mod. 24.

(*c*) In debt upon a bond in *London*, conditioned for the performance of covenants, one of which was for the enjoyment of *Shrub-walk*, in the foreſt of *W.* in *com. N.* and the defendant pleaded performance generally; and the plaintiff replied, that the Earl of *N.* having title by grant, &c. entered, and ouſted him; and the defendant pleaded the Earl of *N.* had no title; and thereupon iſſue was joined, and tried by a *viſne* of *Shrub-walk*, and found for the plaintiff; and though no *viſne* came

ariſe of the walk, and it could not be intended a vill, being only collaterally alleged as a thing granted, and not as a place where any fact was done, yet being tried by a jury of the county where the matter of the iſſue aroſe, it was adjudged for the plaintiff by three judges *con'* Twiſden, who ſaid it was not within the words, and being a new law, it ſhould not be taken according to the intent, againſt the words; and after, error was brought; but the parties agreed, the defendant making the plaintiff ſatisfaction. Lev. 207. Sid. 326. adjudged *per totam Cur' præter Twiſden*, though objected, the action being laid in *London*, the iſſue ſhould have been there tried, unleſs ſome other place had been ſhewed in the record; and *vide* 1 Lev. 122. (*d*) The plaintiff declared, that the defendant *apud London* ſaid of the plaintiff, that he had ſtolen plate at *Oxford*; and the defendant juſtified, that he did ſteal plate at *Oxford*, *per quoad* he ſpoke the words at *London*; and the plaintiff replied, *de injuriâ ſuâ propriâ*, &c. and thereupon iſſue was joined, and tried in *London*, and found for the plaintiff; and though it was adjudged, that the only point in iſſue was, whether the felony was committed, which was triable at *Oxford*; yet the plaintiff had judgment. Croft and Boite, Sand. 247, 248. by three judges, who ſaid, that the iſſue being tried by a jury of the proper county, it was within the expreſs words of the ſtatute; but Twiſden *fortment cont'*; and by the reporter, this judgment was given, not only againſt the opinion of Twiſden, but of ſeveral others, as he was informed; and being of counſel with the defendant, he agreed the meaning of the ſtatute was, that the iſſue ſhould be tried in the proper county where it ariſes, elſe it would be impoſſible, by any plea, to remove the trial from the county where the action is laid. Raym. 181. adjudged, that it was helped by the ſtatute; but ſaid, that the defendant might have demurred upon it. 2 Keb. 496. adjudged, Vent. 263. cited to be adjudged; ſo Adderly and Wiſe, 2 Lev. 164, 165. adjudged, Vent. 263. cited, and *vide* Raym. 392. where the like point was in queſtion, *& adjorn'*; ſo, 2 Jones, 82. *& adjorn'*. And in the caſe of Jenning and Hunking, Vent. 263. (where the Court ſaid it was within the words, but not the meaning of the act; for the intention was ſo, that the trial was in the county where the iſſue did ariſe,) but in regard of theſe precedents cited, they would not ſtay judgment; but, by the report of this laſt caſe, 2 Lev. 121. it does not appear how the judgment was; but Hale Ch. Juſt. there ſaid, the meaning of the ſtatute was, if the iſſue was tried in the county where the matter thereof aroſe; for it is not reaſonable to believe the parliament intended to alter the whole courſe of trials, and to have things tried in foreign counties, *& adjornatur*; and by the report of the ſame caſe, 3 Keb. 350. 371. 509. the parties agreed to amend, and lay the whole matter in the county where the action was laid; and ſaid, the Court inclined ſtrongly againſt the judgment cited. (*e*) Raym. 398.

The above ſtatutes being chiefly calculated to aid imperfections after verdict, and the ſtatute 27 *Eliz. c.* 5. aiding defects in form only on a general demurrer, it was thought adviſeable to enlarge the authority of the Courts further in favour of ſuitors; and therefore,

Carth. 66. Skin. 49. pl. 3.

By the 4 *Ann. cap.* 16. for the amendment of the law, it is enacted, "That where any demurrer ſhall be joined and entered in any action or ſuit in any court of record, the judges ſhall proceed and give judgment according as the very right of the cauſe and matter in law ſhall appear unto them, without regarding any imperfection, omiſſion or defect in any writ, return, plaint, declaration or other pleading, proceſs or courſe of proceeding whatſoever, except thoſe only which the party demurring ſhall ſpecially and particularly ſet down and expreſs together with his demurrer, as cauſes of the ſame, notwithſtanding that ſuch imperfection, omiſſion or defect might have heretofore been taken to be matter of ſubſtance, and not aided by the 27 *Eliz. c.* 5. ſo as ſufficient matter appear in the ſaid pleadings; upon which the Court may give judgment according to the very right of the cauſe, and no advantage or exception ſhall be taken of or for an immaterial traverſe, or of or for the default of entering pledges upon any bill or declaration, or of or for the default of alleging the bringing into court any bond, bill, indenture or other deed whatſoever, mentioned in the declaration or other pleading, or of or for the default of alleging of the bringing into court letters teſtamentary or letters of adminiſtration, or of or for the omiſſion

Note: This act is ſaid to have been penned by the great Lord Somers. See 2 Biſhop Burnet's Hiſt. of his own Times, p. 439.

" of *vi & armis*, *& contra pacem*, or either of them, or of or " for the want of averment of *hoc paratus eſt verificare*, or *hoc* " *paratus eſt verificare per recordum*; but the Court ſhall give judg- " ment according to the very right of the cauſe, as aforeſaid, " without regarding any ſuch imperfections, omiſſions and de- " fects, or any other matter of like nature, except the ſame " ſhall be ſpecially and particularly ſet down and ſhewn for " cauſe of demurrer."——*And*, " That all the ſtatutes of *jeofails* " ſhall be extended to judgments which ſhall be entered upon " confeſſion, *nihil dicit*, or *non ſum informatus*, in any court of " record, and no ſuch judgment ſhall be reverſed, nor any " judgment upon any writ of inquiry of damages executed " thereon, be ſtayed or reverſed for or by reaſon of any imper- " fection, omiſſion, defect, matter or thing whatſoever, which " would have been aided and cured by any of the ſaid ſtatutes " of *jeofails*, in caſe a verdict of twelve men had been given in " the ſaid action or ſuit, ſo as there be an original writ or bill, " and warrants of attorney duly filed according to the law as is " now uſed."

Carth. 158. 367. 520. Ld. Raym. 71. 151. 564. 5 Mod. 16. 69. Comb. 354. Salk. 49. pl. 9.

Notwithſtanding the great enlargement of the power of the judges, by the above recited ſtatutes in amending writs, proceſſes, *&c.* yet none of them were thought to extend to writs of error; and the rather, becauſe ſuch amendment would not be in affirmance of the judgment; but it being found that defective writs of error occaſioned great delay of juſtice,

By the 5 *Geo.* 1. *c.* 13. it is enacted, " That all writs of error " wherein there ſhall be any variance from the original record, " or other defect, may and ſhall be amended and made agreeable " to ſuch record, by the reſpective courts where ſuch writ or " writs of error ſhall be made returnable; and that where any " verdict hath been or ſhall be given in any action, ſuit, bill, " plaint or demand, in any of his majeſty's courts of record, " the judgment thereupon ſhall not be ſtayed or reverſed for any " defect or fault, either in form or ſubſtance, in any bill, writ " original or judicial, or for any variance in ſuch writs from the " declaration or other proceedings."

[By ſtat. of 4 *Geo.* 2. *c.* 26. for turning all law proceedings into *Engliſh*, it is provided, *ſ.* 4. that every ſtatute of jeofails ſhall extend to all forms and proceedings in *Engliſh* (except in criminal caſes), and that this clauſe ſhall be taken and conſtrued in the moſt ample and beneficial manner for the eaſe and benefit of the parties, and to prevent frivolous and vexatious delays.]

(C) Whether the Statutes of Amendment extend to the King, or to any criminal Proceedings.

Gilb. Hiſt. C. P. 116. *Vide* Cro. Car. 144.

IT has been a great queſtion, whether any of theſe ſtatutes extend to the caſe of the king, either to remedy the party where he has prevailed againſt the king, or the king againſt the party; but

but as it has been ruled in both cafes, and feems now eſtabliſhed that theſe ſtatutes do not extend to the king, it will be needleſs to enter minutely into this inquiry; for though only indictments, appeals and informations on penal ſtatutes are excepted in all the ſtatutes from 8 *H.* 6. *cap.* 12. yet becauſe the firſt ſtatute ſays it ſhall be amended on the challenge of the party, in which the king cannot be included, the ſubſequent ſtatutes are ſuppoſed to be made on the ſame platform; and that this exception is only *ex abundanti cautelâ*.

3 Mod. 7. 167. Fitzgib. 56. 122. 263. Stra. 62. Hob. 328. 4 Mod. 396. [Penal actions are not conſidered as criminal proceedings, and therefore within the ſtatutes of jeofails. Cowp. 382. 1 Wilſ. 125.]

Thus in a *quo warranto quare* the defendant claims a warren, the defendant preſcribes for a warren within the manor of *Ridge*, and the *venire* was awarded from the villa of *Ridge*, and not from the manor of *Ridge*, and a verdict for the defendant; the court awarded a new *venire**, becauſe they held the king was not within the ſtatute 21 *Jac.* 1. *c.* 13.

Jones, 320. Cro. Car. 312. * *Vide* Stat. 9 Ann. c. 20. ſ. 7. [The *venire* is now to be awarded of the body of the county, *vide* the ſtat. 4 Ann. c. 16. ſ. 6. and 24 Geo. 2. c. 18. ſ. 3. *Vide* head of *Juries*.]

So in an information for a ſeditious libel, the *venire* was returnable 13 *October*, and the *diſtringas* teſted 24 *October*, this was a diſcontinuance, becauſe not returned in the preſence of the party; and notwithſtanding the queen had a verdict, the court would not amend it, though ſuch amendment would have been warranted by the roll, where the *diſtringas* was well awarded.

Salk. 51. pl. 14. 6 Mod. 268. S. C. 2 Ld. Raym. 1061. 1472. Mich. 3 Ann. The Queen v. Tutchin, by three judges, *beſitante* Gould.

But it has been adjudged, that the ſeveral proviſos in theſe ſtatutes, which except appeals and indictments of felony, &c. and that they ſhall not extend to any writ, bill, action or information upon any popular or penal ſtatute; do not (*a*) extend to thoſe caſes in which a remedy is given by way of recompence to a party; as upon the ſtatute of *waſte*, for not ſetting forth tithe, forcible entry, &c.

Cro. Jac. 414. Sid. 66. Stile, 307. 2 Sand. 258. (*a*) But a writ of raviſhment of ward upon the ſtatute of *Weſtm.* 2. c. 35. is within the proviſo. Dr. Huſſy and Moor, 3 Bulſt. 275, 276. Hob. 101.

Alſo by the 4 *Ann. cap.* 16. for amendment of the law, it is enacted, "That all the ſtatutes of *jeofails* ſhall extend to all "ſuits in any of her majeſty's courts of record at *Weſtminſter*, "for recovery of any debt immediately owing, or any revenue "belonging to her majeſty, her heirs or ſucceſſors, and ſhall alſo "extend to all other courts of record." (*b*)

[(*b*) An information was laid, that teas were imported between, &c. and the day of exhibiting the information, which was the day of the ſeizure, and of courſe would have been excluded: leave was therefore given to amend, by extending it to the next day. Bunb. 49. p. 80. An information on the act of navigation was amended, by ſubſtituting the words *India goods* inſtead of *ſilks*; but the addition of other goods was not allowed, for that would have been to have made a new information. *Id.* 252. p. 327. In one caſe an amendment was permitted, which made quite a new offence; this was in an information of ſeizure for importing brandy and rum in caſks under *ſixty* gallons, by making it, as to the rum in caſks, under twenty gallons. *Id.* 334. p. 415. But where an indenture of appraiſement was dated before the writ of appraiſement, the Court inclined to think it might be amended. *Id.* 58. p. 99.]

And

Vide tit. *Informations.*

And by the 9 *Ann. cap.* 20. *ſect.* 7. it is enacted, "That the "ſtatute for the amendment of the law, and all the ſtatutes of "*jeofails* ſhall be extended to [all writs of *mandamus* and] informa- "tions in nature of a *quo warranto*, and proceedings thereon for "any the matters in the ſaid act mentioned."

(D) In what Caſes the Proceedings in Civil Cauſes are amendable, and the Manner thereof; as by amending one Part of the Record by another. And herein,

1. Of the Original Writ and Proceſs.

8 Co. 156. Cro. El. 644. S. P. Lit. Rep. 50. S. P. but if the inſtructions were wrong, it is not amendable. 2 Vent. 46.

THE original writ is made amendable by 8 *H.* 6. *cap.* 12. and other ſtatutes, when it is not made out purſuant to the inſtructions given to the curſitor; and likewiſe in thoſe miſpriſions which appear to be *vitia ſcriptoris*, and are not of the ſubſtance of the writ; as where the inſtructions to the curſitor are for a *præcipe* againſt *Lenthrop Frank*, *Milite*, and the curſitor makes the original *Lenthrop Frank*, *Generoſo*, the writ (*a*) ſhall be amended according to the inſtructions given the curſitor.

40. 130. S. P. Sid. 412. S. P. (*a*) So *deviſit* for *demiſit*, Rol. Abr. 198. Hob. 249. Brownl. 130. *Vacariam* for *Vicariam*, Hob. 128. were amended, becauſe the inſtructions to the curſitor in both caſes were right. [A *ca. ſa.* amended after it had been executed, by the award of the writ on the roll. 2 Bl. Rep. 836. A bill of *Middleſex* filed as of record of 24 G. 2. when it ought to have been of the 25th, amended by the præcipe. 1 Term Rep. 782. A bill of *Middleſex*, by a common informer in debt *only*, amended by inſerting "in a plea of treſpaſs with an *ac-etiam* in debt. 1 Bl. Rep. 462.]

2 Vent. 152. So if inſtructions are given to the curſitor for drawing a writ againſt *Weſtby*, and he by miſtake makes it *Weſtly*, and ſo are all the proceedings afterwards, this ſhall be amended; and accordingly the Court ordered the curſitor to attend, who ſatisfying them that his inſtructions were right, they ordered the original to be amended in court, without any application to the Chancery, or order thence, and they amended all the proceedings after.

2 Lev. 173. So where in a writ, it was *reddat* inſtead of *reddant*. 2 Sand. 38. So when there are two defendants, and the writ is *præcipe* to them both, *quod teneat conventionem*, this ſhall be amended, becauſe the inſtructions beginning againſt ſeveral, the curſitor had not purſued them.

Cro. Car. 74. Turner and Palmer. A *quare impedit* was brought *ad præſentand' ad eccleſiam de Watton*, where it ſhould have been *ad vicariam eccleſiæ de Watton*, though this be an error in ſubſtance, the vicarage being diſtinct from the parſonage; yet becauſe the inſtruction to the curſitor was right, and this a peremptory writ, it was allowed to be amended.

8 Co. 159. b. So if the party, in order to have a formedon in deſcender draws inſtructions that the land deſcended to him as ſon and heir of the donee, and the clerk draws the writ that the land

land deſcended to him as ſon, and omits heir, if the clerk ſhews his inſtructions, and will make oath thereof, it ſhall be amended.

Alſo the writ was holden amendable if there was (*a*) falſe *Latin*, or a word that was no *Latin*, if it were only in the (*b*) form of a writ; but if it were of the ſubſtance of the writ it could not; for by the ſtatutes the Courts are allowed, where they have ſufficient authority, to amend the form of that authority, but not to make an authority for themſelves, by altering the ſubſtance of the writ.

(*a*) For a diverſity between falſe Latin and no Latin, *vide* Lev. 2. 2 Vent. 173.

(*b*) There is a diverſity between the negligence and the neſcience of the clerk; for the negligence (as if he had a copy of the bond, and does not follow it) ſhall be amended; but his neſcience or ignorance in the legal form and cauſe of originals, is not amendable; for if this were allowed, it would introduce error and barbarity into legal proceedings. 8 Co. 159. a. Lev. 2.

Therefore if the writ be *imaginavit* for *imaginatus eſt*, or *avæ* for *aviæ*, it ſhall be (*c*) amended.

8 Co. 159. b. Moor, 5. pl. 17. S.P.

N. Bendl. 33. S. P. cited. And. 24. S. P. cited. (*c*) But in Blackmore's caſe, 8 Co. 159. b. *hos breve* for *hoc breve* is held not amendable; but *quære*, & *vide* 2 Vent. 173. which ſeems to hold otherwiſe.

But the eſſential part of a writ is not amendable; as in aſſiſe, where the *teſte* was *duodecno regis* for *duodecimo*, the writ was abated; (*d*) becauſe it would have been erroneous to have proceeded on a wrong writ; for this could not have been pleaded in bar of a new aſſiſe; and the Court could not amend it, becauſe the curſitor was judge of the day when the writ iſſued, and there were no inſtructions to amend the writ by.

Lev. 2. Heath and Paget.

(*d*) *Diſtrictionem*, when it ſhould have been *deſtructionem* in a writ of *teſte* not amendable. Freeman's caſe, 5 Co. 43. adjudged. Cro. El. 462. adjudged, the word there being *diſtructionem* with an *i*, and not an *e*. 2 Buſſt. 51. cited, and *vide* Hut. 56. *indicari* for *indictari*; and 2 Rol. Rep. 255.

So if a writ be brought againſt executors in the *debet* and *detinet*, that ſhall not be amended, becauſe the action is miſ-conceived, giving the Court authority to proceed againſt executors *jure proprio*, when they are not ſo chargeable by the law.

8 Co. 159. a. 5 Co. 36.

But the negligent (*e*) omiſſion of what the clerk in courſe ought to have inſerted (as the omiſſion of *dei gratiâ*) in the ſtile of the king, ſhall be amended.

8 Co. 160.

(*e*) So in a writ of partition, the omiſſion of the words *oſtenſurus quare non fecerit*, was ſupplied. 8 Co. 160. a.—In a *quare impedit*, the word *ad* was omitted and amended, Goulſ. 78. Cro. El. 119.—In a *formedon* of lands in *L.* the word *in* was omitted and amended. Noy, 73. [Teſte of a capias amended, as *vitium clerici*, and contrary to implied inſtructions. 2 Bl. Rep. 918. 1 Term Rep. C. P. 291. A replication amended after verdict, by inſerting the *ſimiliter* inſtead of, &c. Sayer v. Pocock, Cowp. 407.]

And here it may be proper to obſerve, that the want of an (*f*) original is (*g*) helped after the verdict by 18 *Eliz. c.* 14. ſo is the want of a (*h*) bill upon the file, (*i*) but the ſtatute does not extend to help a vitious writ.

(*f*) So is the want of a *venire*, *diſtringas*, and other proceſs. *Vide ſupra* the notes on 18 El. c. 14. and 2 Salk. 454. 2 Ld. Raym. 1143. (*g*) *Vide ſupra* the notes on 18 El. (*h*) That the want of bill upon the file, which is in nature of an original, is aided by the equity of the act. Hob. 130. 134. 264. 282. Jones, 304. Cro. Car. 282. Style, 91. (*i*) Cro. El. 722. Yelv. 108. Sid. 84.

But

Sand. 317. 3 Mod. 3. Redman and Edolph.

But if the original be misrecited on the roll, as in ejectment, if it be *summonitus* instead of *attachiatus*, after verdict, if on search no original is found, it will not be error, for the statute helps the want of an original to all intents, as if there had been a good one on the file; and if there had been a good one, such misrecital would not have been erroneous; and if the recital of the original be but form, it was not necessary after verdict to amend the bill.

2. Of the Imparlance Roll.

Roll. Abr. 198. Hob. 246. 2 Roll. Rep. 152. Moor, 892. Hut. 83. Lit. Rep. 278. In the King's

After the first term it is allowed in *C. B.* to amend the imparlance roll by the office paper-book, because that is instructions to the prothonotary to enter up the imparlance roll, and therefore that is equally amendable as the original is by the instructions given the cursitor; but this must be on affidavit that the paper-book has not been altered since the defendant's attorney has put his hand to it.

Bench they will amend both the bill and the roll by the office paper-book, because this is instructions for making them both; but they cannot amend from any other paper-book, because such book is not instructions left in the office to make up both the roll and the bill; but where there is no office-book, as where the general issue is pleaded, it seems they should amend either the bill or the roll by the declaration, of which they gave the defendant a copy, because such declaration is the only instruction to the clerk of the office *.

* In *B. R.* a bill is seldom filed, unless against a privileged person.—Where a bill is not filed, the Court will permit a right bill to be filed, without inquiring into the time of filing, and give the plaintiff leave to amend his plea-roll, by the bill filed. Gardener against Browne, Trin. 15 Geo. 3. B. R. 2 Str. 1151. [But an amendment shall not be made in this manner after verdict, if it change the record in a substantial point. 2 Wils. 147.]

Lit. Rep. 278. Hetley, 142. Latch. 165. Roll. Abr. 207. Cro. Jac. 165. Cro. Eliz. 258. 2 Leon. 120. 2 Mod. 316. 12 Mod. 684. Stra. 139. 2 Stra. 734. 2 Ld. Raym. 1441. 2 Str. 947.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or quantities, yet it may be amended by the paper by the clerks themselves, until a *recordatur* be ordered of the verdict returned on the *nisi prius* roll; but after such *recordatur* it can only be amended by the Court; for the roll lies with the prothonotary to be made up according to the paper-book, until the *recordatur* of the verdict be allowed; but if after the *recordatur* be entered, it is ordered on the roll *in statu quo tunc;* and then the Court is supposed to take conusance of it, in what manner it then was; and if the clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict which is on the *nisi prius* roll, which was settled by the judge of *nisi prius*, and cannot be altered but by rule of Court.

Roll. Abr. 191. Hob. 251. And note; If the count varies in

The imparlance roll cannot be amended by the original writ, because the original writ is the authority on which the Court proceeds, which the plaintiff must prosecute, for otherwise he does not proceed in that cause.

form, the defendant may plead it in abatement, for he has abated his own writ by prosecuting it in a different manner; but if it varies in substance, the defendant may move in arrest of judgment, because the Court has no authority to proceed, having prosecuted a different matter from that which the writ has given authority to the Court to take cognizance of. Jon. 304. Cro. Eliz. 722. Cro. Jac. 654.

The

The imparlance roll cannot be amended by the plea roll or *niſi prius* roll; for the imparlance roll is the original declaration and the ground of all. Roll. Abr. 207. Cro. Car. 92. Lit. Rep. 72. Hut. 92. Hetl. 59. 3 Bulſt. 227. Hob. 76. Latch. 165.

But if the declaration be againſt *H. B.* and he imparls by the name of *R. B.* but pleads by his right name *H. B.* this is no material fault, becauſe it is only a continuance from one term to another, and by pleading by his right name he acknowledges he imparled by a wrong name. Roll. Abr. 199.

3. Of the Plea Roll.

The plea roll may be amended by the imparlance roll, which is no more than a recital of the imparlance roll, and begins with an *alias prout patet*, being the count of the ſecond term, to which the defendant pleaded *ore tenus*. Hob. 76. Roll. Abr. 207.

If there be a miſtake in the attorney's name, it may be amended by the warrant of attorney; for the warrant of attorney being precedent, will amend the plea roll, and the Court will take notice that it is the ſame that appeared (*a*). Moor, 711. [(*a*) In the caſe of Richards *qui tam* v. Brown, the Court of K. B. gave leave to do the very reverſe to what was done in this caſe, *viz.* to alter the name in the warrant of attorney to that in the declaration, and this after error brought, and that variance aſſigned for error. Dougl. 110.]

But if the name of a ſtranger be put into the plea, this will be error, for it cannot then appear to the Court that the ſame man that appeared did plead, and then there was no plea pleaded; and ſo if the defendant's name be miſtaken in the putting in his plea, as if in an *audita querela*, the plaintiff ſurmiſes that he entered into a ſtatute of 300*l.* to the defendant, for the payment of 50*l. per ann.* for ſix years, to *John Buſh*, a ſtranger, if the defendant comes, and *proteſtand'*, *&c. pro plac' idem Johannes Buſh*, inſtead of the defendant; this is erroneous, becauſe it does not appear to the Court that the plea was put in by the ſtranger, to whom the payment was to be made, and not to the defendant; but if the plea had been, that the *prædict'* plaintiff *venit & dicit*, inſtead of the defendant, this will be conſtrued to be the miſpriſion of the clerk, for it is apparent, that the plaintiff could not be the defendant; but it ſhall be ſuppoſed to be put in by him that appeared, ſince there is no other perſon. Yelv. 38. Cro. Jac. 13. [The deciſion here referred to, is that of the court of errour: and the reaſon given by Yelverton why an amendment could not be made in this caſe, is, that the miſtake had been ſpecially ſhewn for cauſe of demurrer in the Court below, and the judgment of the Court had paſſed upon the cauſe ſo ſhewn, and therefore all amendments were ouſted.] Cro. Eliz. 904.

4. Of the Jury Proceſs, and *Niſi Prius* Roll.

If the *venire* be of the ſame place, and in the ſame action, and between the ſame parties, all other faults will be amended. *Vide* head of *Juries*.

But if the place be totally miſawarded, this is not helped by any ſtatute; but if it is only miſawarded in part, this is helped by the expreſs words of 21 *Jac.* 1. *cap.* 13. *Vide* 4 Ann. c. 16. ſ. 6, 7. and 24 G. 2. c. 18. 3. That the award is to be at large of the body of the county; and 3 G. 2. c. 25. Head of Juries.

In

Jones, 302. Godb. 194. Cro. El. 259. Cro. Jac. 528. *Quære.*

In ejectment, where the *venire* was *de placit' tranſgreſſionis*, omitting *& ejectionis firmæ*, the Court held the *venire* to be ill, becauſe it was not in the ſame action, for an action of treſpaſs and ejectment are different, and there might be an action of treſpaſs between the ſame parties; but if the *diſtringas* had been right, they would have judged this *venire* to have been null, and the want of a *venire* is aided by the ſtatute.

Cro. Car. 275. Danv. Abr. 334, 335. (*a*) The award on the roll being right, ſhall amend

If the *jurata* mentions the iſſue to be *de placit' tranſgreſſionis*, where the action is debt, and the award of the *venire* and *diſtringas* debt, this ſhall be amended; for the *jurata* is an award of the *diſtringas*, in purſuance of the award of the *venire*, and the *venire* being right, the (*a*) ſecondary proceſs ought to be made accordingly.

the *venire*, and the *venire* being right; ſhall amend the *diſtringas*, which is the proper proceſs for convening the jurors in the King's Bench: So of the *habeas corpora*, which is the Common Pleas proceſs. Lit. Rep. 252, 253.

Roll. Abr. 202. Cro. Car. 275.

So if the ſheriff return *nomina jurat' inter partes prædict' de placit' tranſgreſſionis*, where the *venire* is *de placit' debit'*, this ſhall be amended; for *in dorſo brevis* he ſays *executio iſtius brevis patet*, &c. which could not be if it was not in the ſame action.

Mo. 465. 710. Danv. Abr. 335.

The award of the *venire* muſt be to a day in the ſame term, or to the next term, but it muſt be in term, otherwiſe it is erroneous.

3 Mod. 78. 10 Mod. 88. 12 Mod. 107. 274. Ld. Raym. 95. 511. 2 Ld. Raym. 1144.

But if the *diſtringas* be without the day of *niſi prius*, or mention a wrong day, if the *jurata* roll be right, the *diſtringas* may be amended by the *jurata* roll.

Cro. Eliz. 760. 820. Owen, 62. Cro. Jac. 162. Cro. Car. 38. 2 Roll. Abr. 200.

So if the return of the *venire* be miſtaken, this may be amended by the roll; and if the *teſte* of the *venire* be out of term, or before plea pleaded, it is no error; for the *teſte* of judicial writs being only matter of form, ſhall not vitiate if miſtaken.

Vide head of *Juries.*

If the number or qualifications of the jury be omitted in the *venire*, it may be amended by the roll, and the rather, becauſe theſe matters are aſcertained by the law.

Danv. Abr. 330. Cro. Eliz. 202. 563. (*b*) But if the chriſtian name be wrong in the *diſtringas*,

If there be a miſtake in the chriſtian name of a juror, it is (*b*) incurable, for the ſtatutes do not extend to it, but only extend to cure ſurnames and additions, for there can be but one name of baptiſm, but there may be various ſurnames and additions; and therefore if it can be proved what perſon the ſheriff meant by his ſurname or addition, it may be amended and ſet right.

or in the pannel returned, or in the pannel of the jury ſworn, if it can be proved to be the ſame man that was intended to be returned in the *venire*, having there his right chriſtian name, it may be amended. Roll. Abr. 196, 197. 3 Bulſt. 18. Hob. 64. Brownl. 174. See 2 Stra. 1214.

Vide for this head of *Juries.*

If the court on an inſufficient ſuggeſtion awards the proceſs to an improper officer, yet this is aided after verdict, for that only makes an inſufficiency in the return of the jury, and inſufficient returns are aided; for it was the deſign of the ſtatute, that if the cauſe

cauſe was tried by a right jury, that it ſhould not be material what officer got them together.

As to the *niſi prius* roll, which is only a tranſcript of the plea roll to carry the iſſue into the country, if it differs from the plea roll in any matter which does not alter the iſſue, it may be amended; but if it differs in any matter which alters the iſſue, it cannot be amended by the plea roll, becauſe it does not give the judge of *niſi prius* authority to try the matter which is in iſſue between the parties on the plea roll (*a*). 8 Co. 166. Moor, 681. Carth. 506. 5 Mod. 211. Salk. 48, 49. (*a*) Variance in the *niſi prius* roll amended by the plea roll in indictment for forgery. Barnard. K. B. 31. 2 Ld. Raym. 1518. 2 Str. 843.

As if the iſſue be on the addition of the defendant's name, whether *J. S.* was huſbandman *die impetrationis brevis*, and the *niſi prius* roll be, whether he was huſbandman generally, omitting the words *die impetrationis brevis*, this is not the iſſue on the plea roll; and therefore cannot be tried. 8 Co. 166.

So in a bond conditioned for the payment of a certain ſum at the firſt ——— next enſuing the date, and on the *niſi prius* roll the date be omitted, this is not the ſame iſſue as on the plea roll. Brownl. 47.

But where the defendant's name is omitted in joining of iſſue, this ſhall be amended by the plea roll, becauſe the iſſue is not varied, and the juſtices of *niſi prius* have authority to try it by the *diſtringas*. Dyer, 260.

So where in an action on the caſe upon *aſſumpſit*, the defendant (upon the plea roll) pleads *non aſſumpſit*, and on the *niſi prius* roll it is *non culpabilis*, after verdict the *niſi prius* roll ſhall be amended by the plea roll, for both pleas traverſe the giſt of the action; and the defendant has the ſame advantage in the *non culpabilis*, as in the *non aſſumpſit*, and the iſſue is the ſame in ſubſtance. Roll. Abr. 202, 203.

So in ejectment againſt *ſeven* defendants, who entered into the common rule, and pleaded to iſſue, the plea roll, *venire*, *diſtringas* and *jurata* were right; but the iſſue on the *niſi prius* roll was between the plaintiff and *five* defendants only: after verdict for the plaintiff this was amended, for the leſſor's title was the giſt of the action, and the only thing inquirable of by the jury. Salk. 48. pl. 5. Ld. Raym. 94. 12 Mod. 107. Comb. 393.

5. Of the Verdict.

If the jury find a certain verdict, and it is entered uncertainly on the record, if the judge who tried the cauſe remembers certainly how the jury found it, it ſhall be (*b*) aſcertained by the memory of the judge, and the verdict may be made certain as the jury found it. (*b*) Where the *poſtea* is amendable by the notes of the verdict taken by the clerk of aſſiſe. Moor, 689. Cro. Eliz. 112. where the miſ-entry of the verdict ſhall be amended. *Vide* Cro. Eliz. 677. 2 Jones, 211. Special verdict amended after argument, without coſts. Ld. Raym. 335. See Str. 514. 1 Lev. 131. *Poſtea* amended by judge's notes. 2 Stra. 1197. 1 Wilſ. 33. [Where there is a general verdict on a declaration, conſiſting of different counts, ſome of which are inconſiſtent, or bad in point of law, and evidence has been given on the good or conſiſtent counts only, the verdict may be amended by the judge's notes. Dougl. 361. 718. *Aliter*, it ſeems, if evidence has been admitted on the bad or inconſiſtent counts. *Id.* 362. But an amendment by the judge's notes, it was formerly holden, could not be made after judgment. *Id.* 703. But it ſeems now, that it may be made at

at any time, even after final judgment, and a writ of error brought. 3 Term Rep. 749. A miſtake in not entering up a verdict on one of the iſſues, allowed to be amended by the judge's notes, after error brought for that reaſon, and joinder in error. *Id.* 659.]

Cro. Car. 338. Eliot and Skypp, adjudged.

As if in debt for 19*l.* 10*s.* the plaintiff declares upon a leaſe of copyhold lands, rendering 38*l. per ann.* and upon a leaſe of freehold land, rendering 20*s. per ann.* and demands 19*l.* for half a year's rent of the copyhold, and 10*s.* for the freehold; and upon *nihil debet* pleaded it is found for the plaintiff, *quoad* the 10*s.* for the freehold, and for the defendant *quoad* the 19*l.* for the copyhold; but in the *poſtea* it was returned, that they found for the plaintiff *quoad* 10*s.* part of the ſaid 19*l.* 10*s.* and *quoad* the reſidue *nil debet*, ſo that it was altogether uncertain which of thoſe rents were paid; yet if the judge that tried the cauſe remembers that, *quoad* the copyhold rent, the jury found for the defendant, and *quoad* the freehold for the plaintiff, the *poſtea* ſhall be amended accordingly.

Roll. Rep. 82. Roll. Abr. 207. Hetl. 52. Lit. Rep. 61.

Alſo a ſpecial verdict may be (*a*) amended by the minute or notes taken by the counſel or clerk of aſſiſe, after a writ of error brought.

Cro. Car. 144. 4 Co. 52. Salk. 47. pl. 4. 48. (*a*) But though a verdict, general or ſpecial, may be amended by the notes in the book of the clerk of aſſiſe, if there be a miſpriſion; yet this cannot be done in a criminal caſe. Salk. 53. pl. 19. 47. S. P. Ld. Raym. 141. 11 Mod. 84. *contr.* [And ſee Dougl. 362. where a miſtake in the verdict in a criminal caſe, was corrected from minutes ſigned by the jury. In Bunb. 283. a miſtake in a ſpecial verdict on an information of ſeizure, amended by minutes, after one argument.]

[The point in this clauſe was not touched upon in any of the paſſages referred to in the former editions.]

But nothing can be added to the minute or notes, though never ſo ſtrongly proved by the evidence, becauſe that would be to ſubject the jury to an attaint for a fact that was never found by them.

(E) What Defects may be amended or aided after Verdict: And herein,

1. Of the Want of ſufficient Certainty in the Plaintiff's Declaration, in not ſetting forth his Cauſe.

For this *vide* head of *Error*.

A Verdict cures not only ſuch defects as may be called artificial defects, and come within the purview of the ſeveral ſtatutes of amendment and *jeofail*, but alſo natural defects, or the omiſſions of the parties in their allegations, which muſt be preſumed to have been given in evidence to the jury; otherwiſe they could not have found a verdict for the party.

[After verdict, the inſertion in ſome of the counts of the defendant's name inſtead of

The chief intent of all the ſtatutes of *jeofails* ſeems plainly to be, that the wrong pleading of any collateral matters not eſſential to the action, ſhould, after the expence of a trial, and verdict for the party, be aided, but not to extend to matters of ſubſtance, or whatever is eſſential to the giſt of the action; for this would have ruined all proceedings in the courts of juſtice; beſides, had ſuch

ſuch eſſential part been ſet forth, it might occaſion a contrary verdict; neither can the jury be attainted for a falſe verdict on the uncertain allegations of the parties, for it cannot appear whether the damages given by the jury be proportionable to the demand or not.

the plaintiff's rejected as ſurpluſage. 3 Wilſ. 43.]

Whatever therefore appears to be eſſential to the giſt of the action, cannot be cured after verdict; for the law requires, that all ſubſtantial facts ſhould be laid in proper time and place, ſo that the defendant may traverſe them diſtinctly if he pleaſes; for as he may traverſe the whole, ſo he may traverſe each ſubſtantial part, in order to put the weight of the cauſe on any one thing that will put an end to the cauſe.

Vide head of *Pleas and Pleadings*, 5 Mod. 286.

But as this matter is more fully treated of under the heads of *Error* and *Pleas and Pleadings*, we ſhall here only obſerve, that the difference in all the caſes on this head turns upon what is *ſubſtance*, and what is *form*; which muſt be determined in every action according to its nature.

2. Of Repugnancy and Surpluſage.

Surpluſage does not vitiate after verdict, according to the maxim, *utile per inutile non vitiatur*; and therefore, if ſuch ſurpluſage is repugnant to what is before alleged, it is void; as if in trover, the plaintiff declares that he was on the 4th of *March* poſſeſſed of goods, and that afterwards, *ſcilicet* the 1ſt of *March*, they came to the hands of the defendant, who converted them.

Cro. Jac. 97. 428.

So in ejectment, the plaintiff declared on a leaſe made to him the 3d of *May*, and that the defendant *poſtea*, *ſcilicet* 1ſt of *May*, ejected him; this was held good after verdict; for by the *poſtea* it appears, that the defendant committed a *tort* on the plaintiff's title; and when he ſays a repugnant day, it is as if he had laid none; and if no day be laid, it ſhall be intended after verdict, that the *tort* was committed before the action brought; for it would be very foreign after verdict, to intend that the action was brought by the ſpirit of prophecy, for a wrong to be committed afterwards; beſides, the jury could not take cognizance of any fact done ſince the action brought, for that was not in iſſue.

Yelv. 94. Carth. 288, 289.

In debt on an obligation, the defendant pleads payment of 50 *l.* 14 *Junii* 11 *Jac.* according to the condition; the plaintiff replies *quod non ſolvit* 50 *l. prædict'* 14 *Auguſt' anno* 11. *ſuprad' quaſ. ad eundem diem ſolviſſe debuiſſet, & hoc, &c.* the verdict found *quod non ſolvit prædict'* 14 *Junii prout* the defendant had alleged; the objection here was, that no iſſue was joined, becauſe they do not meet in the time the money was paid; but the word *Auguſt* is plainly ſurpluſage, for when he ſaid *quod non ſolvit prædict'* 14 *die*, it is a ſufficient traverſe without the word *Auguſt*, and *Auguſt* is plainly repugnant to the word *prædict'*, for *prædict'* refers to *June*; and ſuch ſurpluſage being a repugnancy to what was before material, was idle and void.

Cro. Jac. 549. [See Cro. Ja. 585. where ſuch a variance in the *quantum* of the demand was holden to be fatal.]

Where the plaintiff may releaſe ſuch repugnant part, *vide* Sand. 282. 886. and head of *Pleas and Pleadings*.

But if there be a repugnancy in any point material, there it is not helped by a verdict, unleſs the verdict appears to have been given on a different part of the declaration.

Cro. Jac. 264. Sand. 116.

If the replication be repugnant to the declaration, it makes the declaration bad, becauſe the ſubſequent pleading falſifies the declaration; as if a man declares on a bond made 1 *Martii*, if the plaintiff replies that the bond was delivered 30 *Martii*, this falſifies the declaration; becauſe it could not be made the firſt; ſo if the rejoinder falſifies the bar, the bar is vicious.

3. Of Inſufficiency in the Defendant's Bar.

Cro. El. 778.

As the plaintiff's action muſt have all eſſentials neceſſary to maintain it, ſo the defendant's bar muſt be ſubſtantially good; and if the giſt of the bar be naught, it cannot be cured by a verdict found for the defendant; but if found for the plaintiff, he ſhall have judgment, either for the badneſs or falſehood of the bar; but if it be bad only in form, a verdict will cure it; and if the giſt be traverſed, all collateral circumſtances will be intended after a verdict.

5 Co. 43. Mo. 692. Cro. Jac. 377. S. C. cited.

Thus in an action of debt on a ſingle bill, the defendant pleads payment without an acquittance, and it is found for the defendant, yet he ſhall not have judgment, becauſe the giſt of the plea is bad, ſince the obligation is in force till diſſolved *eo ligamine quo ligatur*, and the acquittance under the ſeal of the plaintiff is the giſt of the bar; but if it had been found for the plaintiff, he ſhould have judgment, becauſe the bar was not only bad in ſubſtance, but found falſe.

Vide head of *Pleas and Pleadings*.

But if the bar be only bad in form, a verdict will ſupply it; as if in debt on a bond conditioned for payment of 100*l*. 25 *Junii prox'*, and the defendant pleads payment on the 20th of *Junii*, and it is, according to the plea, found that he did pay it the 20th; though this bar be bad in form, becauſe it does not follow the condition, and the plaintiff might have taken advantage of it on a ſpecial demurrer, yet the verdict having found payment *before* the day, that in law is payment *at* the day, and the ſubſtance is found.

4. Of immaterial and informal Iſſues.

Lev. 32. Carth. 371. (*a*) An *immaterial* iſſue is where what is materially alleged by the pleadings is not traverſed, but an iſſue taken upon ſuch a point as will not determine the merits of the cauſe; and an *informal* iſſue is where it is not traverſed in a right manner. Brownl. 229. Cro. El. 22 2 Mod. 137. 10 Mod. 19. 11 Mod. 2. Ld. Raym. 168. 2 Stra. 933. 2 Barnard. K. B. 55. 2 St 1011.

A verdict cannot help an (*a*) *immaterial* iſſue; for if what is material in the pleadings be not put in the iſſue, it is not made neceſſary to be proved on the trial; or if it be alleged and proved, yet if it appear inſufficient, ſo as not to be deciſive between the parties, the verdict will be no good foundation for the judgment; but an *informal* iſſue is helped by the verdict.

If the plaintiff declares on a promiſe to find the plaintiff, his wife, and two ſervants, with meat and drink for three years, on requeſt; the defendant pleads that he promiſed to find the plaintiff meat, &c. *abſque hoc*, that he did promiſe to find, &c. for three years next following, and *hoc petit*, &c. and verdict for the plaintiff; yet he ſhall not have judgment, becauſe the promiſe in the declaration is laid to be on requeſt, which promiſe is not traverſed in the ſame manner: beſides the plaintiff in his replication alleges a promiſe next after he was married, which is not the ſame the defendant traverſed; ſo that they are not at iſſue a point traverſed in bar, ſince the bar is for a contract for three years on requeſt, and the replication for a contract for three years next enſuing the marriage, and *non conſtat* by the verdict, which of the contracts was proved on the trial.

3 Leon. 66. Kirlee and Lees. 2 Leon. 195. S. C. cited. Godb. 56. S. C. cited.

So in treſpaſs, the defendant pleads an accord between the plaintiff and *J. S.* of the one part, and the defendant of the other part; the plaintiff replies *quod non habetur talis concord'* between the plaintiff and defendant, *qualis* the defendant had alleged; and iſſue joined and verdict for the plaintiff; yet he ſhall not have judgment, becauſe he does not traverſe the ſame accord that is ſet out in the defendant's bar, but puts another accord in iſſue, not alleged in the defendant's bar, *viz.* between the plaintiff and defendant only.

Roll. Rep. 86.

So in debt on a bond conditioned for the payment of 105 *l.* the defendant pleads payment of 100 *l. ſecundum formam & effectum conditionis*; the plaintiff replies, *non ſolvit prædict'* 105 *l* this is an (*a*) immaterial iſſue, not aided, for the plaintiff has not traverſed the ſame payment that is in the defendant's plea.

Cro. Jac. 585. Sandbank and Turvy, Cro. Car. 593. S. P. adjudged upon error. Hob. 173. S. P. adjudged.

(*a*) But where an iſſue is deciſive between the parties, though not ſo apt, it ſhall be cured after verdict; *vide* 2 Jon. 184. Cro. Jac. 44. 435. and heads of *Error*, and *Pleas and Pleadings*.

If an iſſue be on a point that is impoſſible in *ſubſtance* and *nature* of the thing, it is not cured by the verdict; but if it be only impoſſible in the *manner* and *form* of it, a verdict will cure it; as in debt on a bond conditioned for the payment of 100 *l.* on the 31ſt of *September*, and defendant pleads payment at the day, and it is found againſt him, the plaintiff ſhall have judgment; becauſe the payment is what is material, and the day impoſſible, and is altogether idle and void; for not being paid before the end of that month, the obligation is abſolute.

Cro. Car. 78. Purchaſe and Jegon. Jones, 140. S. C. Latch. 158. S. C. Noy, 85, 86. S. C. adjudged.

In an action of aſſault and battery, the defendant pleads that the plaintiff neglected his ſervice, *per quod moderate caſtigavit*; the plaintiff replies, *quod non moderate caſtigavit*, and the iſſue found for the plaintiff; though this be an informal traverſe, being (*b*) rather a traverſe of the chaſtiſement, than of the moderate manner of doing it, and the right traverſe ſhould have been *de injuriâ ſuâ propriâ abſque tali cauſâ*; yet after verdict it is good, becauſe the jury have aſcertained that he did not beat him moderately.

Sid. 444. Vent. 70. 2 Keb. 623.

(*b*) Where an iſſue joined on a negative pregnant, though bad on a demurrer, is good after verdict, *vide* Cro. Jac. 87. and head of *Pleas and Pleadings*.

Noy, 56. 2 Jones, 184. (a) Where not guilty was pleaded to an *aſſumpſit*, yet the plaintiff had judgment, tho'

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it ſhall be aided by the ſtatute; becauſe being an (*a*) ill plea, and a falſe one, the plaintiff ought to have his judgment, both for the badneſs of the plea and for its falſehood; but if the verdict had been for the defendant, yet the plaintiff ſhould have judgment, becauſe the declaration is not anſwered by the plea (*b*).

an improper plea. Cro. Eliz. 470. 2 Roll. Rep. 368. *cont.* In debt againſt an executor upon the bond of his teſtator, the defendant pleads *non eſt factum*, &c. Hard. 458. In an action of covenant, on a covenant that *C.* was ſeiſed in fee, and aſſigns for breach that *C.* was not ſeiſed in fee, & *ſic infregit conventionem*; though, in covenant, the defendant ought to traverſe either the deed or the breach, and both cannot be involved in *non fregit conventionem*; becauſe the giſt of the action lies on the deed, which muſt be traverſed by itſelf; yet when the defendant pleads a bad plea, which is found againſt him, the plaintiff may have judgment either for the inſufficiency or falſity of the plea. Sid. 289. Lev. 183. S. C. *vide* Moor, 399. Cro. Eliz. 457. 2 Leon. 116. S. P. [(*b*) *Qu.* If in debt on a penal ſtatute, as, for not ſetting forth tithes, for uſury, &c. not guilty would not be a good plea, though *nil debet* is the proper, formal plea. 1 Term Rep. 462.]

Roll. Abr. 200. Yelv. 65. S. P. Cro. Jac. 67. adjudged. Cro. Eliz. 752. S. P. adjudged. Palm. 524. S. P. *per Cur'*. *Miſnomer* in

If on an iſſue tendered by the plaintiff, the defendant joins the *ſcilicet* by the plaintiff's name, or the plaintiff joins the *ſcilicet* by the defendant's name, to an iſſue tendered by the defendant, this ſhall be amended, there being a negative and affirmative before, between the plaintiff and defendant, which is the pattern whence the joining that iſſue is to be taken; there is a ſufficient copy whence this may be amended, it being, from the nature of the thing, a plain miſtake of one man's name for another.

joining iſſue upon an information. Stile, 167.

(F) Of amending the Judgment.

Leon. 134. 8 Co. 158. Carth. 158. 267. 520. Ld. Raym. 565. 5 Mod. 16. 69. Comb. 354.

IT is a general rule, that the Court will make no amendment that will defeat a judgment, the ſtatutes allowing amendments in affirmance of judgments only. But see now 5 G. c. 13. *ſupra.*

Roll. Abr. 337.

But in affirmance of the judgment, the judgment itſelf may be ſet right and amended by another part of the record, in a fact which appears to be the miſpriſion or neglect of the clerk, as in the miſtake of the names of the parties; ſo in debt againſt *A.* and the judgment is *quod prædictus B. capiatur*, when it ſhould have been *prædict' A.* this ſhall be amended.

Vent. 217. [This caſe was on a writ of error from *Ireland*; and ſee Cowp. 841. where the

So in an action brought by *Robert Meredith*, and the judgment as entered, was *quod prædict' Carolus Meredith recuperet*, and the Court held this amendable, being only the fault of the clerk, the miſpriſion being only in the name, which was right in the rest of the record, which was before the clerk, and ſhould have directed him.

Court of King's Bench, in this country, amended a record in ejectment from thence, by enlarging the term.] *Vide* ſeveral caſes to this purpoſe, Cro. El. 400. 864. Hob. 327. Moor, 361. 697. Hut. 44. Brownl. 56. Raym. 39. Comb. 64.

So if in an action of debt upon an obligation againſt *Rob. H.* conditioned that if *Henry H.* or *Rob. H.* the defendant, ſhould pay, *&c.* judgment is entered that the plaintiff *recuperet debitum & damna* againſt the ſaid *Robert*, *& prædictus Henricus in miſericordia*, where it ſhould have been *Robert*, for *Henry* was no party to the record; this ſhall be amended, for it is only the miſtake of the clerk. Cro. Car. 594. Pelham and Heming. A judgment *quod prædictus Thomas recuperet*, inſtead of *prædict'*

Arthurus, amended after twenty years ſtanding. 4 Mod. 371. 12 Mod. 384. 2 Stra. 1132. 1156. 1182.

As to amending the judgment by the docket, it is to be noted, that before the ſtatute 4 & 5 *W. & M. cap.* 2. which, for the ſecurity of purchaſers, requires that all judgments ſhould be docketed, the Courts uſed to amend both the judgment and the docket, where there were ſufficient inſtructions to amend by; but now the docket cannot be amended; and therefore if there be a falſe docket, which is as none, though a right judgment, the purchaſer is ſafe, and the party grieved muſt take his remedy againſt the officer for not docketing it truly. Cro. Car. 574. Raym. 39. Sid. 79. 1 Wilſ. 61. 2 Str. 1209.

In a *quare impedit* for the preſentation of a *vicarage*, and the judgment is *quod recuperet eccleſiam*, this ſhall be amended (*a*), being the miſtake of the clerk, who had ſufficient inſtructions from the *poſtea* to enter it right. Hob. 327. Hut. 41. Cro. Jac. 633. S. C. (*a*) So in debt, where

the judgment was entered *quod recuperet* the ſum in the declaration, *pro miſis & cuſtagiis*, inſtead of *pro debito prædict'*, and amended. Vent. 132. In debt againſt an attorney by bill, the judgment is *quod querens nil capiat per breve*, where it ought to be *per billam*, yet it ſhall be amended. Roll. Abr. 206. Cro. Car. 580.

So if judgment be againſt a man and his wife, and the judgment is that the wife is *in miſericordia*, and not the huſband, this is amendable by the paper-book that is right. Hob. 127. Moor, 869. Cro. Jac. 633. Brownl. 16. Roll. Abr. 206. 215. S. C.

In ejectment brought by two, if judgment be entered that the plaintiffs *recuperet*, this is a plain miſtake of the clerk, and ſhall be amended. 2 Jones, 199. [Where judgment was entered againſt ex-

ecutors *de bonis propriis* inſtead of *de bonis teſtatoris*, and error brought upon it; this being conſidered as merely the blunder of the clerk, was amended, after argument in the Exchequer-chamber. 5 Burr. 2730. 2 Lev. 22.]

If the damages *de incremento* be (*b*) miſtaken by the clerk, the Court will amend it by the judgment-book, becauſe that was a ſufficient inſtruction to the clerk to have entered the judgment by, and therefore it was his miſpriſion not to go according to his inſtructions, which may be rectified and amended. Roll. Abr. 205. (*b*) As where the jury found for the plaintiff, and gave 2 *s.*

damages, and ſo much for coſts, and the clerk, in entering thereof, ſays 2 *s.* for damages, and ſo much for coſts, and ſo much *pro incremento*, *quæ in toto ſe attingunt* to ſo much; in which ſum the 2 *s.* is not comprehended, this ſhall be amended. 3 Bulſt. 114. 8 Co. 162. Palm. 509. Dyer, 55. Roll. Rep. 272. and *vide* like amendments in declarations, where the total ſum is miſcaſt. Bulſt. 171. 179. 2 Bulſt. 149. Yelv. 5. Noy, 44. Poph. 209.

In ejectment, if the judgment is entered *quod querens recuperet* the damages and coſts, and not *quod recuperet terminum*, as the caſe is, this ſhall be amended, though this be but an action of treſpaſs in its own nature. Roll. Abr. 206.

Roll. Abr. 205. In the award of a repleader for the error of the defendant's plea, it was entered *quia placitum eſt ſufficiens in lege*, inſtead of *quia minus ſufficiens eſt*, and the Court held this not amendable (though it was right in the paper-book between the parties); but Popham and Granville *contra*. Owen, 19. And *qu.* If thoſe *contra*, were not right?

If a judgment be given on demurrer againſt the plaintiff, and the entry of the judgment is of a nonſuit inſtead of a judgment in demurrer, this ſhall be amended.

2 Sand. 289. Between Pool and Longville, amended after a writ of error brought, and the firſt judgment affirmed accordingly. Raym. 39. S. P. cited. Sid. 70. cited. [Where, in replevin, the defendant made cognizance for rent in arrear, and the jury found for him, and damages to the amount of the rent claimed in the cognizance; but did not find either the amount of the rent in arrear, or the value of the cattle diſtrained, and judgment was entered for the damages aſſeſſed, he was permitted to amend his judgment, and to enter a judgment *pro retorno habendo*. Rees v. Morgan, 3 Term Rep. 349.]

If in replevin the defendant demurs to the plaintiff's plea in bar to the defendant's avowry, and judgment is entered *quod viſis præmiſſis*, &c. *videtur juſticiariis quod placitum prædict'*, &c. *minus ſufficiens*, *&c.* but theſe words, *ideo conſideratum eſt quod* the plaintiff *nihil capiat per breve ſuum, ſed ſit in miſericordia, & prædict'* defendant *eat inde ſine die* are totally omitted, yet this ſhall be amended.

3 Mod. 112. If judgment is given upon a demurrer, and a writ of inquiry awarded, but in the entry thereof upon the roll, theſe words *per ſacramentum duodecim proborum & legalium hominum* are left out, this ſhall be amended.

Salk. 50. pl. 13. Parſons and Gill. Ld. Raym. 695. Com. Rep. 117. In debt upon a *mutuatus* the judgment was entered up as of *Hil.* term 1700, whereas the borrowing appeared to be 2 *April* 1701. After error brought it was moved to amend the judgment by the paper-book ſigned by the maſter, which was the 2d of *January* 1700, and allowed to be amended; for it is but a ſlip of the clerk, who ſhould have peruſed the paper-book ſigned by the maſter, which is authentic enough to amend by.

Cro. Eliz. 407. Palm. 98. But if there be a miſtake or error in the judgment in any ſuch matter in which the clerk has no inſtructions; as if before the 16 & 17 *Car.* 2. *cap.* 8. a *capiatur* were entered for a *miſericordia*, or *e converſo*; this was error in the judgment, becauſe before the ſtatute it made a fine to the king, and a difference in the execution; and there being no inſtruction in the record itſelf, or in the judgment-book, whereby to amend it, it did not appear whether it was the error of the clerk in the entering, or of the Court in giving the judgment, and therefore could not (*a*) be amended; but may now by 16 & 17 *Car.* 2. *c.* 8. and the 5 *W.* & *M. cap.* 12. takes away the *capiatur* fine, in actions *vi & armis*, therefore no *capiatur* ſhall be entered againſt the defendant, nor any thing in lieu thereof (*b*).

12 Mod. 104. 2 Ld. Raym. 1284.

(*a*) 4 Mod. 6. Carth. 367.

(*b*) Carth. 390.

(G) At what Time the Amendment muſt be made; and therein of Records removed out of inferior Courts, and paying of Coſts.

IT ſeems to be the eſtabliſhed doctrine of the Courts, to allow the plaintiff to amend his declaration at (*a*) any time, whilſt the cauſe is in paper, on payment of coſts, and giving the defendant liberty to alter his plea, becauſe the pleading in paper came in only inſtead of the ancient way of pleading *ore tenus*, and in pleading *ore tenus* the record was only in *fieri*; but after the pleadings were entered on record, if it were not a record of the ſame term, it could not be amended or altered.

Salk. 47. pl. 1.

(*a*) And by Style's Pract. Reg. 45. the plaintiff may amend his declaration, though it be ſeven years paſt ſince he declared, if it be but in paper, paying coſts, or ſuffering the defendant to imparl till the next term after. After plea pleaded, and the replication and rejoinder to part, and iſſue, notice of trial with *proviſo* as to the other, and rule ſerved to make up the iſſue to carry it down to trial; and the *niſi prius* roll ingroſſed in parchment; all the proceedings above continuing in paper, the plaintiff had leave to amend upon payment of coſts. Fareſt. 156. 8 Mod. 226. Ld. Raym. 95. 116. 134. 183. 548. *Vide* Salk. 47. pl 3. where Holt ſaid, that he had known an amendment made, not only after plea pleaded, but after the record was ſealed up, juſt even when it was going to be tried. The defendant cannot amend his plea after iſſue joined, or demurrer thereto; for by this he delays the plaintiff, which may turn greatly to his prejudice. Style's Pract. Reg. 49. Ld. Raym. 669. 679. 683. Str. 11. Salk. 179. Lutw. 1218. *

* The Courts have, in many caſes, ſuffered the defendant, on payment of coſts, and ſubmitting to terms, to amend his plea after demurrer, and even after argument, where leave was prayed before judgment given; *i. e.* where defendants had merits.

If the plaintiff declares, and the defendant pleads, and the plaintiff replies, and the defendant demurs, and the plaintiff joins in demurrer; yet the plaintiff may move to amend on paying of coſts, if the cauſe be ſtill in paper; ſo may he withdraw a demurrer not entered of record, and move to amend.

But where the plaintiff declared againſt *J. G.* knight, the defendant pleaded in abatement he was a knight and baronet; and the plaintiff replied that he was a kinght, *&c.* on motion to have it amended upon payment of coſts, all being in paper, and that the action being by bill the addition was not material; not being within the ſtatute of additions it was denied, there being nothing to amend by, and the defendant had taken (*b*) advantage of the fault.

Salk. 50. Leperd and Germain.

(*b*) Where, after a demurrer, the Court cannot give leave to amend, *vide* Bulſt. 204. March 1. Yelv. 38. Cro. Jac. 13, 14. Leon. 28. Sid. 54. 107. Raym. 231. 2 Vent. 142. 3 Lev. 39. 2 Bulſt. 149. 3 Mod. 235. Ld. Raym. 669. 679. 6 Mod. 263. 310. Fitzgib. 193. 2 Stra. 890. Barnard. K. B. 408. where, after iſſue joined, or plea pleaded, and where not. Vent. 336. Style Rep. 33. 85. But ſee the laſt note to the firſt clauſe. [A mere clerical miſtake in the return to a *mandamus*, may be amended after the return has been filed. Dougl. 130. Rex v. the Mayor, *&c.* of *Lyme Regis*. 1 Str. 273. A declaration in *quare impedit* was allowed to be amended after the defendant had craved *oyer* of the writ, and pleaded a variance between the writ and count. 2 Wilſ. 118.]

An action was brought by the maſter on the ſtatute of *Winton*, for a robbery committed on his ſervant, in which he declared of an aſſault and battery done to himſelf, (though then fifty miles from the place,) alſo that he made oath that he did not know any of the perſons; the iſſue was entered of record, and the jury appeared at the bar ready to try it, but being for other

3 Lev. 347. Bearcroft v. Hundred of Barnham and Stone.

buſineſs adjourned to another day, the plaintiff obſerving his miſtake moved to amend, by declaring of a robbery on his ſervant, *&c.* and it appearing that the year in which the action muſt be brought was expired, and conſequently the action muſt be loſt, if not allowed; the Court after long debate, and conſideration of former precedents, admitted him to amend.

Hil. 4 G. 2. The Dutcheſs of Marlborough and Wigmore. Fitzgib. 193. 2 Stra. 890. Barnard. K. B. 408.

So where in *aſſumpſit* an executor laid the promiſe to be made to his teſtator, and the defendant pleaded the ſtatute of limitations, and on motion to amend and lay the promiſe to himſelf, it was objected, that this would alter the nature of the (*a*) iſſue, and take away the party's defence; yet it appearing that by the expiration of the ſix years the action would be loſt, the Court gave leave to amend.

(*a*) If the iſſue ſhall be changed thereby, there ſhall be no amendment. Lit. Rep. 349. Hetl. 164. Mo. 681. 2 Roll. Rep. 312. [Where an executor had pleaded a former judgment recovered, but by miſtake had ſtated a leſs ſum than the judgment was really for, the Court of C. P. gave leave to amend, though the record had been made up near three years; but they at the ſame time permitted the plaintiff to reply *per fraudem*. Skutt v. Woodward executor. 1 H. Bl. Rep. 238.]

Lit. Rep. 278. Cro. Jac. 142. 365. 2 Leon. 120. Hetley, 142. Latch. 164. 2 Mod. 316. 12 Mod. 8. 684. Stra. 139. 2 Stra. 734. 2 Ld. Raym. 1441. 2 Stra. 947.

If the bill on the file be with blanks, or the imparlance roll be with blanks for dates or (*b*) quantities, yet it may be amended by the paper by the clerks themſelves until a *recordatur* be ordered of the verdict returned on the *niſi prius* roll; but after ſuch *recordatur* it (*c*) can only be amended by the Court, for the roll lies with the prothonotary, to be made up according to the paper-book, until the *recordatur* of the verdict be allowed; but if after the *recordatur* be entered it is ordered on the roll *in ſtatu quo tunc*, and then the Court is ſuppoſed to take cognizance of it, in what manner it then was, and if the clerks might afterwards alter the roll after entry of the verdict, they might amend it in the verdict which is on the *niſi prius* roll, and it cannot be altered but by rule of Court.

(*b*) So in an *ejectione firmæ*, where the bill was with blanks for the quantities of land and meadow. Roll. Ab. 207. 8 Co. 162.

(*c*) Raym. 53. S. P.

Cro. El. 435. 459. 677. 2 Roll. Rep. 471. 8 Co. 162. Moor, 407. Hob. 327. Hut. 41. Roll. Abr. 209, 210. Salk. 49. 2 Jones, 212.

The inferior court whence the record is returned, whether it be by the Common Pleas, or another court of record, may amend after judgment, as well after as before a writ of error brought, and the rule of ſuch amendment is to be certified by the clerk of ſuch inferior court to the ſuperior; for though the record is removed by writ of error, and a *mittimus recordum* is entered on the roll, yet the writ of error is to ſend the record in the ſtate and condition in which it ought to be by law, and that is corrected from all miſpriſions of clerks; or on alleging diminution the record is to be ſent up amended as it ought to be, or it may be amended in the ſuperior court, if the other refuſeth; for as it ſuperintends ſuch inferior court, ſo it may correct the miſpriſions of the clerks of that court.

Cro. Car. 410.

But there is this difference, where the clerks carry the rolls of amendment to a ſuperior court, and where diminution is alleged, and a *certiorari* thereon iſſues; for when the clerks bring up the roll, it appears to have been amended by the date of the rule

rule after error brought; but when diminution is alleged, they bring up the record *in ſtatu quo* the *certiorari* finds it; and therefore when it is brought up they will intend it to be amended at the time of the judgment given, and that the tranſcript firſt ſent up was a diminution and a miſtake; and therefore if dower be brought againſt an infant, who appears and pleads by guardian, he ought not to be amerced, for an infant cannot be amerced for his indiſcretion; nor a guardian, becauſe he is appointed by the Court; ſo this is error in the judgment itſelf, which is not amendable; and if certified by the clerks of the court to have been amended after error brought, could not have been amended, but yet certified to the *certiorari* rightly amended, they will ſuppoſe it was amended the ſame term judgment was given, and during that term, whilſt matters are *in fieri*, they can rectify not only the miſpriſion of clerks, but their own miſtakes.

If a writ of error be brought, the defendant in error ſhall pay all the coſts of the writ of error, becauſe until the record was amended, the plaintiff in error had ſufficient reaſon to bring the writ; but then the plaintiff in error muſt nonſuit his writ; for if he proceed to reverſe the judgment on any other error, there the defendant ſhall not pay coſts for his amendment, becauſe it is plain that the plaintiff did not depend on the error the defendant had amended. 3 Lev. 344, 345. Salk. 49. 3 Ter. Rep. 351.

(H) Where Records defaced by Deſign or Accident, will be ſet right and amended.

IF any part of the record be vitiated by razure, the Court will reſtore it by amendment, becauſe the wickedneſs of any perſon in corrupting the records of the Court, ought not to obſtruct the juſtice of the Court, or prejudice any of the parties; (*a*) as *in ejectione firmæ*, the leaſe was made the 10th of *May*; after verdict for the plaintiff it was made the 11th of *May* by a razure; and it appearing to the Court that the declaration was (*b*) vitiated by ſuch razure, they amended it, both in *C. B.* and *B. R.* Roll. Abr. 208, 209. Latch. 162. S. C. Poph. 196. S. C. (*a*) 2 Roll. Rep. 80, 81. S. P. adjudged; though objected, that if the record ſhould be amended, the delinquent could not be impeached for felony; for to make it ſo by the ſtatute, the razure muſt be ſuch that the judgment be defeated thereby: But, *per* two judges, the razure of the record is the offence, and not the annulling the judgment thereby; and *per* 11 Co. 34. the razure of a record, by which an outlawry was made good, was held felony. (*b*) Where in a *venire facias* the word *Chumley* was razed, and made *Himly*, and amended. Roll. Abr. 208.

If an original writ, upon which a common recovery of ſeveral manors, *&c.* was ſuffered, being larger than the other writs on the ſame file, through the negligence of the officer, and by continual handling, is ſo obliterated and worn out, that but a letter of the name of ſeveral of the manors can be ſeen, but the names of the manors are truly recited in the count, and in the *habere facias ſeiſinam*, the original ſhall be amended according to the other parts of the record. 8 Co. 160. Earl of Arundel and Lord Lumly, cited to have been adjudged by all the judges of *England*, and vide, *eo fortius*, becauſe a common recovery. And. 79, 80. S. C. adjudged by all the judges of *England*;

England; and there is a *nota* by the reporter, that all the parchment remained entire, and if not, perhaps it might have been otherwiſe; and *vide* And. 170.

8 Co. 160. b. So if the original, or other part of the record, be ſtolen, taken away, withdrawn, or avoided by any clerk, though this be felony *per* 8 *H.* 6. *cap.* 12. *ſect.* 3. yet this may be ſupplied and amended by the other parts of the record; but if ſuch part ſtolen, *&c.* or obliterated, cannot be ſupplied by the record, or any exemplification thereof, then it ſhall not be amended.

[(I) Of Amendments in Equity.

[Anon. 2 Atk. 15. 1 Pr. Al. Cur. Canc. 546. A BILL may be amended at *any time* for the ſpecial purpoſe of adding neceſſary parties. Green v. Poole, 4 Br. P. C. 122.

Mitf. Eq. Tr. 258. 263. and the caſes (cited in the note) of After the examination of witneſſes no part of the pleadings can be amended but under very ſpecial circumſtances: but if no witneſs has been examined, an amendment has been permitted after publication paſſed.

Haſtings v. Gregory, Scac. 19th Nov. 1782. and Sanderſon v. Thwaites, in Canc. Tr. 1781. Anon. Barnard. Ch. Rep. 222. Harding v. Cox, 3 Atk. 583. Where a matter has not been put in iſſue by a bill with ſufficient preciſion, permiſſion has been given to amend it on the hearing of the cauſe. Filkin v. Hill, 2 Br. P. C. 194.

Earl of Maſſerene v. Lyndon, 2 Br. Ch. Rep. 291. 1 Eq. Caſ. Abr. tit. *Amendment*, p. 1. note. After appearance the bill cannot be amended without payment of coſts, which are fixed at forty ſhillings, a ſum which the Court will not exceed, notwithſtanding repeated amendments, unleſs the defendant ſtate a caſe of particular oppreſſion.

Ld. Coningſby v. Sir Joſeph Jekyll, 2 P. Wms. 300. and ——— v. Baines, in the note. An amendment to a bill has been permitted, after a demurrer to the whole bill has been allowed; but this ſeems not to have been ſtrictly regular.

Napier v. Lady Effingham, 2 P. Wms. 401. But there ſeems to be no precedent of an amendment to a bill, in a part wherein it was diſmiſſed on the merits.

Serle v. St. Eloy, 2 P. Wms. 386. Where an improper ſubmiſſion was made in the bill of an infant, the Court allowed it to be amended on the hearing of the cauſe.

Counteſs of Gainſborough v. Gifford, 2 P. Wms. 426. In this caſe the draught was correct; but where the miſtake runs through the draught, and the engroſſed anſwer, no amendment will be allowed. Biſhop of Ely v. James, Bunb. 295. Where an anſwer was prejudicial to a defendant from a mere miſtake, though ſuch miſtake was both in the original and office copy, upon evidence of the miſtake, an amendment was permitted after the cauſe had been heard, and after it had been denied on a petition and on a motion.

Woodgate v. Fuller, Barnard. Ch. There are no certain rules reſpecting the amendment of anſwers; but they are in the diſcretion of the Courts. The ad-

miſſion

miſſion of a fact (*a*) is never ſuffered to be ſtruck out, but on an affidavit of ſurpriſe, or the defendant being ill adviſed. But where an amendment (*b*) is admitted in the bill, where, through inadvertency (*c*) a miſtake is made, as to a fact or date, where there is no danger (*d*) of perjury, where the caſe depends upon old documents, lies pretty much in the dark, and new matter is diſcovered, which affords the defendant a good defence; the Courts have allowed amendments to be made, either by ſtriking out paſſages, or making new facts, and this (*e*) after iſſue joined, or upon the hearing of the cauſe. If new matter has ariſen, the practice is to add it by way of ſupplemental anſwer; for the defendant will not be permitted to take the old anſwer off the file, and put in a new one.

Rep. 50. 1 Eq. Ca. Abr. tit. *Amendment*, p. 4. (*a*) Rawlins v. Powell, 1 P. Wms. 297. Pearce v. Grove, 3 Atk. 523. Ambl. 65. S. C. (*b*) Filkin v. Hill, 2 Br. P. C. 194. (*c*) Wharton v. Wharton, 2 Atk. 294. (*d*) Berney v. Chambers, Bunb. 248. Holliday v. Nabb, Bunb. 323. (*e*) Phillips v. Gwynne, cited in Mitf. Eq. Tr. 261. But the author adds, that in later caſes this indulgence has been refuſed. However, in the caſe of Moggridge v. Hudſon, the Court of Exchequer thought that there were many caſes in which it was highly neceſſary that it ſhould be given. In that caſe, Richards moved to file a ſupplemental anſwer to a bill for an account of tithes, upon an affidavit of the diſcovery of new matter. The motion was oppoſed by Abbot, who inſiſted that it was the rule of the Court not to ſuffer a ſupplemental anſwer to be put in after iſſue joined. The Chief Baron admitted the general rule to be as Abbot ſtated; but ſaid there were many exceptions to it: That if they were to refuſe it, another bill might be filed for an account, and then it might appear that the plaintiff ought not to have had a decree in this inſtance, by reaſon of the matter now offered; that tithe caſes were entitled to peculiar indulgence, depending upon old documents, and lying in remote antiquity. Perryn B. added, that he had known many inſtances of ſupplemental anſwers being allowed in ſimilar circumſtances: but ſuppoſing there were no precedent, the motion ſeemed ſo reaſonable and ſo neceſſary, that the Court ought to make one. Eaſter Term, 34 G. 3. Where the amendment is not in a very material point, it may be made without notice; but where it is, it cannot be made without notice, and alſo payment of coſts. 1 Harr. Ch. Pr. 307.

An anſwer ſhall not be amended after an indictment for perjury preferred or threatened. Yet if there were circumſtances extremely ſtrong to ſhew that it was only a mere miſtake (*f*), it might be otherwiſe.

Earl Verney v. Macnamara, 1 Br. Ch. Rep. 419. (*f*) Vaux v. Lord Waltham, cited, *ibid.* Woodgate v. Fuller, Barnard. Ch. Rep. 51. Wharton v. Wharton, 2 Atk. 294.

An infant may amend his anſwer when he comes of age, and therefore no exceptions can be taken to it.

Strudwick v. Pargiter, Bunb. 338.

Where it appears that either the examiner is miſtaken in taking a depoſition, or the witneſs in making it, it may be amended after publication.

Griells v. Ganſell, 2 P. Wms. 646.

A miſtake in the title of an order was allowed to be amended, though for the purpoſe of charging a ſurety, who had entered into a recognizance to abide the order of hearing.

Speering v. Lynn, 2 Vern. 376. Pr. Ch. 115. S. C. 1 Eq. Caſ. Abr. tit. *Amendment*, p. 6. S. C.

Where there was a miſtake in the title of the interrogatories, neither the depoſitions were permitted to be read, nor the title to be amended, though moſt of the witneſſes were gone abroad. But *q.*]

White v. Taylor, 2 Vern. 335. 1 Eq. Ca. Abr. tit. *Amendment*, pl. 7. S. C.]

Ancient Demeſne.

(A) The Nature of the Tenure, and how proved.
(B) Of the Privileges annexed to Ancient Demeſne.
(C) How it may become Frank-fee.
(D) Where Ancient Demeſne may be pleaded, and the Form thereof.

(A) The Nature of the Tenure, and how proved.

4 Inſt. 269. 2 Inſt. 542. F. N. B. 14. Salk. 57. pl. 2. Bl. Tr. 4to. 218. 231.

ALL thoſe lands which were in the poſſeſſion of *Edward* the Confeſſor, and afterwards came to *William* the Conqueror, and were by him, about the 20th year of his reign, ſet down in a book called *Doomſday*, under the title *De Terra Regis*, are (*a*) ancient demeſne lands: theſe were exempt from any feudal ſervitude, and were let out to huſbandmen to plough and cultivate for ſupplying proviſions and neceſſaries for the king's houſehold and family; and for this purpoſe the tenants (who are called by *Bracton*, *villani privilegiati*) enjoyed certain privileges, and the tenure itſelf had ſeveral properties diſtinct from thoſe of other tenures, which it retains to this day, though the lands be in the hands of a ſubject, and the ſervices changed from labour to money.

(*a*) Lands which are next or moſt convenient to the lord's manſion-houſe, and which he keeps in his own hands, for the ſupport of his family, and for hoſpitality, are called his demeſnes, but have not the ſame properties with ancient demeſne. Spelm. 12.

Salk. 57. pl. 2.

This tenure, my Lord Ch. Juſt. *Holt* ſays, is as ancient as any other, though he ſuppoſes that the privileges annexed to it commenced by ſome act of parliament, for that it cannot be created by grant at this day.

Salk. 57. pl. 2. 4 Inſt. 269. Hob. 188. Brownl. 43.

The lands which were in the poſſeſſion of *Edward* the Confeſſor, and were given away by him, are not at this day ancient demeſne; nor are any others, except thoſe writ down in the book of *Doomſday*; and therefore, whether ſuch lands are ancient demeſne, or not, is to be (*b*) tried only by that book.

(*b*) Where the book of *Doomſday* was brought into court by a *certiorari* out of Chancery, directed to the treaſurer and chamberlain of the Exchequer, and by *mittimus* ſent into the Common Pleas *. Iſſue was taken whether

[* The authority referred to for this paſſage is Dy. 150. b.: but the editor has not been able to find any thing to this effect, either in that page, or in any other part of that book. The writ in the regiſter does not require the production of the book itſelf, but only a certificate of the fact from the treaſurer and chamberlain of the Exchequer. F. N. B. 16. C. 9th edit.]

Langhope

Longbope in the county of *Glouceſter* was ancient demeſne, or not; and on producing the book of *Doomſday*, it appeared that *Hope* was ancient demeſne, but nothing ſaid of *Longbope*; and the Court held, that the party failed in his proof. Lev. 106. Sid. 147. [Proof of the name being varied cannot be admitted, without its being averred on the record. *Ibid.* Bull. *Ni. Pri.* 248. 4th ed. *Doomſday*-book will not ſhew whether the lands themſelves are ancient demeſne; it will only ſhew whether the manor is ſo, or not. 2 Burr. 1048.]

But if the queſtion is, Whether lands be parcel of a manor which is ancient demeſne? this ſhall be tried by a jury. Salk. 57. pl. 2. Where an acre of land may be ancient demeſne, though the manor of which it is parcel is not ſo, *vide* Roll. Abr. 321. and for this *vide* F. N. B. 14. Leon, 232. Dyer, 8. 11 Co. 10. Bro. Ancient Demeſne, 15. 2 Leon. 191. 3 Lev. 405.

(B) Of the Privileges annexed to Ancient Demeſne.

MY Lord *Coke* enumerates the ſix following privileges which tenants in ancient demeſne are to enjoy (*a*). 1. That they ſhall not be empleaded for any of their lands, *&c.* out of the ſaid manor, but are to have juſtice adminiſtered to them at their own doors, by *petit writ of droit cloſe*, directed to the bailiffs of the king's manors, or to the lord of the manor, if it be in the hands of a ſubject. 4 Inſt. 269. *vide* Roll. Abr. 323. (*a*) But it muſt appear firſt that the land is ancient demeſne; for if a fine levied of thoſe lands in *C. B.* be ſtill in force, the lands are frank-fee till it is reverſed; and therefore may be empleaded at common law. 2. The land muſt be holden of the manor, being ancient demeſne. 3. It muſt not be holden by knight-ſervice, becauſe huſbandry is the cauſe of the privilege. 4. It is ſaid that the tenant may remove the cauſe out of the lord's court, if there be no ſuitors, or but one ſuitor, for that the ſuitors are judges; otherwiſe there would be a failure of juſtice. 5. If the tenant accept a releaſe of his lord of his ſeignory, or the ſeignory be otherwiſe extinguiſhed, by reaſon of the ſeiſin of the king, or otherwiſe. 6. Or if the lord diſſeiſe his tenant, and make a feoffment in fee. 7. If the lord grant the ſervices of his tenant, and the tenant attorn. 4 Inſt. 269. Alſo if the manor and demeſnes of the manor are in diſpute, they muſt be empleaded at common law, and not in the lord's court; otherwiſe the lord would be judge in his own cauſe. Salk. 56. pl. 1.

2. They cannot be impannelled to appear at *Weſtminſter*, or elſewhere in any other court, upon any inqueſt or trial of any cauſe. 4 Inſt. 269. That they may have a writ *de non ponendis in aſſiſis & juratis* againſt the ſheriff, or any one who hath the return of writs; and if, notwithſtanding ſuch writ, the ſheriff will return them, they may have an *attachment*. F. N. B. 166.

3. They are free and quiet from all manner of tolls in fairs and markets, for all things concerning (*b*) huſbandry and ſuſtenance. 4 Inſt. 269. Roll. Abr. 321. S. P. (*b*) But this privilege does not extend to him who is a merchant, and gets his living by buying and ſelling, but is annexed to the perſon in reſpect of the land, and to thoſe things which grow and are the produce of the lands. F. N. B. 228. 2 Leon. 191. Cro. Eliz. 227. Leon. 231. 233. 2 Inſt. 221. S. P. *Vide* 2 Lutw. 1144. and how it muſt be ſet forth in pleading; and that this privilege extends to tenant in ancient demeſne, whether he hold in fee, for life, years, or at will. Roll. Abr. 322. 2 Leon. 191. [Q. as to tenant for years, or at will; and ſee 2 Burr. 1047.]

4. They are to be free of taxes and tallages by parliaments, unleſs they be ſpecially named. 4 Inſt. 269. That regularly all general acts of parliament extend to ancient demeſne lands, *vide* 4 Inſt. 270. And. 71.

5. That they were not to contribute to the expences of knights of parliament. 4 Inſt. 269.

6. That if they be ſeverally (*c*) diſtrained for other ſervices, than they are obliged to by the cuſtom of the manor, they all, for 4 Inſt. 269. (*c*) Where the tenants

In ancient demeſne are diſtrained to do other ſervices than they ought, for the ſaving of charges, may join in a writ of *monſtraverunt*, albeit they be ſeveral tenants.

do the lord other ſervices or cuſtoms than they or their anceſtors have formerly done, they may have a writ of *monſtraverunt* directed to the lord, commanding him not to diſtrain for other ſervices; and if he will ſtill diſtrain, *&c.* then, by a writ directed to the ſheriff, he may command him not to demand or diſtrain for other ſervices; and if he ſtill perſiſts, then he may raiſe the *poſſe comitatus*, or command the neighbours to reſcue and reſtore the diſtreſs; but the uſual courſe is, that if, after the writ to the ſheriff, the lord will diſtrain, then an attachment lies againſt him, returnable in one of the courts of record at *Weſtminſter*, to anſwer the contempt. Plowd. 129.

4 Inſt. 270. Moor, 211. S. P. Lands in ancient demeſne are extendable upon a ſtatute-merchant, ſtaple, or *elegit*.

in ancient demeſne, upon an *elegit*, may, by the ſheriff, be delivered in execution, becauſe the title of the land is not directly put in plea in the king's court; adjudged. Hob. 47. Moor, 211. pl. 351. and Brownl. 234. S. C.

Vent. 344. In an indictment for not taking upon him and executing the office of a conſtable, to which he was choſen by the leet, the queſtion was, Whether a tenant in ancient demeſne was obliged to execute that office? and the Court held he was.

(C) How it may become Frank-fee.

4 Inſt. 270. 10 Co. 50. IF a fine be levied, or recovery ſuffered of lands in ancient demeſne, this makes them frank-fee.

7 H. 4. 44. Roll. Abr. 327. But if the lord be not a party, he may (*a*) have a writ of diſceit, and avoid the fine or recovery (*b*); for lands in ancient demeſne were not originally within the juriſdiction of the Courts of *Weſtminſter*; but the tenants thereof enjoy this among other privileges, not to be called from the buſineſs of the plough by any foreign litigation.

(*a*) But cannot bring a *ſcire facias*, becauſe not a party to the fine or recovery.

3 Lev. 419. That a termor may have a writ of diſceit, and make it ancient demeſne, at leaſt during his term. Roll. Abr. 327. [(*b*) An action on the caſe, in the nature of diſceit, to reverſe a recovery of lands in ancient demeſne, was brought againſt the vouchee only, as *ceſtuy que* uſe, which was confeſſed by the plea. On motion to enter up judgment, the Court refuſed it, becauſe all the parties to the recovery were not before them; and the vouchee not appearing to be *ceſtuy que* uſe, otherwiſe than by his own acknowledgment, there was danger of colluſion between him and the lord of the manor, to reverſe a recovery of land in frank-fee, and ſo turn it into ancient demeſne. Rex v. Hadlow, 2 Bl. Rep. 1170. *Vide* Rex v. Mead, 2 Wilſ. 17. The lord is not barred of his writ of diſceit by the death of any of the parties to a fine. Zouch v. Thompſon, 1 Lord Raym. 177.]

2 Roll. Abr. 324. Salk. 57. pl. 2. But if the lord be party, then the lands become frank-fee, and are within the juriſdiction of the Courts of *Weſtminſter*; for the privilege of ancient demeſne being eſtabliſhed for the benefit of lord and tenant, they may deſtroy it at pleaſure.

Kelw. 43. Roll. Abr. 775. Leon. 290. If a fine be levied of lands, part ancient demeſne, and part frank-fee, and the lord brings a writ of diſceit, the court of *B. R.* upon view of the tranſcript of the record, and proof that part are ancient demeſne, will reverſe and avoid the fine as to that parcel; but they will not order the fine to be torn off the file, as in caſes where the whole fine is reverſed, becauſe it ſhall ſtand good as to the frank-fee; but they will order a mark to be made on the fine, to ſignify that it is cancelled as to that part, and

and in this caſe the terre-tenant muſt be made party by *ſcire-facias*; for otherwiſe the conuzance of him that was party to the fine ſhall not bind, if the tenements are frank-fee; becauſe by that means the terre-tenant might be diſpoſſeſſed without notice; whereas if he appears upon the *ſcire facias*, he may plead a releaſe or confirmation in bar, and ſo preſerve his poſſeſſion.

But if a fine be levied of land all ancient demeſne, and the lord reverſe it by writ of diſceit, it ſeems doubtful from the books, whether the fine ſhall ſtand good between the parties; ſome ſay, that it ought not to be wholly ſet aſide, nor the conuzor reſtored to his land againſt his own ſolemn acknowledgment on record, eſpecially ſince the lord, who brings the writ of diſceit, ſeeks nothing but to reſtore the land to the privileges of ancient demeſne (*a*); others, on the contrary, hold, that the writ of diſceit, and the reverſal thereon, wholly avoids the fine, and reſtores the conuzor to the poſſeſſion of the land; and the conuzance, though on record, ſhall be no eſtoppel; becauſe it was made in a court that had no juriſdiction of the matter; and therefore the whole proceedings *coram non judice*.

Bro. tit. *Fine*, 101. 17 E. 3. 31. F. N. B. 98. a. 9 H. 7. 12. 8 E. 4. 6. Roll. Abr. 863. Cro. El. 471.

(*a*) But if after the fine levied, the conuzor had releaſed to the conuzee and his heirs, or confirmed his eſtate, he ſhould have retained the lands, notwithſtanding the fine was deſtroyed; becauſe by the releaſe or confirmation, his eſtate would have been made firm and rightful. 4 Inſt. 470. 10 Co. 50. Fitz. Diſceit, 37. Leon. 290. If tenant in tail of lands in ancient demeſne, leaſes for fifty years, and after levies a fine, with proclamations, in the Common Pleas, and this is after reverſed in a writ of diſceit, yet, *quoad* the leſſee, this fine ſhall not be avoided, but ſhall make the leaſe good againſt the iſſue in tail, by the better opinion of the books. *I.* Leon. 290. *vide* Lutw. 710, 711.

If in a writ of right in ancient demeſne the tenant pleads in abatement of the writ, and by judgment it is abated, and the demandant brings a writ of *falſe judgment*, wherein the writ of *right* is affirmed to be good, the Court of Common Pleas ſhall proceed as the inferior court ſhould have done; and although judgment be there given to recover the land, yet the land is not frank-fee, but continues ancient demeſne, becauſe the beginning and foundation of thoſe proceedings was in the court of ancient demeſne.

F. N. B. 19. 4 Inſt. 270.

If the lord enfeoffs another of the tenancy, this makes the land frank-fee, becauſe the ſervices are extinguiſhed perpetually.

Roll. Abr. 324.

So if the lord releaſes to the tenant all his right in the tenancy, or if he confirms to him to hold by certain ſervices at the common law, theſe make the land frank-fee.

Vide Roll. Abr. 324, 325. and the ſeveral caſes there cited out of the year-books, and where it becomes frank-fee, by coming into the hands of the king.

(D) Where Ancient Demeſne may be pleaded, and the Form thereof.

IN all actions, wherein, if the demandant recovers, the lands would be frank-fee, ancient demeſne is a good plea.

8 H. 6. 35. Roll. Abr. 322. Where the ſuits may be removed to the courts above, and they to proceed as the inferior court might have done, *vide* F. N. B. 19. D. 4 Inſt. 270. Moor, 451.

Therefore

Vide 4 Inſt. 270. Roll. Abr. 322, 323. Therefore in all actions real, or where the realty may come in queſtion, ancient demeſne is a good plea; as *aſſiſe*, writ of *ward of land*, writ of *account* againſt a bailiff of a manor, writ of *account* againſt a guardian, *&c.*

Godb. 64. Bulſt. 108. Owen, 28. In *replevin* ancient demeſne is a good plea, becauſe by intendment the freehold will come in queſtion.

5 Co. 105. Hob. 47. Bulſt. 108. Hetl. 177. Cro. Eliz. 826. 2 Roll. Rep. 181. Hob. 47. In an *ejectione firmæ*, ancient demeſne is a good plea; for by common intendment the right and title of the land will come in queſtion; and if in this action it ſhould not be a good plea, the ancient privileges of thoſe tenants would be loſt, inaſmuch as moſt titles at this day are tried by *ejectment*.

5 Co. 105. Roll. Abr. 322. But in all actions merely perſonal, as *debt* upon a leaſe, *treſpaſs quare clauſum fregit*, *&c.* ancient demeſne is no plea.

Cro. El. 826. Roll. Abr. 322. In *treſpaſs contra pacem*, though the realty comes in debate, yet ancient demeſne is no plea; for this is at the ſuit of the king, and puniſhable for the good of the commonwealth.

2 Inſt. 397. Hob. 48. In an *aſſiſe* by tenant by ſtatute-merchant, ancient demeſne is no good plea, becauſe the plaintiff does not demand the freehold, but till he hath ſatisfaction.

Roll. Abr. 323. Hob. 48. In a *quare impedit* ancient demeſne is no plea, becauſe if it ſhould be granted there would be a failure of right, for there they cannot grant a writ to the biſhop.

2 Inſt. 306. Hob. 47. 4 Inſt. 270. Roll. Abr. 323. So in an action of *waſte* ancient demeſne is no plea, becauſe in ancient demeſne they cannot, upon the diſtreſs returned, award a writ to inquire of waſte, according to the ſtatute; for the ſheriff ought by the ſtatute to go in perſon, which cannot be ſupplied by their officer, and ſo there would be a failure of right; but in this the land ſhall not be frank-fee.

F.N.B. 11. 2 Leon. 191. Salk. 56. pl. 1. Comb. 183. Show. 271. If the manor and demeſnes thereof are demanded, ancient demeſne is no plea, becauſe the lord would be judge in his own cauſe.

Dyer, 210. in margin. Stile, 30. Latch. 83. Moor, 451. Ancient demeſne may be pleaded after imparlance, becauſe the lord may reverſe the judgment by writ of *diſceit;* and it goes in bar of the action itſelf, *viz.* in that court, becauſe it is *coram non judice*.

Where the defendant in *ejectment* pleads ancient demeſne, he need not make any defence by adding *defendit vim & injuriam ſuam.* Carth. 220. Show. 386. Salk. 217. *Vide* Doct. Pl. 51, 52. Roll. Abr. 322 and tit. *Pleas and Pleadings.* It may be pleaded without affidavit. 2 Ld. Raym. 1418. Barnard. K. B. 7. [But ſee *contr.* 3 Wilſ. 51. 2 Burr. 1047. And the affidavit muſt ſhew that the lands are holden of a manor, which manor is itſelf ancient demeſne; that the matter can be tried in the court of the manor, that there are ſuitors there, and that the plaintiff hath an eſtate of freehold. 2 Burr. 1047. 8.]

Annuity and Rent-charge.

AN annuity, ſtrictly taken, is a yearly payment of a certain ſum of money granted to another in fee-ſimple, fee-tail, for life or years, charging the *perſon* of the grantor only: if payable out of lands, it is properly called a rent-charge; but if both the perſon and eſtate (*a*) be made liable, as they moſt commonly are, then it is generally called an annuity. Co. Lit. 144. b. Finch. 161. Roll. Abr. 226. Doct. and Stud. Dial. 2. c. 30. F.N.B. 152. A.

[An annuity in fee, granted by the crown out of the 4½ *per cent.* duties payable for exports and imports at *Barbadoes*, is merely a perſonal inheritance. Earl of Strafford v. Buckley, 2 Vez. 170. And ſo, as Lord Hardwicke ſaid, in giving his judgment in that caſe, is an annuity out of the poſt-office or exciſe. Co. Lit. 20. a. n. 4. 14th edition; and as ſuch, the former has been treated by Lord Thurlow. Lady Holderneſſe v. Marquis of Carmarthen, 1 Br. Ch. Rep. 377. A rent created out of a rent is a mere annuity. *Per* Lord Hardwicke, 2 Vez. 178.

As an annuity may be granted in fee, it may, of courſe, as a conditional or qualified fee: but it cannot be entailed, being, in point of charge, ſtrictly perſonal; Co. Lit. 20. a.: therefore a remainder cannot be limited over of it, as it may of a rent-charge; Turner v. Turner, 1 Br. Ch. Rep. 316. Weeks v. Peach, 2 Lutw. 1218; except in a grant by the king, 2 Vez. 181.; but when granted to one, and the heirs of his body, if the condition is performed by the grantee's having iſſue, the eſtate becomes abſolute, and alienable without reſtriction; and this, it ſeems, though the grantee never come into actual poſſeſſion. 1 Br. Ch. Rep. 316. Ambl. 776. S. C. It is not the ſubject of a fine or recovery, Sheph. Touchſt. 11. Pig. 97. 1 Vez. 391.; but paſſes by mere grant or transfer. 1 Br. Ch. Rep. 377. There can be neither courteſy, nor dower of it. Co. Lit. 144. b. Poph. 87. Moor, 83. It is not within the mortmain act of 7 E. 1. ſt. 2. Co. Lit. 2. b., nor the proviſions of the ſtatute of frauds, ſo far as they affect real property. 2 Vez. 170. It is not aſſets in the hands of the heir, becauſe not comprized within the deſcription either of land or tenements: not of executors, becauſe its heritable quality prevents it from going to them. Doct. and Stud. c. 30. p. 97. 2 Vez. 179. But an annuity of inheritance is forfeitable, as an hereditament, for treaſon. Nevil's caſe, 7 Co. 34. b. It is aſſignable, and in moſt caſes, though aſſigns be not named in the grant. Co. Lit. 144. b. Gerrard v. Boden, Hetl. 80. If granted by the king, it muſt be granted out of ſome branch of his revenue, for the royal perſon is not chargeable. Anon. 1 Salk. 58. (*a*) Whether the one or the other ſhall be liable, is in the election of the grantee; which election, when once diſtinctly made, is final and concluſive. Co. Lit. 144. b. Lit. § 219. Ambl. 782.]

(A) How an Annuity or Rent-charge differs from other Rents.

(B) What ſhall be a good Grant or Creation thereof.

(C) Of the Remedies for the Recovery of an Annuity.

[(D) Of the Proviſions made by the Legiſlature reſpecting Life Annuities.]

Apportionment and Extinguiſhment of an Annuity or Rent-charge, *vide* Head of *Rents*.

(A) How an Annuity or Rent-charge differs from other Rents.

Lit. ſ. 218. *vide* for this head of *Rents*.

A MAN ſeiſed of land grants, by deed-poll or indenture, a yearly rent to be iſſuing out of the ſame land to another in fee, in tail, or for life, *&c.* with a clauſe of *diſtreſs;* this is a rent-charge; and if the grant be without clauſe of *diſtreſs*, then it is a rent-ſeck.

Vent. 161. Co. Lit. 142.

A rent-ſervice is an annual return, made by the tenant, either in labour, money, or proviſions, in retribution for the land that paſſes.

Lit. ſ. 214, 215. 2 Inſt. 505. Plow. 134. (*a*) For without ſuch clauſe it is only a rent-ſeck. Whether ſuch reſervation be good in a deed-poll has been doubted, the words of reſervation proceeding entirely from the feoffor or donor; but it ſeems now ſettled, that ſuch reſervation is good in a deed-poll, becauſe whoever claims an eſtate under any deed, ought, in reaſon and equity, to be obliged to take it under the terms expreſſed in the deed. *Vide* Co. Lit. 143. b. 2 Roll. Abr. 449. Plow. 134. Gilb. Rents, 16, 17.

If a man makes a feoffment in fee, or a leaſe for life, or a gift in tail, remainder over in fee, upon ſuch grants there can be no rent-ſervice reſerved at this day, the feoffor or grantor having no reverſion, and the feoffee or grantee by the ſtatute of *quia emptores terrarum* holding of the capital lord; therefore if in ſuch deeds a rent be reſerved, there muſt be a (*a*) clauſe of *diſtreſs* inſerted; and this will make a good rent-charge, the land being charged with a diſtreſs for the payment of it.

Co. Lit. 147. b. 7 Co. 23. b.

If a man grants a rent out of three acres, and grants over, that if the rent be arrear, that he ſhall diſtrain for the rent in one of the acres, this is one entire rent; but it cannot be a rent-charge for the whole, becauſe the greateſt part of the land out of which it iſſues, is not chargeable with any diſtreſs for the recovery of it; and *denominatio ſumenda a majori;* therefore it is taken to be a rent-ſeck, for which, by the words of the grant, the grantee may diſtrain in the third acre; for whenever the remedy, by way of charge for the rent, is not commenſurate to the rent, the rent is called *ſeck*, and the charge is only appurtenant to the rent, and does not give it its denomination; and the reaſon is, becauſe if ſuch original grant ſhould be loſt and worn out by time, and a man were to preſcribe for it, if he were to give it the denomination of a charge, it would graſp more land than was originally intended to be charged; and therefore the law binds them down to the denomination of the rent, as ſeck, and to ſet forth the charge as an appurtenant, that by length of time no more ſhould be comprehended in the charge than was originally intended in the grant of that charge.

Co. Lit. 147. b. 7 Co. 23. b. If a rent be granted to two and their heirs out of one

If a man grants a rent out of his lands to *J. S.* and his heirs, and grants that he may diſtrain for it during his life, this is a rent-charge in *J. S.* becauſe he may diſtrain in the land, out of which it iſſues, during his own life; but it ſhall be ſeck in the hands of his heirs, becauſe by the expreſs words of the deed, the remedy was to ceaſe upon his death; *aliter* if the diſtreſs had

been limited only for years, for then the entire rent had been ſeck, becauſe the remedy being temporary is not adequate to the right, which is perpetual.

acre, and that it ſhall be lawful for one of them and

his heirs to diſtrain for it, this is a *rent-ſeck*; and the diſtreſs given to one is only an appurtenant to the rent; but if he to whom the diſtreſs was not limited dies, the ſurvivor ſhall diſtrain, becauſe the whole rent is then in him. Co. Lit. 147. 7 Co. 23. b.

(B) What ſhall be a good Grant or Creation thereof.

IF a man obliges himſelf to *J. S.* in an annual rent of 10*l. percipiendum annuatim de manerio de* D., and bindeth the ſaid manor, and all the chattels therein, to a diſtreſs, this amounts to a good grant of the rent, and *J. S.* may diſtrain for it. 2 Roll. Abr. 424. For in many caſes, without words of granting,

the law creates a rent-charge, becauſe it is the deſign of the law to render all contracts binding and effectual, ſo far as the intention of the parties may be gathered from the deed; and ſuch interpretation is made ſtrongeſt againſt the grantor, becauſe he is preſumed to receive a valuable conſideration for what he parts with.

So if I bind my goods and lands to the payment of a yearly rent to *J. S.*, this is a good rent-charge, with power to diſtrain, though there be no expreſs words either of grant or diſtreſs; or if I grant that if ſuch a rent be arrear, that *J. S.* ſhall diſtrain for it in the manor of *D.* this is a good rent-charge, for in all theſe caſes it is evidently my intention that my land be liable to the charge. Co. Lit. 147. a. 2 Roll. Abr. 424. Bro. Rent. 14.

So it is if I grant to *S. S.* that he and his heirs, or the heirs of his body, ſhall diſtrain for 40*s.* rent in my manor of *Dale*; this is a good rent-charge in fee or in tail, becauſe the power of diſtraining is in one caſe given to the heirs general, and in the other to the deſcendants of the body of *S. S.*; and whoever has a power of diſtraining, has an eſtate in the rent for which the diſtreſs is given. Co. Lit. 147. a. Lit. ſ. 221. 2 Roll. Abr. 424. 7 Co. 23. Butt's caſe.

But if I grant a rent of 40*s.* out of the manor of *Dale*; and if the rent be behind, that the grantee ſhall diſtrain in my manor of *Sale*; this power of diſtreſs in the manor of *Sale* ſhall not amount to the grant of a rent-charge out of the manor of *Sale*; for though in the former caſes ſuch conſtruction is admitted to ſupport the intentions of the parties, where the grant is not explicit, yet in this caſe the reaſon of ſuch conſtruction fails, becauſe here is a plain grant of the rent out of the manor of *Dale*, and the diſtreſs is given in the manor of *Sale*, as a means for the recovery of it, for which he had no remedy by the grant itſelf; and therefore the rule, *quod expreſſum ſemper facit ceſſare tacitum*, takes place here, that where the intentions of the parties are evident, there that conſtruction ſhall never be admitted, which the law only allows in dubious contracts, *ut res magis valeat quam pereat*; for if that manner of interpretation were admitted, the grant might be made double, and the grantor twice charged, againſt the deſign of the grant. 2 Roll. Abr. 425. Co. Lit. 147. a. 7 Co. 23.

If a rent be granted to *A.* and if the rent be behind, that a ſtranger ſhall diſtrain for it for the uſe of the grantee; this is a 2 Roll Abr. 425.

good rent-charge in *A.*, and a diſtreſs limited to a ſtranger for his benefit, is in effect making him the grantee's ſervant for that purpoſe; and what a man may do by one ſervant, he may do by himſelf or any other.

2 Roll. Abr. 425. But if the diſtreſs had been limited to a ſtranger, without ſaying for the benefit of the grantee, ſo that the limitation of the diſtreſs may ſeem to be independant on the grant, and without relation to it; this diſtreſs does not make it a rent-charge, ſince by no words in the deed the diſtreſs ſhall be applied to the uſe or advantage of the grantee.

Bro. tit. *Grant*, 69. 73. 2 Roll. Abr. 425. If *A.* grants and confirms to *B.* a rent of 5*l.* to be taken out of his lands, which rent *B.* has of the grant of his father, though *B.* never had any ſuch rent from his father, yet this grant of *A.*'s ſhall be good to create a rent-charge in *B.* for it is evidently the intention of *A.* that *B.* ſhall have a rent of 5*l.* out of his land; and a miſtake or error in the deſcription of the thing referred to, ſhall not render the true deſign of the contract ineffectual and void.

Co. Lit. 147. b. If two tenants in common, or ſeveral tenants be, and they If a man ſeiſed of twenty acres of land, grants a rent of 20*s.* *percipiendum de quâlibet acrâ terræ ſuæ*, or out of every acre of land; this is in nature of a ſeveral grant out of every acre, for the grant ſhall be taken moſt ſtrongly againſt the grantor, and the grantee ſhall have 20*s.* out of each acre.

grant a rent of 20*s.* *per ann.* out of their land, the grantee ſhall have 40*s.* rent; for as their eſtate is ſeveral, ſo ſhall their grant be too; and therefore each ſhall be taken to grant a ſeveral rent of 20*s.* 5 Co. 7. b. Plow. 140. b. 161. 171. 289. Co. Lit. 197. a. 267. b.

Co. Lit. 147. b. If *A.* bargains and ſells land to *B.* by indenture, and before enrolment they both join in a grant of a rent-charge to *C.* this after the enrolment ſhall be conſtrued the grant of *B.* and the confirmation of *A.*, becauſe when the bargain and ſale is enrolled, it has the effect of a deed enrolled, from the making thereof; and therefore it muſt be the grant of *B.* who had the land at the time of the grant made; but if the deed had never been enrolled, then it ſhould have been the grant of *A.* and confirmation of *B.*, becauſe the land never paſſed from *A.*, the deed being ineffectual and void, without enrolment.

Bro. tit. *Grant*, 86. 8 H. 7. 3. Plow. 156. Palm. 29, 30. 2 Vent. 204. But a rent *in eſſe*, or already created, cannot be granted to commence after the death of *J. S.* becauſe to ſuch rents there may If an original grant be made of a rent-charge to commence after the death of *J. S.* it is good; for this is not like the caſe of lands, where the livery muſt carry the freehold immediately, and where the abeyance, or want of diſtinguiſhing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, a man that had brought his *præcipe* againſt the grantor, after he had proceeded in it a conſiderable time, might have his writ abated by the freehold's veſting in a ſtranger, by reaſon of a conveyance made by the grantor before the writ brought; but the grant of a rent *de novo* is not attended with this inconvenience; for no man can have a precedent right to a thing which is originally created by the grant itſelf; yet *quære*, at what diſtance of time ſuch charges may be allowed to commence, whether it muſt not be after the lives of

the perſons *in eſſe*; for if they be indefinite, they ſeem to have the ſame tendency to a perpetuity as any other contingent remainders, or executory intereſt; and the bare affectation of a perpetuity is ſufficient to condemn any conveyance.

be precedent titles, and therefore ſuch grants are not good; for

ſuch freehold, by thus being ſplit and ſevered, doth hide the perſon in whom the right is; and therefore the party that has right, will not be able to diſcern againſt whom to bring his *præcipe* for the recovery of it. Bro. tit. *Grant*, 86. 8 H. 7. 3. Plow. 156. [An annuity (after a diſpoſition of it for other purpoſes) was deviſed to the teſtator's eldeſt ſon: and on his deceaſe, to the heirs male of his body; and in caſe of his having no iſſue male, to remain to the teſtator's next eldeſt ſon, and the heirs male of his body: the four eldeſt ſons died without iſſue: it was adjudged, that the claim of the fifth was too remote. Turner v. Turner, 1 Br. Ch. Rep. 316.]

[Where a man deviſed all his lands for the payment of his debts, and alſo an annuity out of a certain town, which the truſtees ſold; it was decreed in equity, that the annuity ſhould iſſue out of the other lands unſold; there being ſufficient to pay the debts.

Ld. Kennoule v. Earl of Bedford, 1 Eq. Ca. Abr. tit. *Annuity*, *&c.* (A). p. 1. 1 Ch. Ca. 295. S. C.

Where an annuity was deviſed out of a rectory, the glebe being but of ſmall value, and the tithes not liable to diſtreſs, it was decreed that the whole rectory ſhould be liable.

Thorndike v. Allington, 1 Eq. Caſ. Abr. tit. *Annuity*, *&c.* (A). pl. 2. 1 Ch. Ca. 79. S. C.

If a man, poſſeſſed of a term, grant a rent generally, without limiting any eſtate, the rent ſhall continue during the term.

1 Ro. Abr. tit. *Eſtate*, (H). pl. 5.

A man poſſeſſed of a term for years, determinable on lives, deviſed 20*l. per annum* to *J. S.* to be paid half-yearly, if the *ceſtuy que vies* ſhould ſo long live. *J. S.* died during the life of the *ceſtuy que vies*, and it was adjudged that the rent was not determined by his death, but ſhould be paid to his executors during the continuance of the term.]

Goſley v. Gilford, 2 Vern. 35. The like determination in the caſe of a deviſe of an annuity to teſta-

tor's executors, and their heirs during the life of *B.*, to the ſeparate uſe of a married woman, who died in the life of *B.* Rawlinſon v. Montague, 2 Vern. 667. So, where a man deviſed an annuity to another during the life of his executor, to be paid him by the executor, and the annuitant died in the life-time of the executor. Savery v. Dyer, Ambl. 139.]

(C) Of the Remedies for the Recovery of an Annuity.

[If a man grants by his deed an annual rent to *J. S.* in fee, for life or years, out of certain lands, with clauſe of diſtreſs, the grantee may at his election either diſtrain for this rent, or have a (*a*) writ of annuity, and thereby charge his perſon.

Lit. ſ. 219. F. N. B. 152. 6 Co. 58. b.

(*a*) But no writ of annuity lies for a rent-ſervice, *vide* tit. *Rents*, and Roll. Abr. 226. 1 H. 4. 4. nor if a man deviſes a rent out of his land, and dies; for after his death it is impoſſible to charge his perſon. 6 Co. 58. b. Nor will a writ of annuity lie for a rent granted for equality of partition, or in lieu of dower; for though theſe be given by the perſon, yet, being granted in ſatisfaction of a real eſtate, they retain the nature of the things for which they are given, and therefore not recoverable in a perſonal action. Pop. 87. Co. Lit. 144, 145. Roll. Abr. 227. Co. Lit. 144. a.

If a man grants a rent out of his lands, and by a proviſo in the deed, or by deed of defeaſance, provides that neither the grant, nor any thing therein contained, ſhall be conſtrued to extend to

Lit. ſ. 220. Pop. 87. 6 Co. 58. But if the

proviſo had been that the grant, nor any thing therein contained, ſhould charge the land, that proviſo had been void,

charge his perſon by writ of annuity; in this caſe the perſon of the grantor is not chargeable; becauſe the charge upon the perſon ariſing only from the manner of conſtruing grants, which, for the conſideration given, ought to be extended as far as the words will bear againſt the grantor, there can be no room for ſuch conſtruction, when by the expreſs words of the grant, the perſon of the grantor is not charged; for no implication ſhall be admitted to overthrow an expreſs clauſe in the deed.

as repugnant to the grant. Co. Lit. 146. a.

Co. Lit. 146. 6 Co. 41. b. 7 Co. 38. b. Dy. 227. [Where a man covenanted to ſettle lands of ſuch a value, and had none at the time, but purchaſed land afterwards, and voluntarily deviſed it, ſuch land was holden to be liable to the annuity in the hands of the deviſee.

If a man grants a rent-charge out of the manor of *Dale*, in which the grantor has no intereſt, with a proviſo that the grant ſhall not charge his perſon, this proviſo is void; becauſe the grantor, having nothing in the manor of *Dale*, could not, by any act of his, charge it; and conſequently, the grantee having no remedy for his annuity, but againſt the perſon of the grantor, the proviſo to exempt his perſon is void, as rendering the whole grant ineffectual; and if in this caſe the grantor had been ſeiſed of the manor, and had granted a rent-charge out of it, for the life of the grantee, with a proviſo that the grant ſhould not charge his perſon, though the grantee himſelf could have no remedy but by diſtreſs, becauſe, that remedy being open to him, the proviſo is good to exonerate the perſon; yet, upon the death of the grantee, his executor may have an action of debt againſt the grantor for the arrears, becauſe the executor has no other remedy for the recovery of them; for he cannot diſtrain after the grant is determined; and therefore the proviſo to exempt the perſon is void againſt the executor, as rendering the grant uſeleſs and ineffectual.

Tooke v. Haſtings, 2 Vern. 97.]

6 Co. 58. b. But if the grantor had given a peny, or any other thing in the name

And hence it is, that if a rent be granted out of lands, with a proviſo that the perſon of the grantor ſhall not be charged, that this proviſo is void, becauſe the grantee, having no diſtreſs given by the deed for the recovery of the rent, would be without any manner of remedy, if the proviſo took place.

of ſeiſin, the proviſo had been good, becauſe he might recover the rent in an aſſiſe. 6 Co. 58. b.

Co. Lit. 146. If *A.* and *B.* jointenants, grant a rent-charge out of their land, with a proviſo that the grantee ſhall not

If a man by his deed grants, if *J. S.* be not yearly paid the ſum of 10*s.* that then he may diſtrain for it in his manor of *Dale*, this is a good rent-charge out of the manor; but no writ of annuity lies for it, becauſe there is no grant of the rent made by the grantor; yet becauſe he hath given the grantee a power to diſtrain, if ſuch a yearly ſum be not paid him, the manor is thereby charged with the diſtreſs, and conſequently with the rent for which the diſtreſs is given.

charge the perſon of *A*, this diſcharges the perſon of *A.* but leaves *B.* liable to the writ of annuity. Co. Lit. 147. b.

Co. Lit. 147. b. Cro. Jac. 390. Roll.

If a man ſeiſed of land in fee, and poſſeſſed of other land for years, grants a rent-charge for life out of both, with a power to diſtrain in both, if the rent be arrear, the leaſehold, as well as the

the land of inheritance, are ſubject to the diſtreſs; becauſe a man may oblige his chattels to the diſcharge of the rent; but the rent being a freehold ſhall iſſue only out of the inheritance; becauſe the leaſehold, being only a temporary and periſhing intereſt, is not a fund commenſurate to the charge; and therefore the rent ſhall iſſue out of the inheritance, which for its duration is a more complete eſtate to ſupport the charge, and render the grant effectual. And hence it was (*a*) adjudged, that though the grantee might diſtrain the leaſehold lands, yet he muſt avow for a rent iſſuing out of the inheritance.

Rep. 330. Cro. Eliz. 607. 622.

(*a*) 7 Co. 23. 25. Butt's caſe.

But if a man poſſeſſed of a term for years, grants a rent out of it to another for life, though the eſtate be of ſhorter duration than the charge; yet becauſe it is the only fund provided by the grant, for the payment of the rent, it ſhall anſwer the grantee ſo long as it has continuance, if the life for which the rent was granted, laſts ſo long.

7 Co. 23. Cro. El. 183.

There is another remedy for the recovery of an annuity or rent-charge, and that is when a power is given the grantee to enter (*b*) and hold the lands till ſatisfied the arrears by the perception of profits, the grantee, when the rent is arrear, may in ſuch caſe enter and hold the lands till ſatisfied by the perception of the profits; though in this caſe it was objected, that there was no eſtate conveyed, out of which a uſe might ariſe to the grantee, upon the nonpayment of the rent; and that this grant could paſs no eſtate to the grantee, as a conveyance at common law, becauſe the grantee could have no inheritance or freehold in the land, when the rent was in arrear for want of livery, nor an eſtate for years, for want of a certain commencement and determination; yet it was adjudged, that by the grant he had an intereſt veſted in him, when the rent was arrear; and though it be an uncertain intereſt, which, for the uncertainty of its commencement and determination, might be void by the ſtrict rules of law, if it were granted independant of any eſtate certain, yet it is good in this caſe, becauſe it is created to attend a determinate eſtate; and the non-payment of the rent fixes the certainty of its beginning, and the ſatisfaction of the arrears, by the perception of the profits, the end and determination of ſuch intereſt; and therefore the grantee may reduce ſuch intereſt, as it riſes, into his poſſeſſion by ejectment, which is the proper remedy to recover the poſſeſſion.

Perception of Profits. Sid. 223. 262. 344. Lev. 170. Keb. 784. Raym. 135. 158. Sand. 112, 113. Jemet and Cawley.

[(*b*) In ſuch caſe, if he enters, he is not compellable to quit till he has been paid intereſt for the arrears down to the day: *aliter*, if he neglects to enter. Robinſon v. Cumming, 2 Atk. 2411. Where a grantee of an annuity has recovered in ejectment againſt a tenant from year to year, of the grantor, he may afterwards, in an action for uſe and occupation, recover all the rent in the hands of the tenant at the time he gave him notice, and down to the day of the demiſe, but not afterwards. 1 Term Rep. 378. Birch v. Wright.]

If a man grants a rent-charge to *J. S.*, his heirs and aſſigns, and if it ſhall happen that the rent be behind and unpaid, that then the ſaid *J. S.*, his heirs and aſſigns, ſhall enter into the land, and have and enjoy the rents thereof, until the arrears be fully ſatisfied; and the grantor covenants to levy a fine to the uſes of the ſaid deed; if after the fine levied the rent be arrear, the grantee may enter into the land, or make a leaſe for years to try his

Cro. Jac. 510, 511, 512. 2 Roll. Rep. 12. Poph. 126. 147. 3 Bulſt. 250. Hawgile and Hare. And by the

his title in ejectment; becauſe by the fine there is an eſtate veſted in the conuzees, to raiſe an uſe in the grantee, of the rent-charge, when the rent is behind; and whenever the rent becomes arrear, the poſſeſſion is executed to that uſe, and conſequently the grantee hath a right to take and keep that poſſeſſion, till the uſe for which it was executed be ſatisfied; and that was till the arrears of rent be paid by the perception of the profits; and therefore though the greateſt intereſt in the land be uncertain, (becauſe it is uncertain when the rent will be paid out of the profits,) yet while his intereſt remains, if his poſſeſſion be diſturbed or deveſted, he may reſtore it by ejectment, which is the proper remedy to recover the poſſeſſion; and if the grantee aſſigns over the rent, the aſſignee may likewiſe enter, and maintain a title in ejectment; for though the uſe ariſes out of the eſtate of the conuzee only, as the rent is in arrear, and, till the rent be behind and unpaid, there is nothing more than a bare poſſeſſion of a uſe, which in its nature is not aſſignable; yet by the conveyance of the rent it ſhall paſs, becauſe it is nothing more than a remedy or ſecurity for the rent; and therefore ſhall attend that into whoſe hands ſoever it comes.

better opinion, it ſeems, that if the rent be arrear before the fine levied, yet the fine levied afterwards ſhall be ſufficient to raiſe an uſe in the grantee to enter into the land for the recovery of theſe arrears; becauſe the fine is guided by the deed of grant, and both amount but to one aſſurance. Cro. Jac. 512.

Co. Lit. 162. 4 Co. 49. a.

An action of debt does not lie for the arrearages of an annuity, if the grantee be ſeiſed of it in fee, tail, or for life.

But where an annuity was granted by deed for two years, and the grantee brought an action of debt for the arrears; on demurrer it was held, that debt would lie upon the contract, it being granted by deed, and for years. Cro. Eliz. 268. For the remedies which heirs and executors have by diſtreſs or action of debt, *vide* head of *Rents*, and the ſtatutes 32 H. 8. c. 37.* 8 Ann. c. 14. 4 Geo. 2. c. 28. 11 Geo. 2. c. 19.

* See a good comment on this ſtatute of H. 8. Co. Lit. 162. a. b.

Roll. Abr. 226. Poph. 87. Hob. 58. Dyer, 344. Co. Lit. 144.

As regularly the remedies for recovery of an annuity or rent-charge are either by writ of annuity or diſtreſs, it is to be ſeen which is the moſt eligible method, and what ſhall determine the grantee's election. If *A.* grants a rent-charge to *B.* and his heirs, if the rent be arrear, not only the grantee, but his heirs *in infinitum*, may diſtrain for it; for the remedy, being commenſurate to the right, muſt be of equal duration with the right; but if in this caſe the rent be arrear, and the grantee brings a writ of annuity, in order to charge the perſon of the grantor, it is no longer to be conſidered as a rent iſſuing out of the land, becauſe the writ of annuity has entirely turned the charge upon the perſon of the grantor, and under that denomination it muſt determine with the life of the grantor, becauſe his heirs are not chargeable.

1 Roll. Abr. 226. Co. Lit. 144. Poph. 87.

But if *A.* had granted for him and his heirs (*a*) to *B.* and his heirs, ſuch a rent out of his lands, in this caſe the heirs, being comprehended in the contract, are bound to make good the grant ſo far as they have aſſets by deſcent from the grantor.

[(*a*) An annuity granted by a body politick, will charge the ſucceſſors, though not named in the grant. Plowd. 455.]

Poph. 87. Co. Lit. 19. a.

If a rent be granted in tail, the grantee cannot alien it while it continues a rent; becauſe as ſuch it may be entailed within the ſtatute

ſtatute *de donis;* but if the grantee brings his writ of annuity, it is no longer within the ſtatute, becauſe then it is become a charge merely perſonal, without any relation to the land out of which it was firſt granted, and therefore is become a fee-ſimple conditional, as ſuch a gift of lands had been before the ſtatute; and therefore the annuity not being within the ſtatute, may be aliened. 7 Co. 4. 35. a. Nevil's caſe.

But in ſome reſpects the writ of annuity is the better remedy; as if a termor for years grants for him and his heirs a rent-charge out of his land to another and his heirs, in this caſe, if the grantee diſtrains, and thereby has thrown the charge entirely off the perſon upon the land, upon the expiration of the term, the rent is gone; becauſe the grantor could not charge the land longer than his own intereſt in it continued; but if the grantee had brought his writ of annuity, the charge upon the perſon had been perpetual, ſo long as the heirs of the grantor had any aſſets; becauſe the grant was for him and his heirs. Annuity where better. Poph. 87.

The next thing to be inquired into is, what acts of the grantee are ſufficient to determine his choice; and this determination muſt be by ſome ſolemn act in a court of record, that it may appear to be the act of the grantee himſelf, and not of a ſtranger, without his permiſſion or authority; and therefore if the grantee diſtrains for the rent, that is no determination of his election; neither is the ſuing forth a writ of annuity any determination, becauſe theſe may be done by a ſtranger, without the grantee's knowledge or conſent; or rather, becauſe the deſign of the law being to help men to the recovery of their rights, in the beſt and moſt beneficial method, the grantee ſhall not be foreclоſed of either of his remedies, by any raſh or unadviſed act of his; but if the grantee counts in the writ of annuity, or avows the taking of the diſtreſs, the count and avowry is a repeated determination, or plain confirmation of his firſt choice and election; and this, being entered on record, is taken to be the deliberate act of his mind, and therefore he ſhall not be allowed to recede from what he has done in ſo ſolemn a manner. Lit. ſ. 219. Roll. Abr. 223. Co. Lit. 145.

But if a man grants a rent-charge in fee, without ſaying, for him and his heirs, and the grantor dies, and the grantee brings a writ of annuity againſt the heir, though he counts thereon, and proceeds to judgment, yet that does not foreclоſe him of his diſtreſs on the land out of which the rent iſſues; becauſe, by the death of the grantor, the grant, as an annuity, was determined, and conſequently the grantee had no election, having but one remedy for the recovery of it, which was by diſtreſs; but the diſtreſs in this caſe ſtill remained, becauſe the grantee loſt his election by the act of God, for which no man ought to ſuffer. Dyer, 344. b. Hob. 58.

So it is if tenant *pur auter vie* grants a rent-charge for ten years, and the *ceſtuy que vie* dies, in this caſe the charge is determined as a rent, becauſe the eſtate for life, out of which it iſſued, is ended; but the grantor is ſtill liable to a writ of annuity for the growing annuity, becauſe the grantee had not by any act of his determined his choice, and therefore the election being taken away Poph. 86. Co. Lit. 148. Mo. 301. 2 Co. 36.

away by the act of God, and not by any act of his own, he may purſue the other remedy by writ of annuity.

Co. Lit. 148. (a) But Q. Whether the caſe may not be ſo circumſtanced as to entitle him to relief in equity? *Vide* 2 Vern. 143, 144. [In the caſe referred to from Vern. the grantee was only a mortgagee of the eſtate charged with the annuity.]

But if the grantee of a rent-charge, before he has made his election, purchaſes part of the land, in this caſe he is (a) without any remedy, either againſt the land or againſt the perſon of the grantor; the land is not liable becauſe the rent is extinct by the purchaſe; and it being in its original creation a rent-charge, though the law gave a double remedy for it, yet when the grantee has by his own act diſcharged the land, and extinguiſhed the rent, he can have no remedy for the thing which he has wilfully deſtroyed, and therefore he can have no writ of annuity againſt the perſon.

[(D) Of the Proviſions made by the Legiſlature reſpecting Life Annuities.

(a) The warrant of attorney is an aſſurance within the act, and muſt be regiſtered. Hopkins v. Waller, 4 Term Rep. 463. Davidſon v. Foley, 2 H. Bl. Rep. 12. 3 Br. Ch. Rep. 598. S. C. Jaques v. Withy, 1 Term Rep. 557.

BY ſtatute 17 *G.* 3. *c.* 26. *ſ.* 1. it is enacted, "That a memorial "of every deed (a), bond, inſtrument, or other aſſurance, "whereby any (b) annuity or rent-charge ſhall, from and after "the paſſing (c) of this act, be granted for one or more life or "lives, or for any term of years, or greater eſtate determinable "on one or more life or lives, ſhall, within twenty days (d) of the "execution of ſuch deed, *&c.* be enrolled in the high court "of Chancery; and that every ſuch memorial ſhall contain the "day (e) of the month and the year when the deed, *&c.* bears "date, and the name of all the parties, and for whom any of "them are (f) truſtees, and of all the witneſſes; and ſhall ſet forth "the annual ſum or ſums to be paid, and the name of the per-"ſon or perſons for whoſe life or lives the annuity is granted, "and the conſideration (g) or conſiderations of granting the ſame; "otherwiſe every ſuch deed (h), *&c.* ſhall be null and void to "all intents and purpoſes."

Downes v. Parkhurſt, cited in 2 H. Bl. 13. But a judgment entered is not ſuch an aſſurance, unleſs perhaps where it is the only ſecurity. Sherſon v. Oxlade, 4 Term Rep. 824. (b) Where ſeveral annuities are payable out of a groſs ſum aſſigned for that purpoſe, every annuity muſt be ſtated in the memorial; it is not ſufficient to deſcribe it as one annuity of ſuch groſs ſum. Hood v. Burton, 4 Br. Ch. Ca. 121. An aſſignment of part of an annuity is within the act; for it muſt always appear by the regiſtry who has the preſent ſubſiſting right. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138. S. C. So, where an annuity was granted before the act paſſed, and aſſigned ſubſequent to it, *and after the aſſignment made*, the original ſecurities, but not the aſſignment itſelf, were enrolled, it was holden, that no proceedings could be had by reaſon of this non-regiſtry of the aſſignment. Grant v. Foley, C. P. Tr. 23 G. 3. A contract to grant and ſecure an annuity, though ſuch contract be in part executed, is not within the act. Jackſon v. Lever, 3 Br. Ch. Ca. 605. (c) The act being made to take effect "from and after the paſſing of it," its operation commenced from the firſt day of the ſeſſion, and affected annuities granted ſubſequent to that time, though before it actually paſſed. Latleſs v. Holmes, 4 Term Rep. 660. Hall v. Whalley, *ibid.* 662. n. (d) The twenty days are excluſive of the day on which the deeds are executed. *Ex parte* Fallon, 5 Term Rep. 283. (e) The omiſſion, or incorrect ſtatement of the date of the warrant of attorney, is fatal. Downes v. Parkhurſt, cited in 2 H. Bl. 13. Duke of Bolton v. Williams, 4 Br. Ch. 210. A defect in the memorial, as to the date of any one of the ſecurities, vitiates the whole tranſaction. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 210. 2 Vez. jun. 138. S. C. but ſee *ex parte Cheſter*, 4 Term Rep. 694. and Saunders v. Hardinge, 5 Term Rep. 9. (f) It is not neceſſary to deſcribe the truſtees *ex nomine*: it is enough if it appear on the face of the memorial that they are ſuch. Oliver v. Style, Exchequer, Tr. 31 G. 3. Anderſon v. Collard, Sittings at *Weſtminſter*, *coram* Lord Kenyon, after Eaſter

Eaſter Term 1791. The names of all the perſons, whether agents or principals, by whom and to whom the conſideration is paid, muſt be ſet forth. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138. S. C. Every truſt relating to the annuity muſt be regiſtered: Hood v. Burlton, 4 Br. Ch. Ca. 121. 2 Vez. jun. 29. S. C. But it ſeems not to be neceſſary to take notice of thoſe which are not created in conſequence of the annuity. Toldervy v. Allen, 5 Term Rep. 480. (g) The memorial muſt contain an account of all the proceedings relative to the conſideration, to whom, and on whoſe behalf it was paid, and the actual mode and manner of paying it. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138. If part be paid in *notes*, a deſcription of it as *money* is bad: and the dates, and other particulars of the notes, muſt be ſtated. Wright v. Reed, 3 Term Rep. 554. If part of the conſideration be money previouſly lent, Kirkman v. Price, 1 H. Bl. Rep. 309.; or part of it be retained in ſatisfaction of a debt, Shove v. Webb, 1 Term Rep. 732.; or to ſatisfy the accruing payments of the annuity, Cox v. Wright, E. 22 G. 3. B. R. Hunt on *Annuities*; or part of it be the giving up of a former annuity, Waſhburn v. Birch, 5 Term Rep. 472.; or if the whole be a judgment recovered againſt the grantor, Jaques v. Withy, 1 Term Rep. 557; a memorial ſtating the payment *generally*, is bad, for it does not diſcloſe the tranſaction truly *. But where the conſideration has been paid from time to time, and has been renewed for the purpoſe of keeping the contract open, the groſs amount may be ſtated as the conſideration. Symons v. Mortimer, 5 Term Rep. 139. The conſideration may be ſet forth merely by way of recital; Sowerby v. Harris, 4 Term Rep. 494.: and it is ſufficient to mention it only once, though there are ſeveral deeds for ſecuring the annuity, in each of which it is expreſſed. Hodges v. Money, 4 Term Rep. 500. But where one of the inſtruments which conſtitute the aſſurance does not ſet forth the conſideration, (for it is not neceſſary that it ſhould be inſerted in every one,) the memorial muſt connect the inſtrument, omitting it with the others, by ſo plain a reference that it may clearly appear to relate to the ſame tranſaction, elſe ſuch inſtrument will be void; and it muſt be inferred from the memorial itſelf that all the deeds are connected. Saunders v. Hardinge, 5 Term Rep. 9. (*b*) The ſecurities being thus made abſolutely void, a ſtranger may take advantage of any irregularity; and therefore, where a *fieri facias* iſſued againſt a perſon in poſſeſſion of goods under a deed given (*inter al.*) in conſideration of an annuity, it was holden that the ſheriff, having notice that the annuity was not regiſtered, was juſtified in returning *nulla bona*. Croſsley v. Arkwright, 2 Term Rep. 603. See too, Saunders v. Hardinge, 5 Term Rep. 9. And where the contract is avoided merely for irregularity, the conſideration-money may be recovered back from the grantor, whether ſuch conſideration be wholly in money, or for a debt *antecedently* due for goods ſold. But *q.* as to goods ſold at the time of granting the annuity. Shove v. Webb, 1 Term Rep. 732. But an action for this purpoſe cannot be maintained againſt a ſurety, who has in fact never received any part of the conſideration, though he join with the principal in ſigning a receipt for it. *Per* Buller J. and Groſe J. *contr.* Aſhhurſt J. Straton v. Raſtall, 2 Term Rep. 366. Where the grantee of a rent-charge had aſſigned ſeveral annuities out of it to different perſons, and there was a diſpute reſpecting the claims of the aſſignees, in conſequence of which the arrears of the rent-charge were paid into the court of Chancery, where the aſſignments were holden void on account of their being improperly regiſtered, that Court would not ſuffer the aſſignees to deduct their conſideration-money out of the arrears paid therein, but ſaid that they muſt firſt apply to a court of law to eſtabliſh their reſpective claims. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. 2 Vez. jun. 138.

* It is the office of the *deed* to expreſs the conſideration fully and truly: all that is required of the *memorial* is to ſet forth truly what is contained in the deed, with the ſingle exception, perhaps, of a ſecret truſt. It ſeems, from ſome of the reports, that the Courts have not always attended to this diſtinction. Ducheſs of Cumberland v. Praed, 2 H. Bl. Rep. 280.

§ 2. "That before any judgment ſhall be entered of record upon any warrant of attorney for recovering or ſecuring the payment of any annuity or rent-charge that hath already been granted for one or more life or lives, or for any term of years or greater eſtate determinable upon one or more life or lives, and before any execution ſhall be ſued out, or action (*a*) brought on any ſuch judgment already entered, or on any deed, bond, &c. already executed for the purpoſes aforeſaid, a like memorial of the deed, &c. ſhall be enrolled in the high court of Chancery; and in caſe the party ſhall neglect to enrol the ſame, any ſuch judgment, execution, or proceeding in the action reſpectively ſhall be null and void."

Vide ſupra, Grant v. Foley. The memorial in ſuch caſe muſt diſcloſe the conſideration truly. Rex v. Wright, Hunt, 43.

(*a*) A *ſcire facias* to revive a judgment entered up before the act paſſed, is an action within this clauſe. Fenner v. Evans, 1 Term Rep. 267.

§ 3. "That in every deed, inſtrument, or other aſſurance, whereby any annuity or rent-charge ſhall, from and after the paſſing of this act, be granted, or attempted to be granted; "the

(*b*) The payment of part of the money to a

third person at the request of the grantor for the redemption of a former annuity, was holden not to affect the legality of the consideration.

" the consideration really and *bonâ fide*, (which shall be in money only (*b*),) and also the name or names of the person or " persons by whom and on whose behalf the said consideration " or any part thereof shall be advanced, shall be fully and truly " set forth and described in words at length; and in case the " same shall not be fully and truly set forth and described, every " such deed, *&c.* shall be null and void to all intents and purposes."

Ex parte Fallon, 5 Term Rep. 283. A debt for goods *antecedently bonâ fide* sold, seems to be a good part-consideration. Shove v. Webb, 1 Term Rep. 732. Q. Whether a judgment recovered, Jaques v. Withy, 1 Term Rep. 557. or an assignment of a former annuity, be a good consideration? *Ex parte* Fallon, 5 Term Rep. 283. Duke of Bolton v. Williams, 4 Br. Ch. Rep. 297. It is not necessary to state the consideration in more than one of the instruments which constitute the assurance. Hodges v. Money, 4 Term Rep. 500.

(*a*) But this relates only to the particular provisions of this section. On a defect in the memorial, any person may apply to the Court. Saunders v. Hardinge, 5 Term Rep. 9.

§ 4. " That if any part of the consideration shall be returned " to the person advancing the same, or in case the consideration " or any part of it is paid in notes, if any of the notes with the " privity and consent of the person advancing the same, shall not " be paid when due, or shall be cancelled and destroyed without " being first paid, or if the consideration or any part of it is " paid in goods, or if any part of the consideration is retained " on pretence of answering the future payments of the annuity, " or any other pretence; in all and every of the aforesaid cases " it shall and may be lawful for the person (*a*) by whom the annuity or rent-charge is made payable, to apply to the Court in " which any action (*b*) is brought for payment of the annuity on " judgment entered, by motion, to stay proceedings on the judgment or action; and if it shall appear to the Court that such " practices as aforesaid, or any of them, have been used, it " shall and may be lawful for the Court to order the deed, " bond, *&c.* to be cancelled, and the judgment, if any has been " entered, to be vacated."

(*b*) The entering up judgment, or even giving a warrant of attorney to enter up judgment in any court, is sufficient to give that court this summary jurisdiction. Haynes v. Hare, 1 H. Bl. 659. *Ex parte* Chester, 4 Term Rep. 694.

§ 5. Directs, That a particular roll shall be kept by the clerk of the enrolments in Chancery, and that every memorial shall be enrolled in order of time, as it shall be brought in; and the day, hour, and time of bringing the memorials into the office are to be specified on the roll. It also appoints the fees of the clerks.

§ 6. Directs, That all contracts for the purchase of annuities from infants shall be void, and incapable of confirmation after the infants shall come of age: and makes the procuring or soliciting an infant to grant any life-annuity, or to promise, or otherwise engage to ratify it when he comes of age; an indictable misdemesnor, punishable with fine and imprisonment: as does § 7. the asking, demanding, or taking by any solicitor of more than 10 *l. per cent.* for procuring money to be advanced on any life-annuity.

(*c*) An equitable estate is within this

The last section excepts from the act any annuity or rent-charge given by will or marriage-settlement; any annuity secured upon lands of equal or greater annual value, whereof the grantor

was

was ſeized (*c*) in fee-ſimple or fee-tail in poſſeſſion at the time of the grant, or ſecured by the actual transfer of ſtock in any of the publick funds, the dividends whereof are of equal or greater annual value than the annuity; any voluntary annuity (*a*) granted without regard to pecuniary conſideration; any annuity or rent-charge granted by any body corporate, or under any authority or truſt created by act of parliament; and any annuity where the ſum to be paid does not exceed ten pounds, unleſs there be more than one ſuch annuity from the ſame grantor or grantors, to or in truſt for the ſame perſon or perſons.

exception, though it be mortgaged for its whole value. Shrapnel v. Vernon, 2 Br. Ch. Rep. 268.

(*a*) An annuity in conſideration of the grantee's giving up his buſineſs to the grantor, is within this clauſe; for any annuity granted for any other than a *pecuniary* conſideration is, for the purpoſes of the act, to be taken to be a *voluntary* annuity. Creſpigny v. Wittenoom, 4 Term Rep. 790.

As to the extent of the ſummary juriſdiction of the common law courts in queſtions on this act, ſee 2 Vez. jun. 154. 4 Br. Ch. Rep. 310.]

Appeal.

AN appeal is the party's private action, ſeeking revenge for the injury done him, and at the ſame time proſecuting for the crown, in reſpect of the offence againſt the publick.

[It is derived from the *French*, "*appeller*," the verb active, which ſignifies to call upon, ſummon, or challenge one; and not the verb neuter, which ſignifies the ſame as the ordinary ſenſe of "*appeal*" in *Engliſh*. 4 Bl. Com. 312.]

Though this be a legal ſuit, and therefore to be carried on in a reaſonable way, yet as none of the ſtatutes of *amendment* or *jeofail* extend to it, the utmoſt exactneſs is required in the proceedings, eſpecially where the life of a man is brought into danger; but as the nice diſtinctions made and allowed of in the ſeveral kinds of appeals, are accurately treated of by Mr. Serjeant *Hawkins*, it may be ſufficient to ſet down here what ſeems to have been moſt materially ſaid by him relating to appeals, under the following heads.

2 Hawk. P. C. 232.

(A) Of the different Kinds of Appeals: And herein,

1. Of an Appeal of Death.
2. Of Appeals of Larceny.
3. Of an Appeal of Rape.
4. Of an Appeal of Mayhem.

(B) In what Courts an Appeal may be brought.

(C) Who may bring an Appeal.

(D) Within

(D) Within what Time an Appeal muſt be brought.
(E) In what County an Appeal muſt be tried.
(F) How the Appellant is to appeal and proſecute.
(G) The Form of the Writ, and for what Faults it may be abated.
(H) The Form of the Declaration.
(I) What may be pleaded in Bar to an Appeal.
(K) How the Appellant is to be puniſhed for a falſe Appeal.

(A) Of the different Kinds of Appeals.

2 Inſt. 132. Bract. 118. 2 Hawk. P. C. 239.

THERE were anciently ſeveral kinds of appeals which ſeem obſolete at this day, as appeals of treaſon, which might be ſued before the parliament and other courts of law, as well as before the conſtable and marſhal, and were determinable by battle.

2 Inſt. 132. (a) But as to the juriſdiction of the conſtable and marſhal, in relation to treaſons committed out of the realm, it ſeems to continue ſtill in force; for in the ſeventh year of Charles the Firſt, an appeal of treaſon ſuppoſed to be committed beyond ſea, was actually commenced before the conſtable and marſhal, who, for want of ſufficient proof to clear the truth, awarded that a duel ſhould be fought between the parties, for the final determination of the matter. Ruſhworth's Collect. Part 2. vol. i. fol. 112. between Donald Lord Rea and David Ramſay, Eſq.

But appeals before the parliament are taken away by 1 *H.* 4. *cap.* 14. and thoſe before other law courts are become (a) obſolete.

4 Inſt. 182. Co. Lit. 126. (b) Co. Lit. 288. a.

Appeals *de pace*, *de plagis*, and *de impriſonamento*, are out of uſe and have been turned to actions of treſpaſs for many hundred years paſt; alſo the whole learning of appeals of (b) *Arſon* ſeems obſolete at this day.

The kinds of appeals therefore that ſeem to require any conſideration at this day, are thoſe of death, larceny, and rape which are capital appeals, and that of mayhem, which is conſidered as a treſpaſs: and therefore,

1. Of an Appeal of Death.

An appeal of death, which is now chiefly in uſe, is a vindictive action which the law gives a wife againſt her huſband's murderer and to the heir at law againſt one who kills his anceſtor, which being the ſuit of the ſubject the king cannot pardon; but as the ſeveral matters ſet forth in the following part of this head more particularly relate to this kind of appeal, it ſeems needleſs to inſert them here.

2. Of

2. Of Appeals of Larceny.

An appeal of larceny is an action which a perſon robbed of goods may bring againſt the felon, in which there ſhall be (*a*) a reſtitution of the goods, and the offender to ſuffer ſuch puniſhment as if he were convicted at the ſuit of the king. H. P. C. 184. Latch. 127. (*a*) Where freſh ſuit is required in order to entitle the party to a reſtitution, *vide* 2 Hawk. P. C. 248.

In every appeal of larceny it is neceſſary to ſet forth whoſe the goods were that were ſtolen, and (*b*) what the price of them was, and that the words *felonicè cepit* be made uſe of. 2 Hawk. P. C. 258. (*b*) But 2 Hawk. P. C. 258. This does not ſeem neceſſary for any other purpoſe, than to ſhew that the crime amounts to grand larceny, and to aſcertain the goods, in order thereby the better to entitle the appellant to a reſtitution.

They who are robbed of goods in which they have a ſpecial property, as churchwardens, carriers, *&c.* may maintain an appeal of larceny, and (*c*) may either bring it generally for their own goods, or ſpecially for the goods of *J. S. &c.* in their cuſtody. 2 Hawk. P. C. 246. (*c*) Keilw. 70. pl. 7.

3. Of an Appeal of Rape.

By the common law, any virgin, wife, or widow, might bring an appeal of rape againſt any one who had raviſhed her, though ſhe were his nief; but a lawful wife could never bring ſuch appeal without her huſband; and by the common law the raviſher was to ſuffer death. 2 Inſt. 180. Co. Lit. 123.

But by the ſtatute of *Weſtm.* 1. *cap.* 13. the offence of committing a rape was reduced to a treſpaſs, and puniſhable in the ſame manner with other treſpaſſes, till the making of the ſtatute of *Weſtm.* 2. *cap.* 34. by which it is enacted, *That whoever raviſhes any woman, where ſhe did not conſent before or after, ſhall have judgment of life and member; and though ſhe do conſent after, he ſhall have judgment if attainted at the king's ſuit;* but it is obſervable, that this ſtatute does not reſtore the old common law in relation to ſuch appeals, as it would have done if it had only repealed the ſaid ſtatute of *Weſtm.* 1. but makes a new law concerning them; whence it follows, that all appeals of rape, which are impliedly given by this ſtatute, muſt conclude *contra formam ſtatuti.* 2 Hawk. P. C. 253.

4. Of an Appeal of Mayhem.

An appeal of mayhem lies for any hurt done to a man's perſon, whereby he is rendered leſs able in fighting to annoy others or defend himſelf. Hob. 134. 2 Jones, 205.

In this action the words *felonicè mayhemavit* are neceſſary, though the defendant is not ſubject to the loſs of member. *Vide* 2 Hawk. P. C. 236.

(B) In what Courts an Appeal may be brought.

2 Hawk. P. C. 232.

APPEALS are commenced either by writ, which is an original out of Chancery, returnable in the *King's Bench* only, or by bill.

Cro. El. 605. (*a*) But not againſt one

Appeals by bill may be ſued in the *King's Bench* againſt any perſon in actual cuſtody, or by (*a*) having bail filed for him there.

who is mainpriſed *de die in diem*. Cro. Eliz. 694. 2 Hawk. P. C. 232. and *note*, That if the appellee be arraigned and tried the ſame term, there is no neceſſity to file a bill againſt him. Jones, 425. Cro. Car. 532. Roll. Abr. 536. But *vide* Skin. 634. pl. 3. where, notwithſtanding the Court ordered a roll to be made, and a copy of it to be delivered to the appellee, and gave him a day to plead.

2 Hawk. P. C. 232. Skin. 634. *Vide* Cro. El. 605. 695.

If a man be brought into court either by a void writ of appeal, or by a voidable one, which is afterwards abated, he may be arraigned by bill *in cuſtodiâ mareſchalli*.

Vide 2 Hawk. P. C. 233. and the authorities there cited, for appeals before the ſheriff and coroner, and

A bill of appeal lies before juſtices of *eyre*, and before juſtices ſpecially aſſigned, and before juſtices of gaol-delivery, and for the ſame reaſon, as ſome ſay, before juſtices of aſſize; who by the purport of ſeveral ſtatutes are authorized to deliver gaols without any ſpecial commiſſion againſt any priſoner in the gaol, which they are to deliver, or as it is generally holden, againſt a perſon whom they have bailed.

appeals of felonies done out of the realm, before the conſtable and marſhal, *vide* 2 Hawk. P. C. 157. And that they cannot be ſued before juſtices of the peace. *Idem.*

2 Hawk. P. C. 233.

If ſome of the accomplices only be in priſon, a bill of appeal lies againſt all, which, after the trial of thoſe in the priſon, ſhall be removed into the *King's Bench*, where the reſt ſhall be proceeded againſt.

(C) Who may bring an Appeal.

Moor, 461. H. P. C. 183. 1 Mod. 216. 2 Ld. Raym. 1288. Holt, 355. (*b*) Alſo an

AN (*b*) infant may bring an appeal, but he muſt proſecute it by guardian, and ſhall be nonſuited upon ſuch guardian's non-appearance at a day whereon he is demandable; but if the infant comes into court, and ſays, that he will relinquiſh the ſuit, and the guardian inſiſts to continue it, the Court may diſcharge him and aſſign another.

appeal lies againſt an infant. H. P. C. 185. 2 Hawk. 247.

H. P. C. 183. 2 Hawk. P. C. 240.

But an idiot, or perſon born deaf and dumb, or one attainted of treaſon or felony, or outlawed in a perſonal action, ſo long as ſuch attainder or outlawry continues in force, cannot bring any appeal whatſoever.

Vide title *Baron and Feme*. 2 Inſt. 68. (*c*) That an

The (*c*) wife only (unleſs ſhe had a ſhare in the guilt, in which caſe it ſhall be brought by the heir) can bring an appeal of the death of her huſband, but ſhe muſt have been his lawful wife; which is to be tried by the biſhop's certificate.

appeal may be brought againſt a feme covert, *vide* 2 Hawk. P. C. 247.

Alſo

Alſo a woman divorced from her huſband, though by a voidable ſentence, (*a*) cannot maintain an appeal. 2 Hawk. P. C. 242.

(*a*) For this at leaſt is implied in the old rule, that a woman ſhall have an appeal *de morte mariti inter brachia ſua interfecti, & non aliter*. 2 Hawk. P. C. 242. *Vide* 2 Inſt. 68.

But a wife who elopes from her huſband, and the wife of one attainted of high treaſon, may have an appeal of his death; though ſuch a wife cannot have dower, for the ſtatutes, which take away dower in thoſe caſes, ſay nothing as to her right of bringing an appeal. 2 Hawk. P. C. 243.

If the wife take another huſband either before or pending the appeal, ſhe puts an end to it for ever; and if ſhe marry after judgment (*b*) ſhe cannot pray execution. 2 Hawk. P. C. 243.

(*b*) But whether the Court may not award execution againſt him either *ex officio*, or at leaſt at the demand of the king, Q. 2 Hawk. P. C. 243.

For the death of an anceſtor who leaves no wife, the heir only can bring an appeal, and ſuch heir muſt himſelf be (*c*) innocent of the fact, he muſt be heir (*d*) general according to the courſe of the common law, and alſo heir (*e*) male, and in his count muſt ſet forth how he is heir to the deceaſed. *Vide* head of *Deſcent*.

(*c*) But if he have a ſhare in the guilt, the next heir ſhall have an appeal againſt him. H. P. C. 182. 2 Hawk. P. C. 243. (*d*) Therefore the father cannot bring an appeal for the death of his ſon, nor the youngeſt ſon in *Borough-Engliſh* for the death of his father; and if the deceaſed have two ſons at the time of his deceaſe, the eldeſt attainted of treaſon, neither of them can bring the appeal, Co. Lit. 8. Leon. 326. Dyer, 50. (*e*) This depends upon *magna charta*, which ordains, that none ſhall be impriſoned on the appeal of a woman for the death of any but her huſband; and therefore if ſhe brings ſuch appeal, the Court *ex officio* will abate the writ; but no other appeals by women are excepted, beſides the appeal for the death of an anceſtor. 2 Hawk. P. C. 243. 4.

If an heir die, pending an appeal commenced by him, it ſeems agreed that no other heir can proceed in ſuch appeal, or commence a new one; and it ſeems the ſtronger opinion, that if the right of bringing an appeal be once veſted in an heir, who dies without bringing any, the right of appeal is gone for ever; and if an heir die after judgment given againſt the appellant, it is queſtionable whether his heir can ſue execution. *Vide* 2 Hawk. P. C. 244. Ld. Raym. 434. 552.

(D) Within what Time an Appeal muſt be brought.

BY the ſtatute of *Glouceſter*, *cap.* 9. (which has been conſtrued to extend only to appeals of death,) *an appeal ſhall not be abated for default of freſh ſuit, if the party ſue within the year and day after the deed done*, the computation whereof, as the law is now ſettled, ſhall be made not from the day when the wound was given, but from the day when the party died; alſo the year and day ſhall be computed from the beginning of the day, and not from the preciſe time when the death happened, becauſe regularly no fraction ſhall be made of a day. 2 Inſt. 320. 3 Inſt. 53. 4 Co. 42. b. 2 Hawk. P. C. 241. 3 Salk. 38. Ld. Raym. 21, 22. 11 Mod. 70. pl. 9.

An appeal of rape may be brought in any reaſonable time, the judgment whereof lies in the (*f*) diſcretion of the Court; for, as has been ſaid, the above ſtatute of *Glouceſter*, *cap.* 9. extends only to appeals of death. 2 Hawk. P. C. 2.

(*f*) So of appeal of larceny. 2 Hawk. P. C. 247.

(E) In what County an Appeal muſt be tried.

Dyer, 38. ALL appeals are local actions, and regularly to be tried in the county wherein the offence was committed.

2 Hawk. P. C. 242. But it is ſaid, that if a perſon had died in one county of a wound given in another, the appeal might be brought in either of them, and the trial be at the bar by a jury returned from the body of each of thoſe counties; but ſince the 2 & 3 *E.* 6. *cap.* 2. which enacts, *That the party may ſue an appeal in the county where the perſon felonioufly ſtricken*, &c. ſhall *die*, &c. it ſeems the trial can be from ſuch county only.

Dyer, 39. 7 Co. 2. 2 Hawk. P. C. 247. So an appeal of larceny is a local action; yet if one rob me of goods in the county of *A.* and carry them into the county of *B.*, I may (*a*) either bring an appeal of robbery in the county of *A.*, or an appeal of larceny in the county of *B.*

(*a*) But if one take me from the county of *A.* into that of *B.*, and there rob me, he ſhall be appealed of robbery in the county of *B.* only, for he was only a treſpaſſer in *A.* 2 Hawk. P. C. 247. So in rape, if a man takes a woman by force in one county, and carries her into another, and there raviſhes her, the appeal ſhall be brought in the latter only. 2 Hawk. P. C. 256.

(F) How the Appellant is to appeal and proſecute.

2 Inſt. 313. 2 Hawk. P. C. 257. AT common law neither plaintiff nor defendant in any appeal whatever, could make an attorney, (*b*) except in ſome ſpecial caſes; but now by the 3 *H.* 7. *cap.* 1. it is enacted, *That the appellant in any appeals of* (*c*) *murder, or death of a man, where battle by the courſe of the common law lies not, may make an attorney, and appear in the ſame, in the ſaid appeals, after they be commenced, to the end of the ſuit and execution of the ſame.*

(*b*) As where a defendant prayed his clergy after his conviction, and the plaintiff replied bigamy; in which caſe he was allowed to make his attorney, in order to procure the biſhop's certificate. 2 Hawk. P. C. 257. Alſo after a defendant is acquitted, he may appear by attorney, in order to recover damages from the abettors. 8 E. 4. 3. pl. 5. (*c*) Cannot appear by attorney in an appeal of mayhem. Carth. 395.

Skin. 48. pl. 1. 670. pl. 9. Carth. 394. Salk. 61. But it ſeems that the appellant cannot make an attorney till he has once appeared in proper perſon; and that if the plaintiff or defendant appear or plead by attorney where they ought not, and the Court receive the plea, and adjourn the cauſe, it ſeems that the appeal is diſcontinued, becauſe ſuch appearance was merely void in law.

Noy, 88. Latch. 173. Moor, 407. Cro. El. 465. The appellant may be nonſuited for not appearing when demanded, at any day of continuance, except a verdict hath been given againſt him; in which caſe by the 2 *H.* 4. *cap.* 7. he cannot be nonſuited.

Roll. Abr. 131. 2 Bulſt. 19. Where an appeal is commenced in the Court below, and removed into the *King's Bench*, the appellee is to be arraigned *de novo* on the ſame bill of appeal, and it is not neceſſary to exhibit a new bill againſt him *in cuſtodiâ mareſchalli*; and if the appellant

Skin. 670. pl. 9. will not appear to proſecute his appeal, the appellee may ſue out a *ſcire*

a *ſcire facias* reciting the whole matter, warning him to appear at a certain day; and if he make default on that day, the Court on demand will nonſuit him; but the appellant may appear *gratis*, and proſecute without any *ſcire facias*. Carth. 394, 395.

(G) The Form of the Writ, and for what Faults it may be abated.

THE writ in an appeal is an original iſſuing out of Chancery, returnable into the *King's Bench* only; before the return thereof the Court of Chancery only can ſuperſede or ſet it aſide, where it appears to have iſſued *erroniceè* or *improvidè*, by ſome error extrinſick to the writ itſelf; but for any error or defect on the face of it, it may be quaſhed after it is returned into the *King's Bench*. Abr. Eq. 416.

The Court (*a*) *ex officio* will quaſh the writ for faults appearing on the face of the writ; as where the ſenſe is defective for want of a material word, or where it wants thoſe words of art which the law has appropriated for the deſcription of the offence. 2 Hawk. P. C. 268.

(*a*) But the appellant is firſt to demand oyer of the writ, and this he muſt do in open court. 2 Hawk. P. C. 267. Bigby v. Kennedies, 5 Burr. 2643. 2 Bl. Rep. 710. S. C.

So if in a writ of appeal brought by huſband and wife, the concluſion is in the name of the wife only; or if the writ omits either the name of baptiſm, or ſurname of the appellant or appellee being under the degree of nobility, it ſhall be abated. 2 Hawk. P. C.

Alſo the Court will abate the writ when the declaration varies from the writ in ſome material point, either as to the reign of the king, or as to the county wherein the fact is laid, *&c.* *Vide* Hawk. P. C. 268. and where ſuch faults in the declaration are not fatal, if the writ on the file be right, 8 Co. 162. and title *Amendment and Jeofail*.

On the exception of the party the Court will abate the writ; as if he ſhews that there are not 15 days between the *teſte* and return of the writ; but this he muſt do before he has pleaded in chief, without taking advantage of it. Salk. 63. pl. 4. See Ld Raym. 671. 12 Mod. 416. 448. 451.

If the writ or declaration miſtake either the name of baptiſm, or ſurname or addition of the appellant or appellee, the appellee before imparlance may plead it in abatement. Vent. 7. For this *vide* tit. *Miſnomer and Addition*; and 2 Hawk. P. C. 184 to 193.

But the omiſſion or inſufficiency of an addition is ſalved by the appellee's coming in and pleading, without taking any advantage of ſuch defect, but not by his bare appearance. 2 Hawk. P. C. 275.

The defendant may at the ſame time plead as many pleas in abatement as he pleaſes, together with matter in bar, and the general iſſue, if he can do it without repugnancy; and if he be (*b*) ſuffered to plead any ſuch plea without pleading with it the general iſſue, the finding it againſt him doth not conclude him from pleading the general iſſue afterwards. 2 Hawk. P. C. 276. (*b*) *Vide* Carth. 56. That he muſt plead the general iſſue at the ſame time that he pleads in abatement.

(H) The Form of the Declaration.

2 Hawk. P. C. 258. *Vide* head of *Indictments.*

THE declaration muſt ſet forth the offence with the utmoſt certainty, and likewiſe deſcribe it by ſuch words of art as the law has appropriated to the purpoſe; therefore if the words *felonicè* in any appeal, *murdravit* in an appeal of murder, *rapuit* in an appeal of rape, *cepit* in an appeal of larceny, *mayhemiavit* in an appeal of mayhem, be omitted, they cannot be ſupplied by any circumlocution.

2 Hawk. P. C. 259. Muſt ſhew the length and breadth of the wound, if practicable.

The declaration muſt ſet forth in what part of the body the wound was given; and therefore if it only ſays, that the wound was given *circa pectus*, it is vicious; but it is certain enough by ſhewing that the wound was given in the left part of the belly, or of the ſide, or in the left leg, *&c.*

2 Hawk. P. C. 260.

(*a*) The year is ſufficiently expreſſed by ſhewing the year of the

"By the ſtatute of *Glouceſter*, *cap.* 9. If an appeal declare the "deed, the (*a*) year, the (*b*) day, the (*c*) hour, the time of the "king, and the (*d*) town where the deed was done, and with "what (*e*) weapon, it ſhall ſtand in effect."

king without adding that of the Lord, or ſaying that it was in ſuch a year of the reign of the king. 3 Inſt. 318. 2 Hawk. P. C. 264. (*b*) Muſt not only ſhew the day of the hurt, but alſo the day of the death; and if done in the night-time, proper to allege *nocte ejuſdem diei*; but a miſtake of the day is not material on evidence, 2 Hawk. P. C. 264. (*c*) *Circa horam primam* ſufficient. 2 Hawk. P. C. 262. Carth. 333. S. P. But a miſtake of the hour on evidence is not material. (*d*) If a place be generally alleged, the law will intend it a vill, unleſs it be mentioned with ſome addition which ſhews the contrary. 2 Hawk. P. C. 265. Skin. 554. Carth. 333. But upon evidence the place is not material, ſo as the fact be proved any where within the county. 2 Hawk. P. C. 265. (*e*) If it were by other means, as by poiſoning, drowning, ſuffocating, burning, or the like, the circumſtances muſt be ſpecially ſet forth; but if the count be for killing with one weapon, and the evidence of killing with another, the variance is not material, if the means made uſe of may any way come under the notion of a weapon. 2 Hawk. P. C. 261. 3 Mod. 158.

(I) What may be pleaded in Bar to an Appeal.

2 Hawk. P. C. 279.

IF the appellant wants any of thoſe requiſites required by law in a perſon who brings an appeal, it will be a good plea; as that a woman was never lawfully married, that *A. B.* is heir at law, and not the appellant, *&c.*

Carth. 17. Where the appellee

Auterfoits convict of manſlaughter is a good plea to an appeal of murder for the ſame killing.

pleaded that he was before indicted of murder, and convicted of manſlaughter, and prayed his clergy which the Court would not allow him. *Vide* 3 Mod. 101. Carth. 16. 19. Salk. 61. Skin. 670 pl. 9.

Salk. 64. pl. 5. Cro. Eliz. 605.

A *retraxit* of one appeal is a good bar of another for the ſame thing, and ſo alſo is a nonſuit; and according to ſome opinions ſo is a diſcontinuance after appearance, but not before.

Sid. 32. Bulſt. 141. Cro. Jac. 283. Yelv. 204. [The caſe referred to in Bulſtr. Cro. Ja. and Yelv. is that of Bradley v. Banks, and there the whole Court were clearly of opinion, that a diſcontinuance before appearance was peremptory.]

2 Hawk. P. C. 282.

A releaſe of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or

or of all demands, is a good bar of any appeal; but a releaſe of all perſonal actions does not bar an appeal of felony, being an action of an higher nature.

If the appellee pleads a ſpecial plea, which does not amount to a confeſſion of the fact, it ſeems he muſt at the ſame time plead over to the felony, except in ſpecial caſes; as where ſuch plea would be prejudicial to him, or where ſuch plea declines the juriſdiction of the Court. 2 Hawk. P. C. 284. Carth. 56.

(K) How the Appellant is to be puniſhed for a falſe Appeal.

BY the common law a defendant may recover damages for a falſe and malicious appeal againſt the appellant and his abettors, by a writ of conſpiracy or action on the caſe. Co. Lit. 283.

And by *Weſtm.* 2. *cap.* 12. it is enacted as followeth, "For as "much as many through (*a*) malice, intending to grieve others, "do procure falſe appeals to be made of (*b*) homicides and other "felonies, by appellors having nothing to ſatisfy the king for "their falſe appeal, nor to the parties appealed for their da- "mages; it is ordained, that when any being appealed of felony "furmiſed upon him, doth (*c*) acquit himſelf in the king's court "in due manner, either at the ſuit of the appellor or of our "lord the king, the juſtices before whom the appeal ſhall be "heard, ſhall puniſh the appellor by a year's impriſonment; and "the appellor ſhall nevertheleſs reſtore to the (*d*) parties ap- "pealed their damages, according to the (*e*) diſcretion of the "juſtices, having reſpect to the impriſonment or arreſtment, "that the party appealed hath ſuſtained by reaſon of ſuch ap- "peals, and to the infamy that they have incurred by the impri- "ſonment, or otherwiſe; and ſhall nevertheleſs make a grievous "fine unto the king; and (*f*) if peradventure ſuch appellor be "not able to recompenſe the damages, it ſhall be inquired by "whoſe abetment by malice the appeal was commenced, if the "party appealed deſire it; and if it be found by the ſame inqueſt, "that any man is an abettor through malice, he ſhall be diſtrained "by a judicial writ, at the ſuit of the party appealed, to come "before the juſtices; and if he be lawfully convict of ſuch ma- "licious abetment, he ſhall be puniſhed by impriſonment and "reſtitution of damages, as before is ſaid of the appellor."

(*a*) The appeal muſt appear to have been brought maliciouſly; therefore if in an appeal of murder, the defendant be found guilty of manſlaugter or homicide *ſe defendendo*, neither the appellor nor his abettors can be puniſhed. 2 Hawk. P. C. 286.

(*b*) In the conſtruction of the words *homicides and other felonies*, it has been held, that they extend to offences made felony by ſubſequent ſtatutes. 2 Inſt. 384.

(*c*) But neither an acquittal by an abatement of the appeal by a bare non-ſuit on a plea, which ſhews that he is not entitled to the appeal, nor a judgment on a demurrer, nor an acquittal on an inſufficient original, nor any other diſcharge of the appellee, which does not finally bar all other proſecutions againſt him, either at the ſuit of the party or of the king, for the ſame felony, entitle him to his damages. 2 Hawk. P. C. 287.

(*d*) If there are ſeveral appellees, damages ſhall be aſſeſſed according to the different circumſtances of their ſeveral caſes. Dyer, 220. pl. 10. 2 Inſt. 386.

(*e*) Therefore if the jury give too ſmall damages, the juſtices may encreaſe them, and in like manner abridge them when they appear to be exorbitant. 2 Hawk. P. C. 288.

(*f*) The abettors are only liable in caſe the appellors be inſufficient; but if the appellor be found ſufficient to render only part of the damages, the judgment againſt the abettors ſhall be for the whole. 2 Hawk. 290. 1.

2 Hawk. P. C. 292.

Alſo at common law, an appellant ſhall be fined for an ill-grounded appeal, at the diſcretion of the juſtices, in caſes not provided againſt by this ſtatute; as upon a nonſuit after appearance, or where the appeal abates by the folly of the appellant, or where a feme covert ſues an appeal known by her to be groundleſs; as for the death of a huſband whom ſhe knows to be alive.

Approver.

H. H. P. C. 192. 3 Inſt. 129. S. P. C. 142. 2 H. H. P. C. 225, 226, 227. 229.

AN approver, or in *Latin*, *probator*, is one who being indicted of treaſon or felony, for which he is in priſon, confeſſes the indictment; and being ſworn to reveal all the treaſons and felonies he knows, enters before a coroner his appeal againſt all his partners in the crime within the realm.

3 Inſt. 125. H. H. P. C. 192.

All perſons may be approvers, except peers of the realm, perſons attainted of treaſon or felony, or (*a*) outlawed, infants, women, perſons *non compos*, or in holy orders.

(*a*) Whether diſabled by being outlawed in a perſonal action, *vide* 2 Hawk. P. C. 205. And whether infants and women may not be approvers, as they may bring an appeal at this day, though they cannot wage battle, *vide* 2 Hawk. 205. Rex v. Margaret Caroline Rudd, Cowp. 331. And that a man above the age of ſeventy, or maimed, may be an approver, though he cannot wage battle. H. H. P. C. 192.

3 Inſt. 139. S. P. C. 144. 2 Hawk. P. C. 294.

The Court is not bound of right to admit any perſon whatſoever to be an approver, nor will any perſon be admitted, unleſs he be actually indicted of treaſon or felony, and (*b*) confeſs the indictment; neither ſhall a perſon indicted of felony continue to be an approver after an appeal exhibited againſt him for the ſame felony; neither ſhall the appellee of an approver be himſelf an approver; for it would falſify the appeal of the firſt approver, in ſuppoſing that he had omitted ſome of his partners; and alſo it would cauſe an infinite delay; for the appellee of ſuch an approver might as well become an approver of others, and ſo on.

(*b*) That if he hath once pleaded not guilty, he cannot be an approver, but ſhall be hanged, becauſe it is found falſe, and his confeſſion contradicts his former plea, 3 Inſt. 129. H. H. P. C. 193. S. P. C. 144. But *vide* Finch, 387. *cont.* and 2 Hawk. P. C. 295. &

2 Inſt. 629. Fitz. Coron. 127. 2 Hawk. P. C. 295.

A man can only approve others of the very ſame crime with that for which he is indicted; and therefore no man can approve another with having been an acceſſary to himſelf, becauſe it is an offence of which it is not poſſible that he himſelf can be guilty; but inaſmuch as an approver is ſworn to reveal all the treaſons and felonies he knows, if he accuſe perſons of crimes different from his own, ſuch accuſation ſeems a reaſonable ground to carry

on a profecution againſt them for ſuch crimes, though it be not of itſelf ſufficient to put them on their trials.

If it appear either by the confeſſion of the approver, or by the return of the ſheriff, or the teſtimony of perſons of credit, that there are no ſuch perſons as ſome of thoſe appealed *in rerum naturâ*, or in the realm, or in the county whereof they are named in the appeal, he ſhall be hanged, unleſs the Court in mercy ſpare him. 2 Hawk. P. C. 296. and the authorities there cited.

The juſtices of the *King's Bench*, and juſtices of gaol-delivery, and juſtices in eyre, may admit a man to be an approver, becauſe ſuch juſtices may aſſign a coroner to take the appeal; but juſtices of the peace cannot admit a man to be an approver, becauſe they cannot aſſign a coroner. 3 Inſt. 130. H. P. C. 194. But whether the lord high ſteward, or juſtices of oyer and terminer can do it without a ſpecial clauſe in their commiſſion, authoriſing them to aſſign a coroner, *Q. & vide* 2 Hawk. P. C. 296. 2 H. H. P. C. 229. is expreſs, that a man cannot become an approver before juſtices of oyer and terminer, becauſe they cannot aſſign a coroner.

As ſoon as a perſon has confeſſed the indictment, with an intent to become an approver, he puts it in the diſcretion of the juſtices, either to give judgment and award execution againſt him, or to reſpite them till he hath convicted his partners; if the juſtices think fit to admit him to be an approver, they will aſſign a coroner to receive his appeal, and will take his oath to diſcover all the treaſons and felonies he knows, and will aſſign him a certain number of days, to make his appeal in, during which he ſhall be at liberty, and ſhall have from the king a (*a*) penny a-day; alſo he muſt make his appeal before the coroner on each day during the time limited, and muſt at laſt repeat it *verbatim* in court; and if the coroner record his failure of making his appeal on any of the days, or the leaſt variation in his repeating it in court, he ſhall have judgment of death. 3 Inſt. 129. H. P. C. 144. 2 Inſt. 629. 2 Hawk. P. C. 297. (*a*) See Anci. Dial. of Exchq. 426. and *Q.* Whether he ſhall have the penny till he has made good his appeal, by convicting the appellees?

2 Hawk. P. C. 297.

The coroner may award proceſs againſt the appellee, to the ſheriff of his own county, till he come to the *exigent*, from awarding whereof he ſeems to be reſtrained by *magna charta*, *cap.* 17. The *King's Bench* and juſtices in eyre, and juſtices of gaol-delivery, may award proceſs into any county to apprehend and try the appellee; but it ſeems queſtionable, whether *juſtices* of gaol-delivery can award proceſs of outlawry into a foreign county, as the *King's Bench* and juſtices of oyer clearly may. 2 Hawk. P. C.

It is at the election of the appellee, either to put himſelf on his country, or wage battle with the approver; and if ſeveral perſons be appealed by one approver, every one of them has his election, either to put himſelf on his country, or to wage battle with the approver, who muſt fight them all, or at leaſt till one of them hath vanquiſhed him; after which he cannot maintain his appeal againſt the reſt; but if a perſon appealed of the ſame felony by ſeveral approvers vanquiſh one of them, he ſhall be diſcharged againſt all the reſt. 2 Hawk. P. C. 297.

If the king pardon either the approver or appellee, pending the appeal, the approvement ceaſes, and the appellee ſhall be diſcharged; H. P. C. 201. 3 Inſt. 130. S. P. C. 149.

discharged; in the first case, because by the pardon the felony is extinct, and the approver is no longer liable to be condemned; in the second, because the approvement is, in truth, the suit of the king; and therefore as much in his power to pardon as an indictment.

2 Hawk. P. C. 298.

Neither the approver's confessing his appeal to be false, nor the conviction of the appellee, exclude him from the benefit of clergy.

2 Hawk. P. C. 299. See Anci. Dial. of Excheq. 426. As it is in the discretion of the Court, whether they will suffer one to be an approver, this method of late has been seldom practised; and in many cases we have what seems to amount to the same, by statute; where pardon is assured to offenders, on discovering and convicting their accomplices. Burn. 43. See the statute of 4 & 5 W. & M. c. 8. 6 & 7 W. 3. c. 17. 10 & 11 W. 3. c. 23. 5 Ann. c. 31. 29 G. 2. c. 30. There seems, however, some objection to the form in which the pardon to the accomplice is promised, *viz.* upon the criminal's being apprehended and convicted. The testimony of such an accomplice would be less liable to *exception*, if the pardon was granted upon his giving evidence generally, let the event of the trial be what it may. Observat. on Stat. 141. 2 Edit. [It hath also been usual, for the justices of the peace by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that, and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that, or any other previous offence of the same degree. 4 Bl. Com. 331. If the discovery upon the whole be fair and ample, he ought not to be prosecuted again, because he has merely by accident omitted any one offence. Cowp. 339. But if prosecuted, he cannot plead this in bar, or avail himself of it upon his trial: but he may move the Court to put off the trial, that he may have time to apply for a pardon. *Ibid.*]

If an approver convict all the appellees, whether by battle or verdict, the king, *ex debita justitiæ*, is to pardon him as to his life, and also give him his wages from the time of the appeal to the time of the conviction; but anciently he was not suffered to continue in the kingdom. It is recited by 5 *H.* 4. *cap.* 2. "That "divers notorious felons, for safeguard of their lives, had become "provers, to the intent, in the mean time, by brocage and "great gifts, to pursue and have their pardons; and then, af-"ter their deliverance, had become more notorious felons "than they were before; and thereupon it is enacted, that "if any person pray or pursue, or cause to be prayed or pur-"sued, for any such felon so attainted by his own confession, to "have any charter of pardon, the name of him that pursues such "charter be put in the same charter, making mention that the "same charter is granted at his instance; and if he to whom "such charter is granted become a felon again, the party who "pursued the charter shall forfeit 100*l.*"

Arbitrament and Award.

AN award is the determination of matters in controverſy, by ſubmiſſion to perſons indifferently choſen by the perſons contending.

Under this Head we ſhall conſider,

(A) The Matter in Controverſy.

(B) The Submiſſion; and therein of the different Kinds, and the Revocation thereof, and of the Stat. 9 & 10 W. 3. touching Awards.

(C) The Parties to the Submiſſion.

(D) The Arbitrators or Umpire.

(E) The Award itſelf, or final Determination of the Arbitrators or Umpire.

1. It muſt be made according to the Submiſſion.
2. It ought to be certain.
3. It ought to be equal, and mutually ſatisfactory.
4. It muſt be of a Thing lawful and poſſible.
5. It muſt be final.

(F) The Conſtruction and Effect of the Award, and herein of the Performance thereof.

(G) Of the Pleadings in Awards.

[(H) In what Caſes the Performance of an Award may be compelled by an Attachment, and the Courſe of Proceeding to be taken in order to obtain it.

(I) Of compelling Performance of an Award by Bill in Equity.

(K) In what Caſes, when, and in what Manner Awards may be relieved againſt.]

(A) The

(A) The Matter in Controverſy.

Roll. Abr. 242. 14 H. 4. 19. 24. 9 H. 6. 6. a. Keilw. 99. Leon. 228. Roll. Abr. 244. pl. 14. 9 E. 4. 44.

WHERE the right of freehold is in debate, the property cannot be transferred by an award; for the arbitrators are in the room of the parties themſelves, and act in their ſtead, as far as commiſſioned; whatever, therefore, the parties can do, may be done by the arbitrators; but the parties (*a*) cannot paſs corporeal inheritances without ſolemn livery.

(*a*) But if the condition of an obligation is to ſtand to the award of *J. S.* touching ſuch lands, and the arbitrator awards the lands to one, and that the other ſhould releaſe to him, if he does not do this, the obligation is forfeited; if the arbitrator awards the land to one, it ſeems the obligation is not forfeited, though the other do not convey to him to make him a good title; for the arbitrator hath not awarded any act to be done by the party; and the award itſelf cannot transfer the right, and ſo muſt be void; and then the condition of the obligation cannot be forfeited; for the awarding the lands to one cannot be expounded, that the other ſhall infeoff him. If, where there is no bond, the arbitrator award that one ſhall infeoff the other, it ſeems an action on the caſe may be maintained for not doing it; for the award in itſelf is as good as if there were a bond, and then there is the ſame reaſon an action ſhould lie, as that the condition of the obligation ſhould be forfeited; for if ſuch an award were void, then the condition of the obligation to perform it could not be broken. *Vide* the authorities *ſupra*. but ſee 3 Bl. Com. 16. Ld. Raym. 115. Kyd. 34 to 40. [In the year 1417, we find a very important arbitration by the keeper of the king's privy ſeal, the chief juſtice of the King's Bench, and one of the other judges of that court, arbitrators nominated and appointed by King Henry V. to ſettle a long controverſy between the biſhop and the prior of the church of *Ely*, concerning their ſeveral claims to eccleſiaſtical and temporal juriſdiction, and the land of ſeveral manors. Bentham's Hiſt. El. Append. 27. e. MSS. Cotton. C. 11. fo. 329.]

9 H. 6. 60. 14 H. 4. 19. Roll. Abr. 266. pl. 3.

An annuity is not determinable by award, for it is reckoned in nature of a freehold, and therefore cannot paſs without the deed of the party.

Roll. Abr. 242. A. p. 3. V.

Partition cannot be made by award, for a freehold cannot paſs without livery and ſeiſin.

Roll. Abr. 242. A. pl. 4. 9 Co. 78. 6 Co. 44. Leon. 104.

It has been (*b*) doubted, Whether leaſes for years, being chattels real, could be transferred by award? Therefore it ſeems ſafeſt when the controverſy relates to theſe, that the parties be bound in mutual obligations to perform the award, and then if the arbitrators award that one ſhall aſſign, transfer, &c. the leaſe to the other, if he refuſes, he forfeits his obligation.

(*b*) An award of the arrears of rent reſerved on a leaſe for years, joined with other things of an uncertain nature, is good. Roll. Abr. 264. pl. 5. Allen, 52. Where an award may be made in waſte. 6 Co. 44. 9 Co. 78. Cro. Jac. 100. Roll. Abr. 266. pl. 9.

9 H. 6. 60.

The detaining a charter of feoffment, as it relates to a real thing, cannot be ſubmitted, but an action of treſpaſs for taking the charter may be ſubmitted; for damages only can be recovered for ſuch taking.

6 H. 4. 6. a. 8 H. 5. 3. b. 4 H. 6. 17. b. Roll. Abr. 264. p. 1. *cont.*

Debt, on arrearages of account before auditors, ſhall not be diſcharged by award, becauſe it appears of (*c*) record, and muſt be diſcharged by matters of as high a nature.

2 H. 4. 18. (*c*) An award may be made in attaint, becauſe not barely founded on the record, but alſo on the ſuppoſed falſe oath. 13 E. 4. 1. b.

Weſt. Symb. Part 2. ſ. 33.

Cauſes criminal are (*d*) not arbitrable, becauſe they ought to be puniſhed for the common good.

(*d*) Though the ſubmiſſion be by bond, yet the obligation is void, and the parties may be puniſhed for entering into ſuch bonds. 2 Vent. 109.

Cauſes matrimonial ſeem not arbitrable, becauſe marriage ought to be free, and religion diſallows the ſevering thoſe whom the church hath joined. West. Symb. Part 2. ſ. 33. Roll. Abr. 252. pl. 10.

But the damages a perſon ſuſtained by a promiſe of marriage, or any thing relating to a marriage portion, may be ſubmitted. 16 E. 4. 2. pl. 6.

Debts due by ſpecialty cannot be diſcharged by naked award; but if the ſubmiſſion were by bond the award would be a good bar, for one ſpecialty may be diſſolved by another. 1 H. 7. 16. b. Dyer, 51. 6 Co. 44. Cro. Jac. 99. 447. 649.

A certain and fixed debt is not diſcharged by an award, for the end and deſign of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have before; and to give him leſs than he had before is to do him a manifeſt injuſtice, which the arbitrator cannot do. 10 H. 7. 4. Roll. Abr. 264. But if 20 *l.* be due to a man, and he and another ſubmit all perſonal things, &c. to arbitration, there, if the arbitrator award 10 *l.* it is a good award, becauſe there were other uncertain things ſubmitted, and the arbitrator had conſideration of all, and ſet one againſt the other in making the award, ſo as perhaps the debt of 20 *l.* was diminiſhed in conſideration of ſome treſpaſſes done by him to the other party. 10 H. 7. 4 Allen, 52. [Godfrey v. Godfrey, 2 Mod. 303. S. P. And ſo things which cannot be ſubmitted by themſelves, may, when joined with things of an uncertain nature, as debt on bond, 6 H. 4. 6. a. b. Coxal v. Sharp, 1 Keb. 937. Morris v. Creech, 623. 659. 1 Lev. 292. S. C. Debt for arrears of rent aſcertained by a leaſe, 10 H. 7. 4. Damages recovered by verdict and judgment. Goldſb. 91. 2.] In debt on arbitration, whereas the plaintiff claimed 40 *l. pro diverſis negotiis*, and ſets out the award; and it was held that the action lay, for the debt being *pro diverſis negotiis*, it was uncertain what was due for buſineſs. Cro. El. 422.

It is holden clearly, that all chattels perſonal, and perſonal actions, ſuch as treſpaſs, conſpiracy, maintenance, &c. may be determined by arbitration, and the right transferred by naked award, though the ſubmiſſion were not by deed; for theſe being transferable by the party himſelf without any ſolemnity, whatever the parties themſelves could do, may be done by the arbitrators, who are their ſubſtitutes, and ſtand in their place: and if on theſe ſubmiſſions without deed the arbitrators award one party a ſum certain, he may bring an action of debt for it; but if they award the doing of ſome other thing, which is beneficial to him, he muſt bring his action on the caſe. 22 H. 6. 39. b. 9 Co. 78. Peytoe's caſe. Roll. Abr. 242. Of ſubmiſſions made purſuant to a rule of Court, *vide poſt*, Let. (B).

The arbitrators cannot make an award of matters different from thoſe which were ſubmitted; therefore if the ſubmiſſion be of ewes with lambs, and after the ſubmiſſion the lambs are yeaned, they cannot arbitrate concerning the lambs. Keb. 600. 2 Weſt. Symb. ſ. 32.

[An appeal at ſeſſions againſt a poor-rate may, with the conſent of the parties intereſted, be referred by the juſtices to arbitration.] Cald. 30. Rex v. Juſtices of Northampton.

(B) The Submiſſion; and therein of the different Kinds, and the Revocation thereof.

West. Symb. Part 2. ſ. 1, 2.

THE ſubmiſſion is the authority given by the parties in controverſy to the arbitrators, to determine and end their grievances; and this being a contract or agreement muſt not be taken ſtrictly, but largely, and according to the intent of the parties ſubmitting.

5 E. 4. 7. Keb. 600. 2 Keb. 238. 3 Keb. 64. a.

This ſubmiſſion may be by word or deed; if the ſubmiſſion be by word, there is no remedy to enforce the party to perform the award; but reciprocal actions on the caſe, and an action of debt will lie, if money be awarded (*a*), for it is in nature of a ſimple contract.

(*a*) But now an action may be maintained in all caſes upon the ſubmiſſion itſelf. Purſlow v. Bailey, 2 Ld. Raym. 1039. Kyd. 7.]

36 H. 6. 8. 22 E. 4. 25. Owdy v. Gibbons, Comb. 100.

[If the ſubmiſſion be by bond, ſuch bond may be given to a third perſon, or even to the arbitrator himſelf; and it may be given by other perſons than the parties themſelves who will incur the forfeiture, if the parties do not perform the award.

Hayes v. Hayes, Cro. Car. 433.

It is not neceſſary that in each of the bonds of ſubmiſſion it ſhould appear of how many perſons the parties to the ſubmiſſion conſiſt. Thus where it appeared that there were three brothers, *Richard*, *Robert*, and *William*; that their father had deviſed certain lands to the two latter, and that, ſeveral diſputes ariſing between them and *Richard*, they had, by bond, ſubmitted to arbitration; *Richard* entering into a bond to *Robert* and *William* jointly; but they giving him ſeparate bonds; it was holden, after ſeveral arguments, on an action brought by *Richard* againſt *Robert*, that the ſubmiſſion was properly made.

Samways v. Eldſly, 2 Mod. 73.

The ſubmiſſion may be by indenture with mutual covenants to ſtand to the award.]

21 H. 6. 30. a. Br. tit. *Arbitrament*, pl. 49. 8 Co. 81, 82.

If the ſubmiſſion be without deed, it may be revoked without deed, and the party ſhall loſe nothing, for *ex nudâ ſubmiſſione non oritur actio*.

But the party muſt give notice of the revocation. Sid. 281.

8 Co. 82. Sid. 281. Brownl. 62. 2 Brownl. 290.

If the ſubmiſſion be by deed, it is of its own nature (*b*) countermandable, though made irrevocable by the expreſs words of the deed; for the arbitrators being conſtituted and put in the place of the parties, by their conſent, to act for them, they can no longer act than they have ſuch conſent.

(*b*) But it cannot be countermanded without deed, *quia ſolvitur, &c.* 8 Co. 80. b. Brownl. 62. If you plead *quod revocavit*, without giving any notice to the arbitrators, the party may take iſſue upon the revocation; for not to let them know you have revoked is no revoking; for *de non apparentibus & non exiſtentibus eadem eſt ratio*; but it need not be ſhewn in pleading, that notice was given, for there *quod revocavit* neceſſarily implies notice. 8 Co. 82. 2 Brownl. 290, 291.

8 Co. 82, 83. Brownl. 62.

But where a man obliges himſelf to ſtand to an award, if the party revokes it according to his power, he hath forfeited his obligation, for the making the award becomes impoſſible by

by his own default, and therefore the obligation is ſimple; but if it be without obligation he forfeits nothing (*a*).

[(*a*) In 2 Keb. 10. 20. 24. and Sid. 281. there is an inſtance of an action on the caſe being maintained for the countermand of a parol ſubmiſſion; and there can be no doubt but an action will lie in ſuch a caſe, for a parol ſubmiſſion amounts to a promiſe to perform.]

If ſeveral plaintiffs or defendants ſubmit themſelves to an award, one cannot revoke the ſubmiſſion without the other, for joint acts are conſidered as the acts of one perſon, and there can be no revocation without the act of that perſon that made the ſubmiſſion. 28H.6.6.b. Brownl. 62.

[If one of the parties firſt revoke the authority of the arbitrators, and afterwards requeſt them to make an award, that will not ſave the forfeiture. But where the ſubmiſſion limits no time for the making of the award, it ſhall be underſtood to be within convenient time; and if in ſuch a caſe the party requeſt the arbitrators to make an award, and they do not, a revocation afterwards will be no breach of the ſubmiſſion. Newgate v. Degeldir, 2 Keb. 10. 20.

One party may revoke with the conſent of the other; but conſent after the revocation will not ſave the penalty of the bond.] Noble v. Harris, 3 Keb. 745.

If a feme ſole ſubmits to arbitration, and afterwards marries, this is a revocation of the ſubmiſſion; and if it be by bond the bond is forfeited (*b*). 2 Keb. 865. Jones, 388.

[(*b*) But if the huſband and wife ſubmit again, the Courts will not encourage the oppoſite party in ſuing for the forfeiture. Samin v. Norton, 3 Keb. 9.]

If one have judgment in an ejectment, and then the controverſy be ſubmitted to arbitration, but before any award be made he ſue out execution, it is a forfeiture of the bond, for he is the (*c*) cauſe no award can be made. T. Jones, 134.

(*c*) A matter was referred by conſent to three of the jury, and before the award was made, one of the parties ſerved the arbitrators with a *ſubpœna* out of Chancery, which hindered them from proceeding in the award; and the Court held this a breach of the rule, and granted an attachment *niſi*. Salk. 73. pl. 10.

In debt upon a bond to perform an award, and *oyer* of the condition, the defendant pleads non *ſubmiſit*, the plaintiff need not aſſign a breach, for the defendant puts the whole ſtreſs of his cauſe upon a matter antecedent to the alleging of a breach; for if there was no ſubmiſſion there could be no award, and conſequently no breach of it. Sid. 290.

A ſubmiſſion may be made a rule of court, purſuant to the ſtatute (*d*) 9 & 10 *W.* 3. *cap.* 15.; and it is ſaid, that although the ſubmiſſion be by bond, yet the party may have it made a rule of Court; in which caſe, it is ſaid, he may proceed on the bond, and likewiſe have an attachment for not performing the award. Salk. 73. pl. 12.

(*d*) *Vide* Sid. 54. Raym. 35. where ſuch rules have been before this ſtatute.

By the 9 & 10 *W.* 3. *cap.* 15. it is enacted, "That it ſhall and "may be lawful for all merchants and traders, and others de- "ſiring to end any controverſy, ſuit, or quarrel, for which there "is no other remedy but by perſonal action, or ſuit in equity, "by arbitration, to (*e*) agree that their ſubmiſſion of the ſuit to "the Stra. 1. 10Mod. 332.

(*e*) An arbitration-bond had theſe words: And if the

obligor ſhall conſent that his ſubmiſſion ſhall be made a rule of Court, that then, &c. Upon motion to make his ſubmiſſion a rule of Court, it was objected, that theſe words did not imply his conſent, but if he would forfeit his bond, he need not let it be made a rule of Court; yet, becauſe this clauſe could be inſerted for no other purpoſe, the Court took theſe conditional words to be a ſufficient indication of conſent. Salk. 72. pl. 8. Ld. Raym. 674. Com. Rep. 114. [A conſent in the ſubmiſſion bond that the award ſhall be made a

"the award or umpirage of any perſon or perſons ſhould be made a rule of any of his majeſty's (*a*) courts of record, which the parties ſhall chooſe, and to inſert ſuch their agreement in their ſubmiſſion; or the condition of the bond or promiſe, whereby they oblige themſelves reſpectively to ſubmit to the award or umpirage of any perſon or perſons; which agreement being ſo made and inſerted in their ſubmiſſion, or promiſe or condition of their reſpective bonds, ſhall or may upon producing an affidavit thereof, made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entered of record in ſuch court; and a rule ſhall thereupon be made by the ſaid Court, that the parties ſhall ſubmit to, and finally be concluded by the arbitration or umpirage which ſhall be made concerning them by the arbitrators or umpire, purſuant to ſuch ſubmiſſion; and in caſe of diſobedience to ſuch arbitration or umpirage, the party refuſing or neglecting to perform and execute the ſame, or any part thereof, ſhall be (*b*) ſubject to all the penalties of contemning a rule of Court, where he is a ſuitor or defendant in ſuch court, and the Court, on motion, ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution by any order, rule, command or proceſs of any other Court, either of law or equity, unleſs it ſhall be made appear on oath to ſuch Court, that the arbitrators or umpire (*c*) miſbehaved themſelves, and that ſuch award, arbitration or umpirage, was procured by corruption or other undue means: and that any arbitration or umpirage procured by corruption or undue means, ſhall be judged and eſteemed void and of none effect, and accordingly be ſet aſide by any Court of law or equity; ſo as complaint of ſuch corruption or undue practice be made in the court where the rule is made for ſubmiſſion to ſuch arbitration or umpirage, before the laſt day of the next term after ſuch arbitration or umpirage made and publiſhed to the parties."

rule of Court, does not warrant the making of the ſubmiſſion a rule of Court. 2 Str. 1178. 2 Barnard. 163. A ſubmiſſion may be made a rule of Court on the motion of one party, and producing the bond executed by the other. Barnes, 55. So it may, though it be no part of the condition of the bond, but be thereunder written, and not ſigned, if it appear by affidavit that it was written before the execution of the bond. *Ibid.* (*a*) The Court will compel a witneſs to a ſubmiſſion to arbitration, to make affidavit of the execution, in order to make a rule of Court. Str. 1. Barnes, 58.] A matter being referred by rule of Court to the determination of the judges of aſſize, it was moved that the judges' determination might be made a rule of Court; and *per* Holt, where a matter is referred to arbitrators by rule of Court, and they make their award, we will compel a performance of it, as much as if the award were part of the rule; ſo a new rule is needleſs. Salk. 71. pl. 6. *Note*; The conſtant practice is to make the rule at *niſi prius* a rule of the Court above, which is always granted on motion. (*b*) If one of the parties revokes the ſubmiſſion, or hinders the arbitrators from proceeding in the award, the Court will grant an attachment. Salk. 73. pl. 10. But if the party dies, there is no remedy by attachment againſt his repreſentatives, for the contempt dies with him. 2 Vern. 444. If the party excepts to the award, though it be affirmed, an attachment will not be granted; for the non-performance of it, while the matter was *ſub judice*, was no contempt. Salk. 73. pl. 11. 2 Ld. Raym. 857. 3 Keb. 446. Alſo, the party muſt be required perſonally to perform the award, and ſuch perſonal demand muſt be made out by affidavit, otherwiſe the Court will not grant an attachment. Salk. 83. pl. 1. (*c*) On * motion to ſet aſide an award, becauſe the arbitrators went on without giving the party time to be heard, or produce a witneſs, Holt ſaid, that arbitrators being judges of the party's own chooſing, he ſhall not come and ſay that they have not done him juſtice, and put the Court to examine it: *aliter* when they exceed their authority.

authority. Salk. 73. pl. 11. Awards have been frequently ſet aſide, eſpecially in equity, where the arbitrators have appeared to have been miſtaken, or have been guilty of corruption or partiality; as if they have an intereſt in the thing in controverſy. 2 Vern. 251. So where there are three arbitrators, and two of them by fraud or force exclude the other, or if they have private meetings, and admit one of the parties, and give no notice to the other. 2 Vern. 514. So where they awarded 495 *l.* againſt one of the parties for calling the other, who was a butcher, *a bankrupt knave*, to repair his honour, as they called it. Vern. 157. So where the ſubmiſſion was to arbitrators, and they had power to chooſe an umpire, which they did by throwing *croſs* and *pile* who ſhould name him; and for this the Court ſet aſide the award. 2 Vern. 485. This ſtatute does not extend to ſubmiſſion by rule of Court. Stra. 701. [It was made to put ſubmiſſions to arbitration in caſes where no cauſe was depending upon the ſame footing as where there was one, and is only declaratory of what the law was in the latter caſe.] 2 Barr. Rep. 701. * This motion will not be received before ſubmiſſion be made a rule of Court. 2 Stra. 1178.

Submiſſions are likewiſe general, as of all controverſies, debts, dues, *&c.* and here the arbitrators are not obliged to determine all matters diſcloſed, but their arbitration of ſome things will be good, though they leave other things undone; but where the ſubmiſſion is ſpecial or conditional, *ita quod* an award be made of all controverſies depending, they ought to determine all matters whereof they have notice, becauſe here, by the expreſs words of the authority, I do not own his determination unleſs all matters in controverſy are ſettled; and therefore to determine one without the others, is to act contrary to the authority; but if upon ſuch a ſubmiſſion the arbitrators make an award but of one thing, it ſhall be intended there were no others to make an award of, unleſs the other ſide ſhew there was, and that the arbitrators had notice thereof.

Cro. Eliz. 839. Cro. Jac. 200. 355. 8 Co. 98. Dyer, 216. Roll. Abr. 257. Sand. 32. Browni. 63. *Vide poſtea*, that awards now receive a more favourable interpretation than formerly, *vide* 9 Mod. 232. 2 Stra. 1024.

(C) The Parties to the Submiſſion, and who are bound by it.

PERSONS that cannot contract cannot ſubmit to arbitration, therefore femes covert, perſons compelled by threats and impriſonment, perſons profeſſed in religion, cannot ſubmit. 10 H. 6. 14. Latch. 207.

The huſband may ſubmit the chattels he hath in right of his wife to an award, for he may diſpoſe of them. Stile, 351. March, 77, 78.

If the huſband ſubmits to arbitration the chattels the wife has as executrix or adminiſtratrix, this ſhall bind the wife, becauſe the wife cannot (*a*) perſonate any one without the huſband during coverture. 21 H. 7. 29. Roll. Rep. 269. Cro. Jac. 447.

(*a*) But Q. For, by ſome opinions, the wife, in this caſe, may ſubmit to an award without the huſband; for when the huſband allows her a power of adminiſtration, he muſt ſuffer her to act purſuant to the truſt repoſed in her, and his expreſs conſent to her adminiſtration is a tacit conſent to all future actions of that nature, and conſequently are his own acts; but whether this makes him liable to a *devaſtavit* is a greater queſtion, becauſe they are not properly acts of adminiſtration, and conſequently he never conſented to them. *Vide* 1 Anderſ. 117. 181. 5 Co. 27.

[An executor may, as ſuch, ſubmit to arbitration. But if the arbitrators do not award as much as he would be entitled to at law, it will be a devaſtavit for the reſidue. As, if an executor ſubmit to arbitration, and it be awarded, that for 70*l.* he releaſe an obligation given to his teſtator, in 100*l.* for performance of covenants

Dy. 261. Office Extr. 159. Anon. 3 Leon. 53. But the ſubmiſſion of itſelf is not

an admiſſion of aſſets. Pearſon v. Henry, 5 Term Rep. 9. covenants which were broken by the obligor, the 100*l.* ſhall be aſſets, for the ſubmiſſion was his own act.

Where the executor engages himſelf perſonally, and in broad terms ſubmits to pay whatever ſhall be awarded, he cannot afterwards reſort to the plea of *plené adminiſtravit*. Barry v. Ruſh, 1 Term Rep. 691.

1 Ld. Raym. 248. 2 Ventr. 249. Executors are bound by the ſubmiſſion of their teſtator.]

13 H. 4. 12. 10 H. 6. 14. March, 111. If an infant ſubmit to arbitration, he may execute or avoid it at his election, as he may all other his contracts.

141. Jones, 164. 3 Lev. 17. Roll. Abr. 268. p. 1, 2. 730. pl. 5. [Equity will not decree an award to bind an infant. Eq. Caſ. Abr. 50. In the caſe of Roberts v. Newbold, it is ruled, that a guardian may ſubmit for the infant, and enter into a bond for his performance of the award. Comb. 318. And in the caſe of the Bp. of Bath and Wells v. Hippeſley, 28 Ch. 2. cited by Ld. Hardwicke, 3 Atk. 614., Lord Nottingham held an infant bound by an award ſubmitted to by the biſhop of the one part, and the infant and his guardian of the other part; and on a bill to confirm it, decreed accordingly.]

Perſons attainted or outlawed cannot ſubmit to arbitration, for they have no property, and cannot by the law controvert any thing.

21 E. 4. 13. A dean without the chapter, a mayor without his commonalty, the maſter of a college or hoſpital without his fellows, cannot ſubmit to an award, for the ſubmiſſion has the force of a contract, and they cannot contract without them

Dyer, 216. b. Caghill v. Fitzgerald, 1 Wilſ. 28. 58. [If a man authorize another on his behalf to refer a diſpute between the principal and another, an award conſequent on ſuch ſubmiſſion is binding on the principal alone; and it is no objection that the agent had no intereſt in the ſubject of the diſpute. But if the agent expreſsly bind himſelf for the performance of the principal, not only the principal who authorized him, but the agent himſelf, is bound by the award (*a*).

(*a*) In general, a man is bound by an award to which he ſubmits for another. Alſop v. Senior, 2 Keb. 707. 718. Shelf v. Bailey, Com. Rep. 183. And where an attorney ſubmits without the expreſs authority of his principal, the attorney only, and not the principal, ſhall be bound. Bacon v. Dubarry, 1 Salk. 70. 1 Ld. Raym. 246. S. C. Comb. 129. S. C. Carth. 412. S. C. In the caſe of Evans v. Cogan, Ld. King thought, that daughters of age and unmarried, might, though not parties to the ſubmiſſion, by conſent ſubſequent, be bound by an award to which their mother ſubmitted, touching the title of an eſtate which was limited to them after her death. 2 P. Wms. 449. The aſſent of a ſolicitor to a reference by rule of a court of equity, it has been holden, is not obligatory upon the client, without his actual concurrence; though ſuch a reference, by rule of *niſi prius*, will bind the client; 1 Ch. Rep. 104. 1 Ch. Caſ. 86.; but the former point may now be doubted.

Strangford v. Green, 2 Mod. 228. If a man ſubmit, for himſelf and partner, all matters in difference between the partnerſhip and another, the partner ſubmitting ſhall be bound to perform the award; but the other ſhall not, becauſe he is a ſtranger to the award.

Mudy v. Oſam. Lit. 30. Hetl. 4. S. C. If the parſon on the one hand, and ſome of the pariſhioners on the other, in behalf of themſelves and the reſt of the inhabitants of the pariſh, but without the authority of the reſt, ſubmit to arbitration by bond, the pariſhioners ſubmitting ſhall alone be anſwerable for a breach of the award by any of the other pariſhioners.]

20 H. 6. 12. a. 41. a. If ſeveral perſons do a treſpaſs, and one of the wrong-doers and the party to whom it is done ſubmit to arbitration, and an award

award is made, the other perſon ſhall take advantage of it by way of extinguiſhment of the treſpaſs; the ſame law where the party releaſes to one of them; for in both caſes a ſatisfaction really is, or is preſumed to be made, and a man cannot receive a double compenſation for the ſame wrong. Roll. Abr. 268. (B).

If ſeveral perſons on the one part, and ſeveral on the other, ſubmit generally to any award, the arbitrators have not only power to determine matters between them jointly, but ſeverally and diſtinctly alſo; and an award between one only of the one ſide and another of the other ſide is good; for this is not doing leſs than the commiſſion warrants, ſince there is an authority in it to determine matters diſtinctly between them, for the ſubmiſſion is of all matters, ſo that it contains as well all things ſeverally between each of them, as jointly between them all, and perhaps there may be no cauſe of award between the others. 2 Rich. 3. 18. b. 1 Keb. 886. 22 E. 4. 25. Latch. 208. Roll. Rep. 298. Brown. 112. Yelv. 203. 1 Bulſt. 123. Cro. Car. 433. Stile, 471. Roll. Abr. 261. Hard. 399. Vern. 259.

[By ſtat. 5 *G.* 2. *c.* 30. *ſ.* 34., it is provided, "That the "aſſignee or aſſignees of any bankrupt's eſtate and effects, "with the conſent of the major part in value of the bankrupt's "creditors who ſhall have duly proved their debts under the "commiſſion, and who ſhall be preſent at any meeting of the "ſaid creditors, purſuant to notice to be for that purpoſe given "in the *London* Gazette, may ſubmit any difference or diſ-"pute between ſuch aſſignee or aſſignees, and any perſon or "perſons whatſoever for or on account, or by reaſon or means "of any matter, cauſe, or thing whatſoever relating to ſuch "bankrupt or bankrupts, his, her, or their eſtate or effects, to "the final end and determination of arbitrators to be choſen by "the ſaid aſſignee or aſſignees, and the major part in value of "ſuch creditors, and the party or parties with whom they ſhall "have ſuch difference, and perform the award of ſuch arbitra-"tors: and the ſame ſhall be binding on all the creditors of the "ſaid bankrupt or bankrupts; and the aſſignees are thereby in-"demnified for what they ſhall fairly do according to the direc-"tions aforeſaid."

Lord *Hardwicke* held, that under this clauſe the creditors could not give a general power to the aſſignees to ſubmit matters to arbitration at their own diſcretion, but that they muſt have a ſpecial meeting, upon notice given for that purpoſe in the *London* Gazette, to conſider of the particular caſe intended to be ſubmitted to arbitration.] 1 Atk. 91. *Ex parte* Whitchurch.

(D) The Arbitrators or Umpire.

THE arbitrators are perſons indifferently choſen, to determine the matters in controverſy according to their own minds, whether they be matters of law or fact: infants, perſons excommunicate, outlawed, &c. (*a*) may be arbitrators, for every perſon muſt uſe his own diſcretion in the choice of his judges; and West. Symb. Part 2. ſ. 27. Hard. 44. Salk. 73. [(*a*) Q. of this? and ſee the part re-

ferred to in West, where these very persons are excepted against as incompetent. In 8 E. 4. 1. & Br. tit. *Arbitrament*, 37. there is an instance of an unmarried woman, the Duchess of *Suffolk*, being an arbitress.]

and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice.

5 Co. 78. 3 Atk. 529. Roll. Abr. 251. Cro. Eliz. 726. Palm. 146. 2 Roll. Rep. 214. Sid. 59. Hard. 45. [2 Atk. 504.

The arbitrators are personally trusted with the authority, and it is not within their power to assign it; therefore if an award be to stand to the determination of a stranger, this is void; but if the award be, that an arbitrament made by *J. S.* shall stand, this is good, because it is their own award, though it refers to the act of another; but though the arbitrators cannot transfer their power, yet they may award that others shall do a ministerial act in subserviency to their award; for what is done by such persons, is done by them as servants and instruments of the arbitrators, and is the act of the arbitrator himself; as that such a conveyance should be made as counsel should direct, such costs paid as the prothonotary should tax (*a*), is a good award.

So if they award releases, but leave it to the Court to give directions to settle the form; *aliter*, if they award, that the Court shall settle the release first, and the arbitrators will afterwards consider whether they shall order it. *Ibid.* So if they recommend it to the parties to appoint a receiver, and if they do not, request the Court to do it; the award shall not be avoided; for it is not a delegation of their power, but a recommendation; and if the parties do not comply, it is surplusage. *Id.* 501.] If the submission be to *Randolphus S.*, and the award is made by *Randulphus S.*, the award is not good, because they cannot be taken to be the same person, being different christian names. Roll. Rep. 271. *Sed. qu.* If a Court would set aside the award for this trifling mistake, if it appeared to be the person meant? [(*a*) But not as any but the officers of the superior courts should settle. B. R. H. 181. 2 Str. 1025.]

Cro. Jac. 315. 584. Hob. 218. Sid. 59.

The arbitrators cannot reserve to themselves a further power, since that would enable them to make a double award, without the interposition of those who impowered them at first.

3 H. 4. 1. b. Roll. Abr. 250.

The arbitrators cannot make their award by parcels at several times, for when they have made an award they have executed their authority, and can do no more; and therefore if two submit all debts, trespasses, *&c.* and the arbitrators one day make an award of the debts, and of the trespasses another day, this is not good as to the trespasses, but they may deliberate of one thing one day, and of another the other day, and then make an entire award of the whole: also an award made in the night is good, for the party's attendance is not requisite; but where an act cannot be done without personal attendance of a third person, it cannot be in the night.

Cro. Eliz. 676.

Sid. 281. 2 Keb. 10.

If a submission is made to *A.* and *B.*, when their occasion will permit, convenient time must be given, after request; and if no arbitration be then made, the parties may revoke.

Roll. Abr. 261.

If there be a submission to arbitration, and if they cannot agree before the first of *May*, then the submission is made to *J. S.* to be the umpire, to be made before a certain day then next to come; if the arbitrators never discourse about the matter, so as there is not any disagreement between them, yet if they do not make an award before the day, the umpire may determine the matter; for these words, *if they cannot agree*, are not

not to be taken literally, but only that if they do not make an award, that then, &c.

If the condition of an obligation be to ſtand to the award of certain perſons, *A.* and *B.* and *J. S.* being umpire for both parties, in this caſe an award by *A.* and *B.* is (*a*) good; for *umpire*, in the common ſignification of the word, denotes a perſon that is to make an end of the matter, if the others cannot. Roll. Abr. 261, 262. Oſborne and Rogton.

(*a*) If a ſubmiſſion be to four, and to the umpirage of *J. S.*, the four and *J. S.* may join in making the award; otherwiſe, if their power had been divided in the ſubmiſſion; as if it had been to the four, and if they could not agree, then to *J. S.* Bulſt. 184. *Vide* Hard. 44. *Sed. qu.* In this laſt caſe, if the five join in the award, is it not the award of the four? [If arbitrators join with the umpire in the deed of umpirage, it is merely ſurpluſage, and the deed is good. The diſtinction taken in Bulſtr. 184. is abſurd. 1 Bl. Rep. 463. 3 Burr. 1474.]

If the condition of an obligation be to ſtand to the award of *A. B. C.* and *D*, *ita quod* the ſaid award before ſuch a day be made in writing by the ſaid *A. B. C.* and *D.*, or any two of them, under their hands, &c. any two of the arbitrators, without the reſt, may make an award; for though by the firſt part they are bound to ſtand to the award of thoſe four, yet their power is divided by the ſubſequent words, and the *ita quod* is but an explanation of the condition, and the whole makes but one ſentence. 3 Bulſt. 62. 68. Yelv. 203. Sallows v. Gilling. For this *vide* Vent. 50. 2 Keb. 57. Cro. Jac. 400. Moor, 849. Roll. Rep. 223. 375. Barnes, 57.

If the arbitrators and umpire have the ſame time allotted them to make their award in the ſubmiſſion, as to the umpire it is not abſolutely void; for if one of the arbitrators die, or abſolutely refuſe to meddle, then the umpire may determine the matters, otherwiſe not; for two different judges cannot have a concurrent juriſdiction of the ſame thing; and a diſagreement between the arbitrators at their firſt meeting, gives no power to the umpire to interpoſe, becauſe, though they do not agree at their firſt meeting, they may at the next. 2 Sand. 131. Sid. 428. 455. Roll. Abr. 261. Raym. 187. 1 Lev. 285. *Vide* T. Jones, 168. 2 Ventr. 116.

The arbitrators may chooſe the umpire before their own time is expired, for that is no relinquiſhing the arbitration, but a prudent proviſion in caſe they ſhould diſagree; and therefore an award by them at any time before their time expired is good, and an award by the umpire in that time is void. Roll. Abr. 261. Cro. Car. 263. 2 Sand. 132. Raym. 206. Lutw. 544.

Salk. 70. pl. 2. S. P. Ld. Ray. 222. 12 Mod. 120. *per* Holt, and 2 Mod. 169. *Contra* [In 2 Term Rep. 644. it is expreſsly determined, that the arbitrators may elect an umpire the very inſtant they begin to take the matter into conſideration, and that this is the faireſt way of chooſing one.]

The condition of a bond was, if the arbitrators make an award on or before 19 *Feb.* &c.; and if they do not make it before, &c. their authority doth not determine till after the 19th, and the award cannot be made by the umpire before the 20th. Mod. Rep. 274.

If the arbitrators have time to the 10th of *June*, and if they agree not to nominate one to determine it by the ſaid 10th, here if the arbitrators chooſe an umpire, that determines their power; for it ſeems plainly the deſign of the parties, that either one or the other may determine it by that time, and not that both ſhall have concurrent juriſdictions. Roll. Abr. 261. Sid. 428. Godb. 241. 2 Sand. 132. *Vide* Salk. 70. *cont.* *Vide* Lev. 174. and Salk. 72. pl. 2. Ld. Raym. 671. 12 Mod. 512., where it is ſaid, that if the umpire be named

named in the ſubmiſſion, he cannot make his umpirage before the time given to the arbitrators to make their award be expired.

Roll. Abr. 262. If the arbitrators make an award of part during their times, the umpire cannot make an awaad of the reſt, unleſs the ſubmiſſion be, that if the arbitrators make an award of part, or of none, then the umpire may make an award of the part remaining or the whole.

2 Vent. 113, 114. Trypit and Eyres; adjudged by three judges againſt Pollexfen Ch. Juſt. who held, that C. might have proceeded notwithſtanding his refuſal; and there could not be two concurrent juriſdictions in ſeveral perſons. If the condition of an obligation be to ſtand to the award of *A.* and *B.*, ſo as the ſaid award be made before ſuch a day; and if they make no award, then to ſtand to the award of ſuch umpire as the ſaid *A.* and *B.* ſhall nominate, ſo as the ſaid umpire make his award before another day, and the arbitrators before the firſt day make no award, but afterwards name *C.* to be umpire, who thereupon immediately refuſes, and the arbitrators afterwards nominate *D.*, who before the laſt day makes an award; this is a good award, for the nomination of *C.* to be umpire did not make him ſo; but when he refuſed, it amounted to no more than a bare propoſal to him; and the form of pleading always is *ſuſcepto ſuper ſe onere arbitri*, ſo that it is the acceptance makes him umpire.

3 Lev. 263. S. C. *Vide* Salk. 70. pl. 2. where, *per* Holt, if the arbitrators chooſe an umpire who refuſes, they cannot revoke or chooſe again, for they have executed their authority; *aliter*, if they chooſe him on condition he do accept; but Rookſby doubted whether an expreſs condition would make a difference, becauſe it ſeemed to be implied.

Lev. 139, 140. Bean and Newberry. Keb. 790. 832. 857. S. C. If the condition of an obligation be, that whereas *A.* and his ſon of one part, *&c.* have ſubmitted to the award of *B.* and *C.* *ita quod*, *&c.* before 1 *May*, and if they make none, to the award of ſuch umpire as they ſhould chooſe, to be made before the 1 *June*, and the arbitrators make no award, but chooſe an umpire who makes an award, but *quoad* the ſon awards nothing; this is a void award, for though the *ita quod* be in the clauſe referring to the arbitrators, and the award be made by the umpire, yet the *ita quod* relates by conſtruction to the umpire as well as the arbitrators.

[Hall v. Lawrence, 4 Term Rep. 589. An award made by the umpire merely on the evidence as ſtated by the arbitrators, without any re-examination of the witneſſes, if he were not required by the parties to re-examine them, is good.]

(E) The Award itſelf, or final Determination of the Arbitrators or Umpire.

21 E. 4. 39. b. 10 Co. 57. Dyer, 242. HERE we muſt obſerve that the courts of juſtice have of late been more liberal in the conſtruction of awards than formerly, and that many of the niceſt diſtinctions to be met with in the books, are by no means to be admitted as precedents in expounding awards at this day; and this the Courts do in furtherance of juſtice, and for quieting controverſies; however, as an award is a judgment, and can only be expounded by itſelf without

without the aid of an averment of matters *dehors* to explain the meaning of the arbitrators, it is neceſſary that it ſhould appear on the face of it,

1. That it be made according to the Submiſſion.

If an award be made of any other thing than what is contained in the ſubmiſſion, it is void; for no act is my own, or binding on me, unleſs done by me, or by commiſſion from me. Plow. 396. Dyer, 242.

If arbitrators award to do an act to a ſtranger, this is good (*a*). Dudley v. Mallery, 3 Leon. 62. Anon. 1 Leon. 316. [(*a*) But ſuch an act muſt appear to be for the party's benefit. Bedam v. Clerkſon, 1 Ld. Raym. 123.]

But an award that an act ſhould be done by a ſtranger, is void, becauſe he is not within the ſubmiſſion. Anon. Moor, 3. p. 11. Sams v. Pitt, Moor, 359. 10 Co. 131. But if he hath any remedy in law or equity to compel the ſtranger to do it, the award is good. Roll. Abr. 248, 249. Stile, 152. Upon this principle, an award that one of the parties ſhall be bound with ſureties, is bad. Norwich and Norwich's caſe. Show. Rep. 82. 3 Mod. 272. S. C. 3 Leon. 62. Thurſby v. Halburt. [An award that all proſecutions ſhall ceaſe in all actions between *A.* and *B.* will not extend to ſuits where *A.* is plaintiff, and *B.* and others are defendants. Barnardiſton v. Fowler, 10 Mod. 204.]

If two ſubmit to an award all actions, and the arbitrators award a releaſe of all actions till the time of the award, ſome books have ſaid that this is void for the whole, becauſe it extends to things partly in the ſubmiſſion and partly to things out of it, and it is one entire act; for ſay they, to do that act they are not obliged, becauſe not within the ſubmiſſion; and to do an act relating only to things contained in the ſubmiſſion, is another act from what is awarded; (*b*) others have ſaid that this is not void, unleſs there are ſhewn on the other ſide cauſes of action ariſing between the time of reference and of making the award, otherwiſe none ſhall be intended; and then the releaſe only relates to the things in ſubmiſſion. 10 Co. 131, 132. 1 Roll. Rep. 437. Vandlore and Trip, Roll. Abr. 242. 2 Roll. Rep. 192. Cro. Eliz. 809. Cro. Jac. 353. 447. 663. Poph. 134. Sid. 365. 2 Mod. 169.

(*b*) Hob. 190. Sid. 154. Moor, 885. Hutt. 29. 1 Salk. 74. Bunb. 250. [Award of general releaſes under a ſpecial reference, is good for the matters referred, and void as to the reſt. 2 Bl. Rep. 1115. So on a ſubmiſſion by an executor and an adminiſtrator in thoſe characters, an award that they execute general releaſes to each other, is good, for the Court will not intend that any thing is ordered to be releaſed except the matters in diſpute between the parties. 1 Term Rep. 691.]

But it has been reſolved, and ſeems now ſettled, that the act is not entire; for he may releaſe all actions to the time of the ſubmiſſion; for though there is one deed of releaſe awarded, yet that deed relates to ſeveral things that are dividable in their own nature one from the other, and ſo it ſhall be good for what is in the ſubmiſſion, and void for the reſidue. 3 Lev. 188. 2 Mod. 169. Salk. 74. pl. 14. 3 Lev. 413. 2 Lev. 3.

The arbitrators cannot bind a man's liberty or right to real things, where perſonal things are ſubmitted; and therefore if they award ſervice for two years, or a releaſe of the right of lands in ſatisfaction for a treſpaſs, this is void; for nobody can be ſuppoſed to ſubmit more than his perſonal eſtate to anſwer a perſonal injury, for that only might be taken in execution for it by the common law; and that may be bound to anſwer it; 9 E. 4. 44. Roll. Abr. 243. pl. 12, 13.

6 Mod. 221. Salk. 76. pl. 19. Roll. Abr. 243. *cont.*

therefore if the arbitrators award a horſe, money, a quart of wine, in ſatisfaction for a treſpaſs, this is good; for here a new perſonal duty is raiſed inſtead of the former, and to ſatisfy out of the perſonal eſtate is neceſſarily implied in the ſubmiſſion, for this is a means neceſſary to quiet the matters.

Palm. 107. Roll. Rep. 362. 2 Roll. Rep. 192. Cro. Jac. 664.

If two ſubmit to award all quarrels concerning tithes in a place certain, and the arbitrator awards that one ſhall pay to the other 20*l.*, and the other ſhall releaſe to him all actions; this ſhall be intended all actions concerning the tithe, unleſs the contrary appear on the other ſide, and the actions may be ſevered; and this ſhall be good for the acts in the ſubmiſſion, and void for the reſt.

2 Sand. 190. Roberts and Marries.

A ſubmiſſion of all debts and demands, and a releaſe of all judgments, executions, and extents awarded, is a good award.

20 H. 6. 18. 3 Bulſt. 65. [This point does not appear in the caſe in the

A ſubmiſſion of all matters between the plaintiff and another, and an award made of things that the party hath in right of his wife, is good; for theſe things are comprehended under the words *all matters*.

year-book referred to in Bulſtr.]

3 Bulſt. 312, 313.

On a ſubmiſſion of all injuries, an award of all debts, duties, and treſpaſſes, is a good award; for whatever is againſt law is an injury.

Cro. Eliz. 66. 858.

A ſubmiſſion of all actions now depending, and an award of all actions, good; for it ſhall be intended actions depending.

Where the words *de & ſuper præmiſſis* reſtrain the award to the thing ſubmitted. Cro. Eliz. 861. 8 Co. 97. Cro. Jac. 200. 351. Roll. Abr. 257. Sand. 32. 6 Mod. 232. A ſubmiſſion of all controverſies touching money laid out for his wife when ſhe was ſole, at her requeſt, and the award of 340 l. for all ſums laid out for the wife when ſole, omitting at her requeſt; this is void, becauſe they award another thing than that which is contained in the ſubmiſſion. Cro. Jac. 640. *

* *Qu.* If the ſubmiſſion be recited in the award, whether the award ſhall not bear reference to the terms of the ſubmiſſion, and be conſtrued accordingly, *i. e.* to mean, *at her requeſt*, and be good?

[Green v. Waring, 1 Bl. Rep. 475.

Under a reference of all matters in difference between partners, the arbitrators may award a diſſolution of the partnerſhip. So between a maſter and apprentice, they may award the indentures of apprenticeſhip to be delivered up.

Malcolm v. Fullarton, 2 Term Rep. 645.

Under a reference *of all matters in difference between the parties in the cauſe*, the arbitrators may travel out of that particular cauſe, and take into conſideration any croſs demands between the parties, though not pleaded by way of ſet-off: and the coſts being to abide the event makes no difference. But under a reference of *all matters in difference in this cauſe between the parties*, they are confined to the matters in diſpute in that cauſe only. But this diſtinction in the terms being perhaps too refined for the general underſtanding of mankind, it is recommended (*a*) to make the former a reference *of all matters in difference between the parties*, omitting the words *in the cauſe*, and the latter a reference *of all matters in difference in the cauſe*, omitting *between the parties*.

Smith v. Muller, 3 Term Rep. 626.

(*a*) By Buller, J.

Malcolm v. Fullarton, 2 Term Rep. 645.

Aſſignees of a bankrupt having received a ſum of money from a debtor to the bankrupt as due to his eſtate, and having commenced

menced an action againſt the ſame debtor for a further demand on the ſame account, to which the general iſſue only was pleaded, and this cauſe being referred to arbitration, it was holden, that, under the general reference above ſtated, the arbitrators might award that the aſſignees ſhould repay a part of the money which they had already received, if it appeared to have been paid by miſtake.

A demand as executor may be taken into conſideration under a general reference.] Elletſon v. Cummins, 2 Str. 1144, Roll. Abr. 244.

There is a controverſy between *A.* and *B.* on the one part, and *C. D.* and *E.* on the other part, and *C.* for himſelf, and *D.* and *E.* ſubmits the matter, and promiſes to ſtand to the award; if the award be that *C.* ſhall pay ſo much in ſatisfaction of the controverſy, it ſhall bind him, though it concerns *D.* and *E.* who are ſtrangers to the ſubmiſſion, inaſmuch as the thing awarded is to be done by him, and not by the ſtrangers to the ſubmiſſion.

If there be a controverſy between the parſon and his pariſhioners, whether tithes ſhall be paid in *ſpecie* or not, and they ſubmit all controverſies, and the arbitrators award that they ſhall pay ſo much a-year for tithes; this is good, for that was the (*a*) debate on the award. Roll. Abr. 254.

(*a*) If the ſubmiſſion be of a ſuit depending in an *ejectione firmæ*, and the award be of the right of the land, it is not good. Roll. Abr. 246. If the ſubmiſſion be of all actions perſonal, *ſectis & querelis*, they cannot make any award of any real ſuit, for the word *perſonal* refers to all that comes after the copulative; but if the ſubmiſſion be of all actions perſonal, *ac ſectis & querelis*, they may; for the word *ac* makes a plain diſtinction between the ſeveral parts of it. Roll. Abr. 246. If the ſubmiſſion be of a term, and all that belongs to it, and the award is made of the rent which ſhall become due next *Michaelmas*, the award is not good, becauſe it may be extinguiſhed by ſurrender, eviction, &c. before *Michaelmas*. Roll. Abr. 245. If the ſubmiſſion be of all actions, they cannot make an award of cauſes of actions; but otherwiſe if the ſubmiſſion be of all actions and quarrels, for the word *quarrels* comprehends cauſes of action. Roll. Abr. 245.

If the ſubmiſſion be of all controverſies to the time of the ſubmiſſion, and the award be that one of them ſhould deliver up an obligation made ſince the ſubmiſſion, in ſatisfaction of all matters, &c. this is good, becauſe the bond is given only in ſatisfaction. Roll. Abr. 243. p. 10. If the ſubmiſſion be of all actions depending between *A.* and *B.*, an award cannot be made of any action depending by *A.* and his wife againſt *B.* being out of the ſubmiſſion. Roll. Abr. 246. This muſt depend on the intention of the parties, where that can be collected with certainty.

An award may be good, though part of it be made of a thing not within the ſubmiſſion; as if an award be to pay 1000*l.*, and to procure a ſtranger to be bound to pay 22*l.* *per ann.* the plaintiff muſt lay the breach in not paying the 1000*l.* for as to the other part it is wholly void. 437. Cro. El. 758. 809. acc. Kelw. 43. Semb. 5 Co. 78. *cont.* For this *vide* Leon. 304, 305. Cro. Ja. 448. 10 Co. 131. Roll. Rep.

If an award be good for part, and void for part, the plaintiff may aſſign the breach, that the defendant did not perform the thing ſubmitted, *nec performavit in aliquo*; for it ſhall refer only to that in the ſubmiſſion, for the reſt is void, and not to be performed. 2 Roll. Rep. 46.

If the arbitrators award on one ſide an act contained in the ſubmiſſion, and on the other ſide an act out of it, this a void Poph. 134. Cro. Jac. 149. Semb.

award for the whole; for this is unequal, becauſe there is ſomething on the one ſide awarded only, and nothing on the other; for what they intended to balance it with on the other, appears to be void.

2 Sand. 293. So if a leaſe be awarded to the party for life, the remainder to *J. S.*, If the arbitrators award 10*l.* to one of the parties, and 5*l.* to a ſtranger, this is good as to the party himſelf, and void for the ſtranger.

the remainder is void to the ſtranger. Cro. Eliz. 758.

Nichols v. Grunnion, Hob. 49. Baſpole's caſe, 8 Co. 98. Middleton v. Weeks, Cro. Jac. 200. Sallows v. Gurling, Cro. Ja. 278. Ormelade v. Cooke, Cro. Ja. 355. For this *vide etiam.* Brownl. 63. 2 Brownl. 310. Sid. 12. Dyer, 216. 242. Hard. 45. [4 Leon. 49. Lutw. 554. Hawkins v. Coclough, 1 Burr. 274. But where the ſubmiſſion is of certain things ſpecifically named, with a proviſion or clauſe, *ita quod*, the arbitrator ought to make his award of all, otherwiſe it will be void. Baſpole's caſe, 8 Co. 98. Hamond v. Hatch, Goldſb. 125. p. 14. (*a*) This conditional clauſe is uſually expreſſed by the words, "*Ita* "*quod de præmiſſis*:" but the expreſſion, "ſo as the *ſame* award be made and delivered by a particular "day," admits of a ſimilar conſtruction, the "*ſame*" referring to every thing before mentioned. Riſden v. Inglet, Cro. El. 838. A proviſo that an award be made on or before a particular day, implies a proviſo that it be made "of the premiſes," though that be not expreſſed. Lee v. Elkin, Lutw. 545. Where there is a proviſion for the appointment of an umpire, the conditional clauſe, if inſerted with reſpect to the arbitrators, extends to him, though it be not repeated. Bean v. Newbury, 1 Lev. 139.] An award may be good, though made of leſs than is contained in the ſubmiſſion; as if the ſubmiſſion be of all actions, treſpaſſes, demands, and controverſies, and the award be made of ſome only, this is good; for no more ſhall be ſuppoſed to be made known to the arbitrator; and if there be other cauſes of action in being, and they were made known to the arbitrator, they muſt be ſhewn on the other ſide; and this as well where the ſubmiſſion is conditional (*a*) by *ita quod*, as where it is abſolute; for the award being made *de præmiſſis*, ſhall be ſuppoſed to ſettle all things.

[Hopper v. Hackett, 1 Lev. 132. 1 Keb. 738. An award of one particular thing for the ending of a hundred matters in difference, is ſufficient: as, where the ſubmiſſion was of all matters in controverſy, and the award taking notice of ſeveral matters, ordered the defendant to pay to the plaintiff four pounds for arrears of rent, and towards the repair of the houſe.

Baſpole's caſe, 8 Co. 98. a. But ſee King v. Hammerton, 1 Barnard. K. B. 316. where the general principle, here laid down, is contradicted. Where ſpecifick ſubjects of difference are ſubmitted, but without the conditional clauſe "of and concerning the premiſes," it is ſaid the arbitrator may make his award of any of them without conſidering the others.

8 Co. 98. a. *Vid.* 2 R. 3. 18. Br. tit. *Arbitrament*, p. 44. cited in Plowd. 289. Bean v. Newbury, 1 Lev. 140. 1 Keb. 885. *contr.* As it is of ſeveral particular things, ſaith Lord *Coke*, ſo it is of ſeveral particular perſons; and therefore if two of the one part, and one on the other part, ſubmit themſelves, the arbitrator may make an arbitrament between one of the two of the one part, and the other of the other part, and it will be good.

Jovce v. Haines, Hardr. 399. Where the ſubmiſſion was by two plaintiffs on one ſide, and defendant and his wife on the other, of all matters and controverſies between them, "or any of them;" the award was holden good, though nothing was awarded concerning the defendant's wife,

wife, on account of the words " between them or any of " them."

If *A.* and *B.* on one ſide, and *C.* on the other, ſubmit to the award of *J. S.* all matters between them; *J. S.* may make an award of any matter between *A.* alone and *C.*, for the ſubmiſſion ſhall be taken diſtributively, and perhaps there was no matter between *B.* and *C.* Arnold v. Pole, Roll. Abr. tit. *Arb.* D. 5. Carter v. Carter, 1 Vern. 259.

A ſubmiſſion of all matters in difference between the parties, when there are more than one on one ſide, is the ſame as a ſubmiſſion of all matters between the parties, or either of them; and therefore on ſuch a ſubmiſſion an award of a ſum to be paid by one of the two or more to the ſingle party is good. Athelſton v. Moon, Com. Rep. 547.

But if, in ſuch caſe, it appear in the ſubmiſſion that there were differences between the perſon on one ſide, and all the parties on the other, and the ſubmiſſion be with the proviſional clauſe; the award muſt comprehend all the parties, becauſe the ſubmiſſion is under a condition that it ſhall do ſo.] Harris v. Painter, Ro. Abr. tit. *Arb.* O. P. cited in Lutw. 1628.

If the award be conditioned to be delivered in writing under hand and ſeal, the circumſtances muſt be obſerved, or the award is void; and therefore if it be delivered under ſeal only, it is not ſufficient. Dyer, 243. 2 Roll. Rep. 243. Bulſt. 110. Roll. Abr. 245. Cro. Jac. 277. 2 Mod. Rep. 77, 78. Palm. 97. Lutw. 560. 1 Str. 116. That the arbitrator, if he cannot write, ought to ſet his mark on the award. Bulſt. 110.

If two ſubmit all actions till the ninth of *June, ita quod arbitrium fiat de præmiſſis*, and an award is made of all actions till the ſeventh, ſome have ſaid this is leſs than the ſubmiſſion, and void; but the better opinion is, that this is well enough, eſpecially unleſs there be ſhewn on the other ſide an action ariſing between the ſeventh and ninth. Roll. Rep. 362. 2 Roll. Rep. 193. Cro. Car. 216, 217. Cro. Jac. 578. 8 Co. 97.

[Where the ſubmiſſion to an award was that it ſhould be made on or before the firſt day of *Michaelmas* term, and the time was enlarged *until* the firſt day of *Hilary* term, Lord *Thurlow* held that an award made on the firſt day of *Hilary* term was good, that it was an enlargement of the time *in ſtatu quo*, and therefore muſt include that day. Knox v. Simmonds, 3 Br. Ch. Rep. 358.

The awarding of coſts is incidental to the power of an arbitrator: a proviſion therefore in the reference that the coſts ſhall abide the event of the award, is a reſtriction of the power which he otherwiſe neceſſarily hath of giving coſts at his election. 2 Term Rep. 644.

By the terms *event of the award*, muſt be underſtood *the legal event*, and therefore under this proviſion the party ſhall pay only ſuch coſts as he would have been liable to pay if a verdict had paſſed againſt him. Coſts therefore ſhall not be taxed againſt executors, nor ſhall plaintiff be entitled to any, if his original demand be found by the arbitrators to be under forty ſhillings. So where in an action of treſpaſs for pulling down the plaintiff's gates and aſſaulting him, the defendants juſtified to all the counts except one under different rights of way, and pleaded not 3 Ter. Rep. 138. Swinglehurſt v. Altham, Highnam, and another, executors, v. Haſſell, Hil. 14 G. 3. Butler v. Grubb,

Hil. 23 G. 3. K. B. not guilty to the whole, and the arbitrators awarded the defendants a right of way, but different from those claimed in the pleas, and gave five shillings damages for the assault, which they found was committed in the exercise of the right of way negatived by the arbitrators; it was holden that the plaintiff was entitled to no more costs than damages; for the arbitrator's award is not equivalent to a judge's certificate under the statute of 22 & 23 *Car.* 2. *c.* 9.

Browne v. Marsden, 1 H. Bl. Rep. 223. An award to the plaintiff of "the costs by him sustained in "the said action to be taxed by the proper officer," does not include the costs of the reference, but is confined merely to those of the action.]

2. It ought to be certain.

5 Co. 77. Salmon's case. Cro. Eliz. 432. S. C. Roll. Abr. 263. S. C. Moor, 359. S. C. Roll. Rep. 271. Dyer, 242. Yelv. 98. As an award is in nature of a judgment, it ought to be wholly decisive; for if it doth not determine the matter, it becomes the cause of a new controversy: therefore if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give bond to the value of the land; for then the sense of the award must be supplied by averment: now if it hath the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itself; for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only guest at, and not expressed: but the parties intended to be obliged only by what the arbitrators themselves declare to be their award; and were the bond to be according to the value, they cannot assign their power to any person to assess the value.

[The certainty of an award may be judged of according to a common intent, and consistent with fair and reasonable presumption: therefore, where the submission was in general terms, "of all actions, "&c.," and the arbitrator recited *one*, which was in fact depending, referring to the submission, as authorizing him to determine it, the award was holden sufficiently certain, for there was no probable presumption of any other cause of complaint, the parties not having desired to be heard upon any more than that one. Hawkins v. Coclough, 1 Burr. 274.]

Cro. Jac. 314. Thine and Rigby. Jenk. 348. S. C. So if the arbitrators award that one party shall give security to the other for the payment of 16*l.*, this is not a good award, because it does not appear what security, whether by bond, or otherwise.

2 Str. 1024. S. P. An award to enter into an obligation for the payment of a sum of money, without mentioning the sum, is void for uncertainty. Lev. 88. Sid. 270.

Roll. Abr. 264. p. 9. Massey and Aubrey. Stile, 365. S. C. If the condition of an obligation be to submit to an award all controversies between *A.* and *B.*, and an award is made that *A.* shall permit *B.* to enjoy certain leases of lands purchased from *J. S.*, and that *B.* shall pay the rents, and perform the covenants, and deliver to *A.* a true copy of the leases, and pay the arrears to the time of the purchase from *J. S.*, this is a good award as to the rents and covenants, though not particularly specified; for though generally it is true that an award is to be interpreted by its own words, and not by any matter out of the award, which doth

doth not appear in the words; yet when the words of an award have relation to things certain, out of the award, theſe things may be averred; for that is the expreſs mind of the arbitrators, which they have expreſsly referred to; but as to the arrears the award is void; becauſe they have not referred to any matter that falls within the cognizance of *B.*, for he cannot compel *A.* or *J. S.* to ſet the time of the purchaſe; and an award of what cannot be certainly done is not a certain determination.

If an award be that one ſhall acquit the other of an obligation of 200*l. aut eo circiter*, and the party is bound in an obligation of 105*l. aut eo circiter*, this is a good award. Roll. Abr. 263. p. 8. March, 18. S. C.

If an award be that one ſhall pay the other 6*l.* on the twenty-firſt of *May*, and that the other ſhall releaſe his right in certain lands *prædict' primo die Maii*, omitting *viceſimo*, not good, becauſe there was not any ſuch former day before-mentioned, and ſo the mind of the arbitrators not underſtood. Roll. Abr. 263. p. 6. 254. p. 15. Markham and Jennings. Yelv. 97. S. C. Brownl. 92. S. C. Cro. Jac. 149. S. C.

If an award be made between *A.* and *B.* touching certain quarters of malt delivered by *A.* to *B.*, that *B.* ſhall pay to *A.* ſo much for every quarter, as a quarter of malt was then ſold for, this is void; becauſe not ſaid at what market price; for one market may be much dearer than another. Roll. Abr. 263. Hurſt and Bambridge.

[An award, "that the defendant ſhall deliver certain goods "particularly named, and three boxes, and *ſeveral* books, with-"out naming the books," is uncertain: the books ſhould have been particularly deſcribed, unleſs it had been ſaid that the books were within the boxes, by which they would have been ſufficiently aſcertained. So, an award "That one of the parties ſhall "deliver up to the other a certain writing obligatory, or a cer-"tain bill obligatory which he had before," is altogether uncertain, for it does not ſay of what ſum, or of what penalty the bond is, or of whom it was obtained.] Cockſon v. Ogle, 1 Lutw. 550. Bedam v. Clarkſon, 1 Ld. Raym. 124.

If *A.* and *B.* merchants, and *C.* and *D.* with all the other owners and mariners, ſubmit to the award of *J. S.*, concerning a ſhip taken by way of repriſal, and *A.* and *B.* enter into an obligation on one ſide, and *C.* and *D.* on the other ſide, and 1000*l.* is awarded to *C.* and *D.*, to the uſe of themſelves and the reſt of the owners and mariners, this is a good award, though every man has not a certain allotment, for *C.* and *D.* ſubmit jointly in the name of the reſt; and therefore an award of any thing to them as one perſon, without ſubdiviſion, is good; and *C.* and *D.* being intruſted for the reſt, they are bound to make a reaſonable diviſion; if not at common law, at leaſt in Chancery. Roll. Abr. 249. Stile, 133. 136. 152. S. C.

If an award be made that *A.* ſhall pay *B.* his day's work, and taſk work, and *B.* ſhall then pay 25*l.* to *A.*, and then they ſhall make each other general releaſes, this is a void award, and cannot be helped by averment that he paid ſuch a certain ſum for day's work and taſk work; becauſe the award is void in itſelf, by not ſettling the certain ſum; and if that is void upon which 2 Sand. 292. Pope and Bret, 2 Keb. 736. S. C.

which the ſubſequent payment and releaſes are to be made, the whole award muſt be void.

Winch v. Saunders, Cro. Jac. 584. Palm. 145. S. C.

An award is made of 40*l.* and mutual releaſes; but if it ſhall appear to the arbitrators that one of them ſtands obliged, &c. that then ſo much ſhall be deducted, this makes the whole award void; for it is uncertain how much will be due; but if the award had been that if any bill of debt appears to ſuch a ſum, that this ſum certain ſhould be deducted, this perhaps would have been a good award; and though he awards mutual releaſes, which would make a final end of all, yet it appears it was to be after payment; and therefore that part of the award ſhall not ſtand alone, for that is contrary to the intent of the award: ſo if the arbitrators make an award with a *proviſo* (*a*) at the end of it, that if they do ſuch an act the whole award ſhall be void, the whole award is void; for the award ought in preſent to be certain.

(*a*) Kinge v. Fines, 1 Sid. 59.

Roll. Abr. 251. pl. 14. An award that one of the parties

An award that one ſhall pay part of the charge of the voyage, and allow his part of the loſs that ſhall come to the ſhip upon account, is good; for it may be reduced to certainty.

ſhall account with the other, not good, becauſe the matter not ſettled. Fitz. Abr. tit. *Award*, 37. An award that one ſhall pay a moiety *cujuſdam debiti*, &c. held not good, for the uncertainty. Rol. Abr. 263. *Quære?* And *vide* 6 Mod. Rep. 231. where an award that joint-tenants ſhould make partition by mutual conveyances, though it did not point out what part each of the parties was to have, was holden good.

Dyer, 242. Roll. Abr. 263. p. 5.

If the ſubmiſſion be of 200 acres, called *Kelſtorne Ling*, and the award be concerning the waſte lands in the town of *K.* this award is void, and cannot be helped out with an averment; ſo if money be awarded to be paid by one, and it is not ſaid in ſatisfaction of what he owes the other, that cannot be averred.

Stile, 28. Five pounds awarded for

If an award be that one of the parties ſhall pay to the other ſo much as is due in conſcience, this is a void award.

quit rents and other ſmall things, void for the uncertainty. March, 144. * An award to pay ſo much money as ſuch land is worth, void for uncertainty. Skin. 248. *arguendo*. [In the caſe from March an infant was concerned.]

* *Qu.* If it is a final payment?

6 Mod. Rep. 244. Salk. 76. 2 Salk. 498. 2 Ld. Raym. 1076. Arnote and Breame; by three judges againſt Holt, Ch. Juſt. who ſeemed of a contrary opinion.

If *A.* commits a nuiſance to *B.* by erecting ſcaffolds on his own ground, and the arbitrators award that the ſcaffolds ſhall be removed, it muſt be underſtood that they are to be removed by *A.* on whoſe grounds they are; for though any perſon may by law remove a nuiſance, yet the arbitrators, who are judges of equity as well as law, muſt be underſtood to intend it of him who committed the nuiſance, and therefore the award not void for uncertainty.

Beale v. Beale, Cro. Car. 383. Hanſon v. Liverſedge, 2 Vent. 242.

An award to pay the charges of ſuch a ſuit, is good; becauſe it is the intent of the arbitrators it ſhould be reduced to a certainty by the attorney's bill, who is the only perſon that can know the certainty †.

Linfield v. Ferne, 3 Lev. 18.; but *vide* 3 Lev. 414. where the award was to pay all expences of a ſuit, and all reaſonable expences *circa ſectam præd.* and it was admitted *per Cur'* to be void for uncertainty; but

but to pay such costs or charges as the master or prothonotary shall tax, has been always held good. Sid. 358. Carth. 156. 2 Wilf. 267. 1 Barnard. K. B. 463. † And the proper officer of the court may tax it.

An award was, that one of the parties, he, or his executors, should release; and my Lord *Holt* inclined to think that it may be construed that *he and his executors* should release. Salk. 69. pl. 1. Ld. Raym. 247.

[An award "that the one shall seal and deliver a demise to the other, *or* his assigns, is certain enough; it shall be understood "to himself." Wats v. Philips, 1 Keb. 335.

An award "that the plaintiff shall pay the defendant a certain "sum on a particular day, and that then the defendant shall re "assign the land mortgaged to him by the plaintiff," is sufficiently certain, though it do not say for what term the re-assignment shall be, whether for years, life, or in fee; for it shall be understood to be for the whole interest mortgaged. Rosse v. Hodges, 1 Ld. Raym. 234.

It is no objection to an award that it is conditional, as that one of the parties shall enjoy a house for three years and a half, and shall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the house shall be void. So (*a*) that he shall pay the other 10*l.* on condition that each shall acquit the other; for it shall be taken as a positive-injunction that they *shall* acquit each other. Ferser v. Proud, Cro. J. 423. Linfield v. Feme, (*a*) 3 Lev. 18. Kyd, 136.

So it may be made with a penalty to attach on the non-performance of a preceding part; as to pay 12*l.* on two several days, and on default of payment the first day, to pay the whole 12*l.* immediately after. Kockill v. Wetheral, 2 Keb. 838.

Where it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen; as if the submission be with respect to a way leading to a house, and the award be, that the one shall give a bond of 300*l.* to the other payable at three years' end; and in case the way be taken away, then that he shall pay less by a certain sum, and if not, a certain sum more. Collet v. Powell, 2 Keb. 670.

An award in the alternative, that the party shall do one thing or another, is not liable to the objection of uncertainty; for when he has done one of the things he has performed the award; as if the award be that he shall deliver up to the other party a certain deed, or pay him 50*l.* and such an award in the alternative seems to be the best mode of compelling a party to exert himself to procure the performance of what is not immediately in his power.] Kyd, 137. Lee v. Elkins, 12 Mod. 585. Lutw. 545. S. C.

3. It ought to be equal and mutually satisfactory.

Awards must not be on one side only; this must be understood thus; that all controversies being between two parties, that which is awarded to be done to one must be an advantage to both, so as to end the controversy, and discharge one, as well as give satisfaction to the other; for if it doth not, it is manifestly unjust; and therefore, whenever it appears to the Court that, notwithstanding the award, the thing remains a duty as before, and Roll. Abr. 253. 8 Co. 98.

and is not discharged, that apparently is an award on one side, and consequently is void; not that where one party is by the award to have something paid him, or the like, and not the other, that that award should be naught; for perhaps nothing may be due to him, and he might be the only trespasser in the case.

Roll. Abr. 253, 254. Hob. 49. (a) But if an award be that the obligor in a single bond shall pay the money, that had been no award, without saying that he should be discharged; for payment, without a discharge and acquittance, will not discharge a single bond. Hob. 49.

Thus in case of a trespass submitted, the arbitrators award that one shall pay the other 3*l.* this is void, because only on one side; for it is not said for what, and so the trespass is not discharged, and then the other party hath no advantage by the award; but if it were awarded *de & super præmissis*, it would be well enough; likewise if the award had been that he shall pay 3*l.* for a trespass, it had been good, and yet one only was to do an act, but then the trespass by that award had been (a) discharged.

7 H. 6. 40. Roll. Abr. 253. p. 2. [But if the award recite a trespass committed by the plaintiff against the defendant, and another by the defendant against the plaintiff, and for that reason order, "that the one shall be quit against the other, and the other against him;" the objection of want of mutuality will not lie against it. 7 H. 6. 41. 21 H. 6. 9. 22 H. 6. 39. Bt. Arbitrament, p. 33.]

A. and *B.* submit all actions had by *A.* against *B.*, and all actions by *B.* against *A.*, and the arbitrators award that *A.* shall go quit of all actions had by *B.* against him, this is naught; because they say nothing as to the other actions.

Cro. Jac. 314. An award was made that one of the parties should be bound with sureties, such as the other should approve, in the sum of 150*l.*, to be paid him at such a time, and that they should seal mutual releases; and the Court inclined that the award was void; for if the party did not like the sureties, he was not to seal a release, so it is but an award of one side. 3 Mod. 272, 273.

An award that one should have such trees, and that the other should give him security to pay 16*l.*, is void; because it is not certain what security; and then that part of the award being void, the other part must be void too; for else it would be an advantage to one only.

Roll. Abr. 253.

If one party alone be ordered to do something, and nothing else appears to the Court, it shall be presumed that he alone was the wrong-doer, and the award is good, if it appears that he is by the award discharged of all actions that might be brought against him for that wrong; but when it appears that the arbitrators design both parties satisfaction for the wrong done each of them, there, if the satisfaction designed one be not well awarded, the whole shall be void for the partiality.

Roll. Abr. 251.

A naked award is no good plea in trespass, unless something be awarded to the plaintiff in amends; for if there be no trespass, there is nothing about which an award can be made; and if there be one, and the arbitrators do not award satisfaction, they do not act according to the design of their institution, for they are not indifferent, and so there is no good award.

Roll. Abr. 251. So an award that

If trespass be of beasts taken and detained, and they arbitrate that the owner shall have the beasts again, this is void, for it is against

againſt natural juſtice to give him his own again, without ſatisfaction for the unjuſt taking and detention.

the owner ſhall have parcel of his own goods. *Vide* 1 Roll. Abr. 252. If an award be, that whereas the parties are indebted each to the other 40 *l.* they ſhould acquit each other, a good award; the ſame law where each have done the other a treſpaſs. Roll. Abr. 252.

An award that one ſhall go to *Rome* or *Paul*'s, not good, becauſe to nobody's advantage. Roll. Abr. 252.

An award that two ſhall intermarry, no good award, for that ought to be at the parties choice; and the bodies of the parties are not ſubmitted to the power of the arbitrators. 9 E. 4. 44. Roll. Abr. 252.

If the award give ſatisfaction for ſlanderous words ſpoken of a man about a crime which it appears was pardoned, that award is void; for if the crime be pardoned, no harm could come to him by ſpeaking them, therefore the award is unequal. Sid. 178. If there be an award that one ſhall pay ſo much money for coſts in a ſuit for words, the words muſt be ſhewn, otherwiſe it doth not appear that the award is juſt and equal. Sid. 12. *Vide* 2 Vent. 242. this caſe cited; and there the Court ſeemed diſſatisfied with this opinion, and ſaid that Syderfin was but a young reporter.

If an award be that if one will make his law that he did no treſpaſs, that then he ſhall go quit, it is not good, for that cannot be pleaded in bar of an action; for it ſuppoſes, contrary to the ſubmiſſion, that there was no treſpaſs; neither can it be averred that the award was for the ſame treſpaſs the action was brought for, for it ſuppoſes no treſpaſs. 46 E. 3. 17. b. 19 H. 6. 37. Roll. Abr. 251. Dyer 356.

There are controverſies between *A.* and *B.*, and *A.* and *C.* as attorney to *B.* ſubmit to an award, the arbitrators award ſo much money to *A.*, and that *A.* and *C.* ſhall releaſe to each other, to the uſe of each other; this is void, becauſe the award is on one ſide, for *B.* cannot take advantage of the releaſe, for that is to the uſe of *C.* Carth. 412. Bacon and Dubarry. Salk. 70. pl. 3. S. C. Ld. Raym. 246. Skin. 679. Comb. 439. 12 Mod. 129. 1 Wilſ. 28. 58.

The award may be beneficial to the party, though a thing is awarded to be done to a ſtranger to the ſubmiſſion; as if the arbitrators award that one of the parties ſhall pay money to the ſervant of the other. 3 Leon. 62. But an award to pay money to a mere ſtranger is ſaid to be void. Roll. Abr. 247. But *vide* Salk. 74. pl. 13. where, by Holt, it is good, and ſhall be intended for their benefit. But an award that the parties ſhall in ſuch proportion diſcharge a debt by bond in which they are jointly bound, is good, though the obligee be no party to the ſubmiſſion. Roll. Abr. 247. If two brothers ſubmit to arbitration, and one of them is awarded to pay ſo much to his mother yearly, this is good; for the payment being to be made to his mother, ſhews it to be a benefit to him. Salk. 74. No judgment was given in this caſe.

If an award be to pay ſo much money in diſcharge of all actions, a releaſe ſhall be intended to be awarded, unleſs the contrary be ſhewn on the other ſide. 2 Roll. Rep. 1. [But ſee Nichols v. Granwin, Brownl. 58. Hob. 49.] An award is made *ſuper præmiſſis*, that one ſhall pay 20 *l.* to the other at *Michaelmas* next, and then the other ſhall releaſe to him all actions perſonal; this ſhall be underſtood a releaſe to the time of the award, not till *Michaelmas* next. Roll. Abr. 256.

[An award that all ſuits ſhall ceaſe is equivalent to an award of a releaſe. Strangford v. Green, 2 Mod. 228.

So

1 R. Abr. tit. *Arb.* K. 10. Harris v. Knipe, 1 Lev. 58.

So that all "controverſies" ſhall ceaſe, and that the one ſhall pay 12*d.* to the other, although he have nothing given to him.

R. Abr. 254. p. 12. 260. p. 1.

An award was made "of and upon the premiſes," that one ſhould pay the other 10*l.* at a certain day, and that the parties aforeſaid ſhall continue in love and friendſhip as formerly: it was holden to be an award on both ſides, and that it ſhould be intended in ſatisfaction of all matters between the parties, more eſpecially as it was ſaid, that the parties ſhould be friends as formerly.

Ormelade v. Coke, Cro. Jac. 354. Hob. 49. 1 Freem. 285. 266. (*a*) Hopper v. Hackett, 1 Lev. 132. (*b*) Hawkins v. Coclough, 1 Burr. 277.

An award "that the one ſhall pay 10*l.* to the other in ſatisfaction of a treſpaſs," is good; for both parties have benefit, the one receiving money, and the other being diſcharged of the wrong. So (*a*) an award "that one ſhall pay ſo much *for* arrears of rent," the word *for* implying that it is to be in ſatisfaction of the arrears. So (*b*) for having made the firſt breach in the law, implies that the ſum awarded ſhall be taken in ſatisfaction.

Elliott v. Chevall, Lutw. 541.

An award recited that there had been conſiderable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40*l.* were due to the plaintiff, and then ordered that the defendant ſhould pay that ſum to the plaintiff. It was holden that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40*l.* by the defendant was intended to be in full ſatisfaction of the debt.

Kyd, 153. Tomlinſon v. Arriſkin, Com. Rep. 328. Cooper v. Hirſt, Lutw. 539.

It ſeems now not to be neceſſary that an award ſhould expreſs that a ſum awarded to be paid, or an act to be done, in favour of one of the parties, ſhall be in ſatisfaction; or that it ſhould contain any equivalent terms: a diſcharge to the other muſt neceſſarily be preſumed from the payment of the ſum, or the performance of the act.]

4. It muſt be of a Thing lawful and poſſible.

Roll. Abr. 248. (*c*) If they award a ſum of money to be paid at a day paſt, it is void.

If the arbitrators award a thing (*c*) impoſſible *ex naturâ rei*, it is void; but if they award a thing which cannot be done, but is not in the nature of the act itſelf (*d*) contradictory or repugnant, this may be a good award; for there is no conſtruction to be made of the award, but by the words thereof.

8 E. 4. 1. b. If they award that a man ſhall make an obligation immediately, this is no good award; for time is required to the making. 18 E. 4. 21. but *quære*, and *vide* 2 Brownl. 311. and Salk. 69. pl. 1. (*d*) As an award that one ſhall pay 20*l.* where he hath not 20*d.* is good, for no contradiction appears in the award itſelf. 19 E. 4. 1. Awards that one ſhall turn the river of *Thames*, kill, ſteal, forge a deed, &c. are void. Co. Lit. 206.

Roll. Abr. 248.

If an award be that one ſhall make a feoffment to another of an acre, and immediately after deliver the charters; this is good, becauſe they may be delivered in the ſame inſtant.

Leon. 316. 3 Leon. 62. Hard. 46. Moor, 3. 359.

An award that a ſtranger ſhall (*e*) do an act is void, becauſe another in his natural freedom is not ſuppoſed within my power.

(*e*) But an award to do an act to a ſtranger is good, becauſe it obliges only to an endeavour

deavour; and this ſhall be ſuppoſed to be for the other party's benefit. Leon. 140. Roll. Abr. 249. Roll. Rep. 270. An award to be obliged by ſureties, void as to the ſureties. 2 Sand. 337. 10 Co. 131.

An award to levy a fine is good; for though it is an act of the court; yet by the law and publick juſtice of the kingdom, it is not to be refuſed to any man; but if the award be to command the juſtices to do it, this is no good award, for the parties in effect pray leave to agree from the king himſelf, which is quite different from the nature of a command. Roll. Abr. 249. So an award that one ſhall ſurrender his copyhold into the hands of two of the tenants of a manor, who ſhall preſent it, is good. Roll. Abr. 247.

An award to pay ſo much *apud domum J. S.* good; for he is not bound to pay it in the houſe, but as near as he can to it; or it ſhall be intended a common inn, and if the party will not let him pay there, it has been ſaid that the endeavour is ſufficient, for they cannot award any thing that will make the party a treſpaſſer. Roll. Abr. 249. Roll. Rep. 6. Cro. Car. 226. 2 Bulſt. 39. Freem. 205. 3 Lev. 153.

An award that one of the parties ſhould diſcharge the other of a bond in which both were bound to a ſtranger, is a good award; for it ſhall be intended that the money was to be paid at a day to come; and therefore he might then tender it and acquit the other; and if the day of payment be paſt, he may pay the penalty, and compel the other to give a releaſe, in a court of equity *. Jones, 431. Cro. Car. 541. * And now by ſtatute 4 Ann. c. 16. ſ. 12. payment after the day, of principal and intereſt, is good.

An award that one of the parties ſhall diſcharge the other from his undertaking to pay a debt to a third perſon, a good award; for by the award he is ſet in the place of the other perſon, and the creditor upon payment is compellable in equity to give a releaſe. 1 Mod. Rep. 9. Beckett and Taylor.

An award the tenth day of the term to ſtay the ſuit, and judgment given in the action that term; in an action for non-performance, and *non aſſumpſit* pleaded, it was moved in arreſt, that every judgment given was as of the firſt day of the term, and ſo the award to ſtay the ſuit then was altogether impoſſible; but it was holden that though this might have been a good objection upon a ſpecial demurrer, where it is ſhewn for cauſe, yet now the court muſt give judgment on this record only; and it doth not appear on this record when judgment was given on the other. Yelv. 35. Hays and Wright.

If *A.* and *B.* ſubmit to the award of *J. S.*, and he awards that *A.* ſhall pay to *B.* 30*l.* within two months next following, and that upon payment thereof they ſhall give mutual releaſes to one another, and within the ſaid two months *B.* dies, the money ſhall be paid to his executor, who thereupon muſt releaſe, for the award creates a duty. 2 Vent. 249.

5. It muſt be final.

An award may be good for part only, but then it muſt be final as to that part. 19 H. 6. 36. 8 E. 4. 10.

(a) 2 Mod. 227. Eq. Caſ. Abr. 48. Barnes, 56. Lev. 58. S. P. [In 2 Str. 1024. That all manner of proceedings (if any) depending at law, ſhall be no farther

An award that all ſuits ſhall (a) ceaſe is a final award; ſo an award that one of the parties ſhall not (b) ſue an obligation; for this amounts to an extinguiſhment of the debt. An award that a ſuit in Chancery ſhall be (c) diſmiſſed, a final award; ſo if the arbitrators award a (d) *retraxit;* an award that one ſhall not (e) proſecute nor proceed in ſuch a term, ſeems to be good; but an award that one of the parties ſhall be (f) nonſuit is not good, becauſe the party may begin again; ſo that each party ſhall (g) diſcontinue their actions which they have againſt each other; for this is not a final determination.

proſecuted, holden not to be final: but ſee 6 Mod. 34. *contr.*] (b) Roll. Abr. 54. (c) Salk. 75. pl. 17. 6 Mod. 231. (d) 5 H. 7. 22. (e) Cro. Jac. 525. (f) 19 H. 6. 36. Roll. Abr. 540. 6 Mod. 282. S. P. admitted. (g) 5 H. 7. 22. [An award "that each of the parties ſhould pay "his own charges at law, and that the defendant pay the plaintiff 5 s. for his making the firſt breach," was holden to be good; for it muſt neceſſarily be preſumed that the ſuits were to ceaſe, and the 5 s to be paid by the defendant to be taken as a diſcharge. Hawkins v. Coclough, 1 Burr. 274.]

[2 Atk. 501.

If an award direct that debts due from the parties jointly ſhall be paid by them in moieties, and then mentions three ſuch debts only, the Court will not preſume that there are more.]

Sid. 59. Cro. Ja. 584. Hob. 218. Palm. 110. 146.

A conditional award not good, becauſe not final to determine matters in difference; the ſame law where any thing is referred to the arbitrators' future judgment or expoſition.

[Selſby v. Ruſſel, Comb. 456.

An award "that if the plaintiff, on account prove certain ar- "ticles againſt the defendant, then he ſhall pay ſo much as the "plaintiff was damnified thereby," is not final. So alſo, "that "if the defendant make out upon oath before a judge, any diſ- "burſements made on account of the plaintiff, that the plain- "tiff ſhall pay them; but in caſe the defendant do not prove "theſe matters within a certain time limited, then the parties "ſhall give general releaſes;" this is not final.

(b) Palm. 110. *per* Dodderidge, J. (i) Booth v. Garnet, 2 Str. 1082.

But an award of a thing to be done at a future day, if ſuch thing muſt then be abſolutely done, is final; as to pay money (h) at three ſeveral days to come. So to give a note (i) or a bond for the payment of money at a future day.]

Poph. 15, 16. Sherry and Richardſon, 2 Roll. Rep. 189. Grove and Saunders, Kyd, 146.

If the arbitrators award general releaſes within four days after the award, and if in ten days after the releaſes ſo made the party diſlike the award, upon payment of ten ſhillings, the award ſhall be diſcharged; here the award is good, and the proviſo to make void the award after ſuch releaſes, is altogether void and repugnant; for if the obligation be once forfeited by non-performance of the award, it can never be diſcharged by the award itſelf; but if the arbitrators award general releaſes within four days after the award, and if ten days after the award made the parties diſlike the award, &c. the award ſhall be void; this award is not good, becauſe not final and deciſive; for the parties may diſlike the award within the four days.

Salk. 71. pl. 5. Glover and Barrie.

If the arbitrators award that *A.* ſhall beg *B.*'s pardon in ſuch manner and ſuch place as *B.* ſhall appoint; as to this part the award is void, for the arbitrators ought to have made a final determination

determination of the matter themſelves, and not to have left the manner and place of begging pardon, which in this kind of ſatisfaction makes the moſt conſiderable part, to the judgment of *B.* *Vide* Sid. 12. That an award that one of the parties ſhall make his acknowledgment before the mayor of *C.* is good.

When the arbitrators award a thing not ſubmitted, with a reſervation to themſelves of a future power of judging of the matter, and they award a thing within the ſubmiſſion; this is good for the thing within the ſubmiſſion, for as to that it is final, and void for the reſidue. Palm. 146. Cro. Jac. 315. 584.

If they arbitrate that all controverſies ſhall ceaſe, except that concerning one bond; this is final, for as to the bond they arbitrate that it ſhall continue in force. Cro. Jac. 277. 400.

[An award that *A.* ſhould execute a covenant to indemnify *B.* againſt a *qui tam* action begun at *A.*'s inſtance in the name of another perſon, was holden to be good, for it was not in the power of the arbitrators to order the ſuit to ceaſe, the poor being equally intereſted in it with the informer; and in this caſe too the informer was (*a*) a third perſon. Philips v. Knightley, 2 Str. 903. 1 Barnard. 84. 151. 387. 457. 463. S. C. Fitzg. 54. 168. 270.

(*a*) According to the report by Fitzgib. the informer was the plaintiff in the preſent action.

It is enacted by ſtatute 23 *G.* 3. *c.* 58. "That for every piece "of vellum or parchment, or ſheet or piece of paper upon which "ſhall be engroſſed, written, or printed any award, there ſhall "be charged a ſtamp duty of five ſhillings."]

(F) The Conſtruction and Effect of the Award, and herein of the Performance thereof.

AN award, as has been ſaid, is to receive a liberal conſtruction, and to be governed by the intent of the arbitrators, where no inconvenience will enſue; therefore, if the arbitrators award a thing to be done, without ſaying within what time, the party ſhall have reaſonable time, becauſe they muſt intend all things neceſſary to the doing the thing they award. 2 Brownl. 311. Salk. 69. pl. 1.

If the award be to pay money to *J. S.* if he dies, the money ſhall be paid to his executors; a ſubmiſſion of all actions, and an award of a releaſe of all actions, except a bond, this is an award that the bond ſhall ſtand. 2 Vent. 249. Roll. Abr. 257. Cro. Jac. 277. Yelv 203.

An award that one ſhall enjoy ſuch a houſe, and pay the rent, elſe the award for enjoying the houſe to be void, is a good award; for the award is abſolute, unleſs upon his own fault; and the thing is reſerved to the future judgment of the arbitrators. Cro. Jac. 423. Roll. Abr. 250. like caſe.

If a battery is ſubmitted, and the award is, that one ſhall releaſe, and the other pay him 10*l.*, the releaſe muſt only be underſtood of the battery, and muſt be firſt performed before the 10*l.* ſhall be paid. 21 H. 7. 28. Semb.

If an award be, that one ſhall make a leaſe to the other, rendering rent, and the leaſe be made, but the rent not paid, the Moor, 3. Cro. El. 211. *cont.*

Cro. Jac. 423. obligation is not forfeited, for the award did not reach to the payment of the rent, which must be recovered by distress or action of debt; but if the award had been that he should pay the rents at such set times, the obligation would have been forfeited if they had not been paid; and in such case it is a sum in gross, and payable without demand, for the party must offer it to save his obligation.

8 Co. 98. Sand. 32. Roll. Rep. 362. 2 Wils. 267. 293. Roll. Abr. 256. Lev. 58. Leon. 72. It is an established rule, that an award may be good in part, though void as to other parts of it; and that the party is obliged to perform that which is well awarded; and excused, as to that only which is void: but if an award is good as to one party, and void as to what is awarded to the other party, the award is void in the whole.

Roll. Abr. 244. Hob 218. 2 Lev. 3. 3 Lev. 413. Cro. Eliz. 58. [A mistake in matter of calculation, or an unintentional omission, which turns the balance to the other side than that on which it ought to fall, will not vitiate an award *in toto*. Ambl. 245]

36 H. 6. 12. 7 H. 6. 40. If the arbitrators award one thing on the one part, and the time expires before they award any thing on the other part, this is altogether void, and contrary to their authority, because it doth not finally determine the things contained in the submission equally on both parts.

8 E. 4. 11. 21. 1 H. 7. 5. (*a*) But if there be no such provision, the If it be provided by the (*a*) submission that the award should be notified or delivered to the parties in writing, it is no award till notified or delivered, because it is not according to the power in the submission.

parties must take notice of it at their peril; and if they do not the act awarded, it is a forfeiture of their obligation. 8 E. 4. 18. 21. 1 H. 7. 5. 8 Co. 92. b. *Vide* Keilw. 175. *cont.* [But this was not the point on which the judgment turned.]

Dyer, 218. If several persons of the one part, and several of the other part, submit themselves to arbitrament, provided the arbitrator deliver the award to the parties, or one of them, he is not obliged to deliver the award to one of each party, but it is sufficient to deliver it to any of the said parties.

5 Co. 103. Moor, 642. Hungate's case. Cro. Eliz. 885. But if two on the one part, and one of the other submit to an award, *ita quod arbitrium fiat & deliberetur utrique partium prædict'*, the delivery of the award to one on the one part, and to the other of the other part, is not sufficient; for each party is each entire party; for each, by non-performance, incurs the penalty, and each provides in order to his performance, that it should be made known to him.

Hard. 399. Cro. Car. 541. If two men submit to an award, so that it be *paratum deliberari partibus* such a day, it need not be averred that it was *paratum deliberari, &c.* at the day, for the publication of the award itself is sufficient.

Dyer, 218. Salk 75. pl. 15. S. P. If the submission be general, that the award shall be delivered before such a day, it may as well be delivered by word as by deed; and therefore *non deliberavit in scriptis*, in such case, no good plea.

2 Keb. 462. Debt upon an award by word only, is within the statute of 21 *Jac.* 1. *cap.* 16. of limitations, and must be sued within six years; it is otherwise of an award by specialty.

If there be an obligation to ſtand to an award, each ought to perform it on his own part, at the peril of his obligation. 21 H. 7. 28. b. If a ſum of money be

awarded one of the parties, and that they both ſhall give mutual releaſes, if he who is to receive the money refuſes it; yet, upon a tender and refuſal, he is as much obliged to ſign a releaſe, as if he actually received it. Salk. 75.

If money be awarded and not paid, the party may either have his firſt action, or action of debt; for if there be payment, the firſt wrong was determined; but otherwiſe he cannot plead the award as a determination and bar of the wrong; for ſince the award of arbitrators doth not bind any man's property, as judgments at law do, it is fit the party, when he pleads it in bar, ſhould ſhew an execution at the time appointed. 4 H. 6. 1. a. 20 H. 6. 12. b. 21 H. 7. 28. 49 E. 3. 3. a. Roll. Abr. 267. *Vide* Salk. 69. pl. 1. 76. pl. 19. Carth. 117. and *quære*.

As to the performance of the award, if there be no time limited, it is to be performed in a convenient time. 20 E. 4. 8. Where the party ſhall

be excuſed by the act of God, *vide* 21 E. 4. 70. Where the thing awarded to be done, becomes impoſſible by the act of a ſtranger, *vide* 2 Mod. 27, 28.

Though an award cannot be made part at one time and part at another, yet it may be performed part at one time and part at another; for the nature of the thing may require performance at different times and places. 8 E. 4. 10.

An award for one party to deliver a releaſe or bond to the other, if that one party delivers it to *A.*, who delivers it to *B.*, who tenders it to the other party, who refuſes, this is a good performance of the award. 2 Leon. 110. 181. In debt on an obligation for performing an

award, by which award the parties were to give mutual releaſes, the defendant pleaded that he made a releaſe to the plaintiff, and delivered it to *J. S.* for his uſe; and this was held a good performance of the award, for the defendant could not plead *non eſt factum*, neither could he countermand it; and as the arbitrators had not appointed any place where the releaſes ſhould be delivered, if the plaintiff ſhould abſent himſelf, it would be very inconvenient. Cro. Eliz. 54.

If the ſubmiſſion be of a Chancery ſuit, and the arbitrators award that the ſuit ſhall ſtay, and that one be quit againſt the other for all matters in the bill, it is ſufficient performance to ſay that the other *ſtetit quietus*, though he did not procure an actual diſcharge; but where one by deed is obliged to acquit another of ſuch a debt, or ſuch a ſuit, it is not ſufficient to ſave him harmleſs, but he muſt procure an actual diſcharge; but the award here being *quod ſtaret quietus*, means no more than that the party ſhould be acquitted by force of the award itſelf, and not that another diſcharge ſhould be procured; and in this caſe if a new bill be exhibited, yet that is no diſturbance to incur a forfeiture without proceſs iſſuing out, as the *ſubpœna*, for till proceſs the party is not actually moleſted. Roll. Rep. 7, 8. 2 Bulſt. 93 to 96. Cro. Jac. 340. [A matter was referred by conſent at *niſi prius* to three of the jury, and before the award was made one of the parties ſerved the arbi-

trators with a *ſubpœna* out of Chancery. This was holden to be a breach of the rule, and an attachment *niſi* was granted. Salk. 73. Under a rule of court to abide by an award, and not to bring any bill in equity, an award is made, that *A.* ſhall pay to *B.* 20 *l.*: this award *A.* moves the court to ſet aſide; but the court confirming it, he pays the money, and then files a bill: this is a high contempt in *A.*, his counſel, and attorney. Rex v. James Wheeler, 3 Burr. 1256.]

But if a man ſubmits a rent-charge to arbitration, and the arbitrator award *quod ſtaret quietus* of the rent, he who hath the rent ought 2 Bulſt. 96. If the award is *quod ſtaret*

acquietus from an information, ought to releaſe the ſame to the other, in performance of this award, for to be quit of the rent ſuppoſes the demand not in being.

this is not good, unleſs it be actually releaſed, becauſe the king may proſecute it. 2 Bulſt. 96.

Cro. Jac. 525. 10 Mod. 204. S. P. If an award be not to continue the ſuit, if the party continue it by attorney, this is a breach; but if the attorney continue it without his knowledge, it is no breach. Cro. Jac. 525.

If an award be that the plaintiff ſhall not proſecute or proceed in a ſuit the ſame term, the entry of a continuance is no breach of this award, for otherwiſe the party can never afterwards go on in this action.

[Ld. Raym. 234.

If an award order a defendant to re-aſſign to the plaintiff an eſtate in mortgage, he is bound to do ſo without requeſt.

10 Mod. 204. Roll. Abr. 246.

An award that all ſuits ſhall ceaſe between *A.* and *B.* does not extend to ſuits between *A.* on the one ſide, and *B.* and *C.* or *B.* and his wife on the other, ſo that the proſecution of ſuch a ſuit is no breach of the award.

Mo. 3. p. 8.

Where an award was that one ſhould make a leaſe for years to another rendering rent, and the leaſe was accordingly made, it was holden that the arbitration-bond was not forfeited by the non-payment of the rent, becauſe the leſſor had his proper remedies for that by diſtreſs or debt; but if the award had been that the leſſee ſhould pay the rent, the bond had been forfeited. So if it be awarded that one ſhall enter into a bond for the payment of money to another, the entering into the bond is a ſufficient performance of the award, nor will the non-payment of the money, according to the condition of ſuch bond, be any breach of the award.

Str. 903. 1 Barnard. 463.

Baker v. Rocheſter, 1 Sid. 365. Squire v. Grevell, 6 Mod. 34.

Where the award orders a releaſe to a time beyond the ſubmiſſion, a releaſe to the time of the ſubmiſſion is a ſufficient performance.

Sweet v. Hole, Ca. temp. Finch. 384.

A conſiderable number of years having elapſed ſince the making of an award, is no objection to the party being called upon to perform it.]

3 Bulſt. 65.

An award is made to infeoff *J. S.* *J. S.* comes and deſires the party to infeoff *J. M.* and him to the uſe of himſelf; (and it is done;) this is a good performance of the award, for though the conſtruction of the ſenſe of the award is to be taken on the expreſs words, yet what is a performance of the award is to be taken according to the intent of the arbitrators.

Moor, 3. pl. 9.

A man cannot plead generally the award performed, but he ought to ſet forth the award, and therein how he hath performed it.

(G) Of the Pleadings in Awards.

49 E. 3. 3. Roll. Abr. 267. Note; There is a

IF the arbitrators award money to be paid at a day to come, this is a good plea in bar in an action of treſpaſs before the day, becauſe it is *debitum in præſenti*, though *ſolvendum in futuro*; and

if a party might have an action of treſpaſs before the day, and recover, he might have an action of debt after the day, and ſo a double ſatisfaction for the ſame thing.

difference between an accord with ſatisfaction and an award; for in an accord a man muſt plead preſent ſatisfaction, and it is no plea in bar to plead an accord with ſatisfaction at a day to come, for in all perſonal injuries the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cauſe of complaint, and therefore a preſent ſatisfaction is a good plea; but where the wrong-doer promiſes a future ſatisfaction, the injury continues till ſatisfaction is made, and conſequently there is a cauſe of complaint in being, and if the treſpaſs were now barred by this plea, he could have no remedy for the future ſatisfaction, for that ſuppoſes the injury ſtill to have continuance; but where perſons ſubmit to arbitration, the arbitrators are judges of the injury, and if they award money payable at a day to come, that is a good award, and may be a good plea in bar to an action of treſpaſs brought in the mean time, becauſe this thereby becomes an immediate debt attainable by law. 5 E. 4. 7. Plowd. 5. b.

It was formerly holden, that an award of a releaſe, a horſe, a quart of wine, to enter into an obligation, or any other collateral matter in ſatisfaction, without performance, was no good plea in bar; for were it a good plea in bar, the plaintiff could have no remedy afterwards to compel the party to do the thing awarded, for by the bar the treſpaſs would be nullified. Roll. Abr. 266. Salk. 76. pl. 19.

But it has been ſince holden, in an action on the caſe upon a ſpecial promiſe made by the defendant to deliver a parcel of hops to the plaintiff on ſuch a day and place, on a certain price agreed on, &c. to which the defendant pleaded in bar, that after the promiſe made, both he and the plaintiff referred all matters, and that the arbitrators awarded that the defendant ſhould releaſe the plaintiff, and that he ſhould releaſe the defendant of all actions and demands whatſoever; and alleged, that from the time of the award hitherto, he was always ready, and yet is, to releaſe the plaintiff according to the award, &c. And upon demurrer to this plea, after ſeveral debates, it was adjudged, that this award was no bar to the action, becauſe nothing was awarded but only mutual releaſes from each other, ſo that the award itſelf is no bar, but the thing awarded, when executed, would be a bar; and a difference was taken where any thing is awarded in ſatisfaction, there the award itſelf is a bar before it is performed; but where nothing is awarded but releaſes on both ſides, there, when the award is executed, the releaſe will likewiſe be a bar: and the court held, that the defendant may bring his action againſt the plaintiff for not releaſing according to the award, and therein ought to recover all his damages and coſts loſt in the action againſt him. Carth. 378. between Freeman and Bernard adjudged, Trin. 9 W. 3. Salk. 69. pl. 1. S. C. Ld. Raym. 247. S. C. and the difference there taken, that by awarding a collateral thing to be done, a new duty is raiſed, and the old diſcharged, and then it may be pleaded in bar, though not executed; *ſecus* if a releaſe only be awarded, which created no new duty. *Vide* Carth. 188.

The above caſes muſt be underſtood where the action was brought before the time for performing the award was expired; for if an award be to pay money at a day to come, and the money be not paid at the day, and afterwards an action of treſpaſs be brought, this is no good plea in bar, for no man can plead this in bar without ſhewing he has paid the money; for it is againſt natural juſtice to make one default and wrong an excuſe for another; but if the party tender it at the day, and the other refuſe it, then it is a good plea in bar, it being his own fault, and he hath ſtill a remedy for the money. Keilw. 121. Roll. Abr. 267. Dyer, 75. Hob. 49. Raym. 450. Salk. 69. pl. 1. Ld. Raym. 247. Carth. 378.

[Farrer v. Bates, All. 5. Clapcott v. Davy, 1 Ld. Raym. 612.

An award which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand.

(*a*) 7 H. 4. 31. b. Br. 44. b. p. 48. (*b*) Thomlinſon v. Arriſkin, Com. Rep. 328.

To an action of treſpaſs a defendant may ſometimes plead an award made on ſubmiſſion by the plaintiff and (*a*) a ſtranger: ſo he may plead (*b*), that the treſpaſs complained of was committed by the defendant and another, and that the matter was afterwards ſubmitted to arbitration by the plaintiff, the defendant, and the other treſpaſſer.

4 Ter. Rep. 146.

To a plea of an award, the plaintiff may reply that the ſubject matter of his action was not included in the reference, though the terms of ſuch reference were general, of all matters in difference, and the cauſe of action was in point of fact ſubſiſting at the time of the reference.]

Leon. 72. That the plaintiff may declare that *inter alia* it was awarded. Lit. Rep. 312. Sid. 161. Contr. 366.

If in an action of debt upon an award, the plaintiff declares that the arbitrators did make an award that the defendant ſhould pay unto the plaintiff 10*l.*, this is a good declaration, though nothing is ſhewn to have been awarded on the other ſide; for it is ſufficient for the plaintiff to ſet forth that part of the award which entitles him to his action; and if the defendant will impeach the award for any thing, he muſt ſhew it ſpecially on his own part.

[In an action on the award itſelf it is neceſſary to ſet out in the declaration only ſo much as is ſufficient to ſupport the plaintiff's caſe: but in an action of debt on the arbitration-bond, the whole demand muſt be ſet out at length, though *Holt*, Ch. J. thought, that even in this caſe the omiſſion of that which is void would not be material. 1 Burr. 278. 1 Salk. 72. There is this difference again between actions on the award itſelf, and actions on the arbitration-bond: in the former caſe the plaintiff muſt ſtate a mutual ſubmiſſion; in the latter, it is unneceſſary, for by oyer it appears on the face of the condition, and the plea of *nul agard fait* admits it. 2 Str. 923.]

Sand. 326. Veal and Warner; but the Court would not give judgment for the defendant, but ſuffered the plaintiff to diſcontinue, becauſe they apprehended it to be only a trick in the pleading, for which the chief juſtice reprehended *Sanders*, who excuſed himſelf by reaſon of the ſeverity of the award. 2 Keb. 568. S. C.

In an action of debt upon a bond conditioned for the performance of an award, the defendant pleaded that the arbitrators did make an award that the defendant ſhould pay to the plaintiff 3100*l.*, and ſhould give to the plaintiff a general releaſe, and pleaded that he had paid the money and given a releaſe accordingly, but did not ſhew what on the part of the plaintiff was awarded to be done; and the plaintiff replied without ſhewing the other part of the award in his replication, and took iſſue that the defendant had not paid the money; and the defendant put in an inſufficient rejoinder, upon which the plaintiff demurred; and *per Cur'* the plaintiff cannot have judgment, becauſe the award as ſet forth and agreed in pleading is void; but if the plaintiff would have helped himſelf, he ought to have ſhewn the other part of the award before he had taken iſſue.

Yelv. 152. Cro. Jac. 220. Sand. 102. S. P. *arguendo*, *vide* Stile 429. where

If in debt upon an obligation conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*; and the plaintiff replies, and ſhews the award, he muſt alſo ſhew the breach, without which he hath no cauſe of action, for the obligation is guided by the condition; and though the defendant can make

make no anſwer to the breach, yet it ought to appear to the court that the plaintiff hath cauſe of action. it is ſaid that the plaintiff can aſſign only one breach.

But if in debt upon bond to perform an award, and *oyer* of the condition, the defendant pleads *non ſubmiſit*, the plaintiff (*a*) need not aſſign a breach, for the defendant puts the whole ſtreſs of his cauſe upon a matter antecedent to the alleging of a breach; for if there be no ſubmiſſion there could be no award, and conſequently no breach of it. Sid. 290. (*a*) So if the defendant pleads a releaſe. Brownl. 90. Yelv. 79.

If in debt upon an obligation conditioned for the performance of an award, the defendant ſhews that the arbitrators did make an award, that the defendant before ſuch a day ſhould pay to the plaintiff 100*l.*, or otherwiſe ſhould procure one *A.*, being a ſtranger, to be bound to the plaintiff for the payment of 12*l. per annum* to the plaintiff for his life; and the defendant pleads that he hath performed the ſaid award, and the plaintiff replies, that the defendant hath not paid the ſaid 100*l.* without ſaying, nor hath procured *A. &c.* yet this is a good replication, for the award as to that part is merely void, and therefore the plaintiff (*b*) need not take notice thereof. Leon. 304. Owen 153. S. C. adjudged by three judges againſt two, who held that the plaintiff ſhould have ſhewn the whole award, and thereupon the law would have adjudged one part void, and not to be done. Leon. 140. S. C.* (*b*) So if the award be, that the defendant, together with a ſtranger, ſhall enter into a bond, in the aſſignment of a breach the plaintiff muſt not ſay that the defendant and ſtranger did not enter into a bond, for though both did not, yet the defendant alone might enter into bond. Godb. 165. [If an award be good in part, and bad in part, it is ſufficient to aſſign a breach in that part which is good. 2 Wilſ. 293.]

* It would have been better if the plaintiff had ſhewn, that neither the one thing nor the other had been done.

[Where an award was that the defendant ſhould pay to the plaintiff 16*l.* 10*s.*, and all ſuch coſts, charges, and expences as the plaintiff had been put unto in a cauſe then depending between them, and that thereupon they ſhould execute mutual releaſes, it was holden that the breach was properly aſſigned in the non-payment of the 16*l.* 10*s.* only; for that the bond was forfeited by the breach of any one part of the award, and the recovery in this action would be a bar to any future action brought on the bond for the coſts, *&c.* when aſcertained.] 2 Wilſ. 267. Fox v. Smith, 293. Addiſon v. Gray.

In an action of debt upon an award, it is not (*c*) neceſſary for the plaintiff in his declaration to lay time or place where the award or ſubmiſſion were made; but if the defendant denies either, the plaintiff may reply, that the award or ſubmiſſion was made at ſuch a place. 2 Brownl. 137. (*c*) But where an award is pleaded in bar of a treſpaſs, a place muſt be laid where the ſubmiſſion was made. Cro. Eliz. 66. The plaintiff need not ſet forth the *profert in curia*, becauſe it is no deed. Stile 459.

[To a plea of *nul agard* the plaintiff replied that an award was made after the execution of the bond, and before the exhibiting of his bill (to wit) on, *&c.* in the condition mentioned. It was adjudged on a ſpecial demurrer, that the time of making the award is poſitively enough alleged under the *ſcilicet*, and that the defendant might have taken iſſue upon it. Biſſex v. Biſſex, 3 Burr. 1730.

In debt on an award to pay ſo much money and to execute mutual releaſes to the date of the arbitration-bond, judgment will Bell v. Simpſon, 2 Wilſ. 10.

will not be arreſted becauſe it does not appear upon the record that there was any arbitration-bond, though this perhaps may be a good objection at the trial.

Henderſon v. Williamſon, 1 Str. 116.

In debt upon bond conditioned to perform the award of *J. S.*, ſo as it be made in writing under his hand and ſeal, *&c.* it is not ſufficient for the plaintiff in his replication to ſtate that *J. S.* made his award in writing, and to ſet it out, but he muſt ſhew that it was under his hand and ſeal, purſuant to the terms of the ſubmiſſion.]

Cro. Jac. 577. By two judges againſt the chief juſtice, who held the publication there, and allegation that it was ready to be delivered at the ſaid ſhop in *London*, was well enough; if adjudged.

If there be a ſubmiſſion to the award of *J. S.*, ſo that the ſaid award be made under his hand and ſeal, on or before the 5th day of *September* following, ready to be delivered at the ſhop of *J. N.* in the *Exchange*, *London*, and in an action of debt upon an award made thereupon, the plaintiff declares that the ſaid *J. S.*, under his hand and ſeal the 4th day of *September* following, *apud Caſtrum Eborum*, did make an award *ad tunc & ibidem parat'* to be delivered at the ſhop of the ſaid *J. N.* in the *Exchange*, *London*; this is no good declaration, for the parties are not bound to take cognizance of the delivery elſewhere than at the place appointed.

but it was adjourned. 2 Roll. Rep. 193. S. C. adjourned. 3 Mod. 331. S. C. cited as *Vide* 2 Lev. 68. L. Raym. 533.

Sid. 370.

If in debt upon an obligation conditioned for the performance of an award, ſo as, *&c.* the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billæ*, *ſcilicet* the 24th of *June* (which was a day within the ſubmiſſion) the arbitrators made an award, *&c.* and the defendant demurs generally, the plaintiff ſhall have judgment, for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them, yet this is form only, and helped by a general demurrer.

[Brown v. Goodman, E. 29 G. 3. 3 Ter. Rep. 592. n.

But no action will lie upon the arbitration-bond, if it appear that the award was made after the time limited in the bond, though ſuch time were enlarged by the mutual conſent of the parties.]

3 Mod. 330. 11 Mod. 170. 12 Mod. 234. 317. Ld. Raym. 115. 247. 533. 989. Lutw. 524. But for this, *vide* letter (F) *ſupra*.

If in debt upon a bond conditioned for the performance of an award, ſo as it be made, *&c.* and ready to be delivered to the parties, or to ſuch of them as ſhall deſire the ſame; the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies, and ſets forth the award, and ſhews a breach, but doth not ſay that it was ready to be delivered to the defendant, yet this is a good replication; for when the award is made, it is ready to be delivered to the parties, or to ſuch of them as deſire it, ſo that it muſt be deſired; and if denied, the party may plead that matter ſpecially.

2 Vent. 242. Harſon and Liverſey.

If in debt upon an obligation conditioned for the performance of an award in writing, or by word of mouth, the defendant pleads no award made, and the plaintiff replies, that at the time of the bond and award he had an action againſt the defendant for ſcandalous words, and that the arbitrator *ore tenus* did declare

clare and publiſh his award in manner following, *viz.* That the defendant ſhould pay to the plaintiff 12 *guineas*, and all ſuch money as he had expended *circa proſecutionem placitat' præd'*, &c. this is a good award, and well ſet forth, although the award doth not mention any ſuit before; for he that ſets forth a parol award is not (*a*) tied to the very words, but it is ſufficient to ſhew the effect and ſubſtance of what was awarded by word of mouth.

(*a*) But if the award had been in writing in ſuch form of expreſſion, it had not been good. 2 Vent. 242. agreed *per Curiam.*

[An award was that the defendant ſhould pay to the plaintiff 11*l.* on or before the 7th day of *May*, and the breach aſſigned in that the defendant did not pay the ſaid 11*l. ſecundum formam et effectum arbitrii prædicti:* and the Court held it to be well enough, though they ſaid that it would have been more correct to have aſſigned the breach in the very words of the award.] Lee v. Elkin, Lutw. 545.

A man cannot plead generally the award performed, but he (*b*) ought to ſet forth the award, and ſhew how he hath performed it. Moor, 3. pl. 9.

(*b*) But if an award be to pay the rent mentioned in ſuch an indenture, the defendant in pleading performance need not ſet forth the indenture, but refer generally to it. 1 Vent. 87. But if it be to be paid in ſuch manner and at ſuch times as is expreſſed in the indenture, then it muſt be ſet forth at large. Vent. 87. So if an award be to pay money given by will. Vent. 87.

In pleading a countermand to a ſubmiſſion to arbitration, it need not be alleged that the party gave notice to the arbitrators, for without that it is no countermand, and therefore if no notice be given, iſſue may be joined upon the point *quod non revocavit.* 8 Co. 82.

If the ſubmiſſion be by word, though the award be by deed, the party may (*c*) wage his law; for though a deed cannot be diſſolved without deed, yet a verbal contract may be diſſolved by word only; and this in its original is a verbal contract. Co. Lit. 295. 2 Sand. 65.

(*c*) And therefore an action of debt will not lie againſt the adminiſtrator whoſe inteſtate was party to ſuch an award. Cro. Eliz. 600.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff ſets forth an award with a *profert in cur'*, and the defendant craves *oyer*, and then demurs for variance between the award ſet out in the replication and the *oyer*, and the variances appear material, the defendant muſt have judgment; otherwiſe if the variance had been as to thoſe parts in which the award was void; and though in debt on an award the plaintiff (*d*) need not ſet forth more than makes for him, yet it is otherwiſe in debt on a bond, for there the plaintiff muſt reply the whole award; and if ſuch replication be without a *profert*, the defendant (*e*) may reply *nul tiel agard.* Salk. 72. pl. 9. Ld. Raym. 715. 12 Mod. 534. Foreland and Marygold adjudged. (*d*) Sid. 161. Lev. 162. *Vide* Lit. Rep. 313. Burr. 278.

(*e*) *Vide* Style, 459.; where it is ſaid, that the plaintiff need not ſet forth a *profert* thereof *in curia*, becauſe it is no deed. But it is the ſafeſt way.

If an award be made, that certain buildings erected on a wharf, which were a nuiſance to the plaintiff, ſhould be pulled down within thirty-eight days from the date of the award, &c. and upon *nul agard* pleaded the plaintiff ſets forth an award, but without date; yet this is well enough, for the date ſhall be computed Salk. 76. pl. 18. 2 Ld. Raym. 1076. 6 Mod. 244. Arnitt and Breame.

puted from the making of the award, as a deed takes its date from the delivery, though actually dated on another day.

[Mitf. Eq. Pl. 209. (a) 2 Atk. 295. 501. (b) 3 Atk. 529. 644. (c) 2 Atk. 396. 501.

An award may be pleaded to a bill to ſet aſide the award, and open the account (*a*); and it is not only good to the merits, but likewiſe to the diſcovery (*b*) ſought by the bill. But if fraud or partiality are charged againſt the arbitrators, thoſe charges muſt not only be denied by way of averment in the plea, but the plea muſt be ſupported by an anſwer, ſhewing the arbitrators to have been incorrupt and impartial (*c*).

Kill v. Holliſter, 1 Wilſ. 129. Mitchell v. Harris, 2 Vez. jun. 129. 4 Br. Ch. Rep. 311. S. C. Wellington v. M'Intoſh, 2 Atk. 569. *Vid* Halfhide v. Fenning, 2 Br. Ch. Rep. 336. *contr.*

A mere agreement to refer matters to arbitration, where no actual reference has taken place, or is depending, will not ouſt the juriſdiction of any court either of law or equity.

[(H) In what Caſes the Performance of an Award may be compelled by Attachment, and the Courſe of Proceeding to be taken in order to obtain it.

THE ſubmiſſion to arbitration being made a rule of Court, an attachment is granted againſt the party refuſing to perform the award, as for a contempt of that court of which the ſubmiſſion is a rule.

Rex v. Myers, 1 Term Rep. 266.

The attachment in this caſe is only in nature of a civil execution, and therefore cannot be executed on a *Sunday*.

Robins v. Sayward, Str. 441.

But it is ſo far criminal, that the motion for it cannot be grounded on the affirmation of a Quaker.

1 Keb. 130. 138. 559. 1 Sid. 452. Sir T. Raym. 35. 152. 2 Keb. 22. 645. 1 Ch. Caſ. 185. Hales v. Taylor, 1 Str. 695. Stock v. De Smith, Caſ. Tem. Hardw. 106.

The courts of law were for ſome time rather ſcrupulous about interpoſing in this ſummary way in order to enforce obedience to awards; though the courts of equity, where the ſubmiſſion was under one of their rules, made no difficulty in doing it. And an attachment is not at this time what the party applying for it is entitled to *ex debito juſtitiæ*, but it is entirely in the diſcretion of the court whether to grant it or not: and therefore they have refuſed it where there hath been contrariety of evidence, or the caſe hath been a hard one, or the perſon againſt whom it hath been moved hath been a bankrupt, and incapable of paying the money awarded.

Perry v. Nicholſon, 1 Burr. 278. 1 Cr. Pr. 272. 1ſt ed.

Davila v. Almanza, 1 Salk. 73. p. 10.

If one of the parties revokes the ſubmiſſion, or hinders the arbitrators from proceeding in the award, the court will grant an attachment.

Webſter v. Biſhop, 2 Vern. 444. Paterſon v. Groſs, 2 Barnard. 227.

But if the party dies, there is no remedy by attachment againſt his repreſentatives, for the contempt dies with him. And therefore the Court will not ſtay proceedings in an action upon the ſubmiſſion bond, or upon the award, though the party be in cuſtody on the attachment. But they will not grant an attachment, unleſs

unleſs under ſome very particular circumſtances, where an action hath been already commenced. And if the defendant be taken in execution on a judgment, the attachment will be diſcharged. Stock v. De Smith, Caſ. Temp. Hardw. 106, 107. Richardſon v. Chancey, 1 Barnard. 386.

If exceptions are made to the award, though it be affirmed, an attachment will not be granted; for the non-performance of it, whilſt the matter was *ſub judice*, was no contempt. Morris v. Reynolds, Salk. 73. p. 11. 2 Ld. Raym. 857. S. C.

The defendant, a feme ſole, and the plaintiff agreed to a reference. The defendant was awarded to deliver up two notes, and pay a ſum of money; ſhe married, and her huſband refuſed to pay: and it was a queſtion, Whether the court could grant an attachment againſt both or either of them? Anon. B. R. 1 Cr. Pr. 272. 1ſt ed.

The courſe of proceeding in order to obtain an attachment is this; the award muſt be tendered to the party againſt whom it is intended to move, and if he refuſe to accept it, affidavit of the due execution of the award, and of ſuch tender and refuſal, muſt be made, and on that an application to the court to make the order of *niſi prius* a rule of court; a copy of this rule muſt then be ſerved on the party refuſing to accept the award: if he ſtill refuſe to accept it, an affidavit muſt be made of perſonal ſervice of the rule, and of the diſobedience to it; and then, upon application, grounded upon that affidavit, an attachment will be ordered. Kyd on *Awards*, 216. 1 Cr. Pr. 271. 1ſt ed.

Where the award is accepted, but the money being demanded is not paid, an affidavit muſt be made of the due execution of the award, and of the demand and refuſal of the money. But a demand of the money made by a third perſon authoriſed ſo to do, by indorſement on the award unſtamped, is ſufficient without any warrant of attorney. Kyd, 216. Longman v. Holmes, 2 Bl. Rep. 990.

Where the ſubmiſſion is made a rule of court, the award becomes ſo of courſe, and therefore the motion for an attachment is the next immediate ſtep. 1 Salk. 71.

If the ſubmiſſion to the award be made a rule of court under the ſtatute, the affidavits on which to move for an attachment need not be entitled in any cauſe, but thoſe in anſwer muſt be regularly entitled. Bevan v. Bevan, 3 Ter. Rep. 601.

If the time limited by the ſubmiſſion expire without any thing being done, and a reference to a ſecond arbitrator be ſubmitted to, ſuch ſubmiſſion muſt be made a rule of court, and muſt be by the parties to the record, elſe the court will not interpoſe by attachment. For the court cannot in ſuch a caſe enter into the merits of the award, though with the conſent of the parties, for there is a nullity of juriſdiction. Owen v. Hurd, 2 Ter. Rep. 643.

Where on a reference at *niſi prius*, the plaintiff takes a verdict by conſent for ſecurity; he may upon an award being made in his favour, either enter up judgment on the verdict, and take out execution for the ſum awarded, if it do not exceed the ſum for which the verdict was taken, or apply to the court for an attachment. But he cannot enter up his judgment without the Kyd, 216. Forſter v. Brunetti,

leave

1 Salk. 84. Read v. Garnett, Barnes, 58.

leave of the court, and for this purpoſe he muſt have an affidavit of the due execution of the award, and the demand and refuſal of the money awarded, in like manner as on a motion for an attachment.

Robinſon v. Davis, 1 Str. 526.

Upon an affidavit that the original award was loſt by coming up in the *Briſtol* mail, which was robbed, an attachment was moved for upon a copy of it, and granted *niſi*.

Knox v. Simmonds, 3 Br. Ch. Rep. 361.

Where a reference has been ſubmitted to under an order of the Court of Chancery, Lord *Thurlow* ſeemed to think, that the proper motion was not for an attachment, but that the party refuſing to perform the award, ſhould ſtand committed. And notice of ſuch motion muſt be perſonal, not on the clerk in court. However nothing was done in that caſe, nor is the practice by any means ſettled.

(I) Of compelling Performance of an Award by Bill in Equity.

Hall v. Hardy, 3 P. Wms. 189, 190.

WHERE the award is to pay a ſum of money, it is ſaid that a bill in equity to compel performance is improper: but where it is to do any thing in ſpecie, a court of equity will ſometimes lend the aid of its decrees to enforce the execution of it. And a bill in general will lie for performance, either where the award hath been made under a ſubmiſſion entered into by order of the court, or where, though the ſubmiſſion be voluntary or the award defective in circumſtances, the parties have long acquieſced in it, or it has been in part executed.

1 Ch. Rep. 86.

2 Ch. Rep. 304.

3 P. Wms. 189, 190.

A court of equity will decree a ſpecifick performance of an award for conveying an eſtate, where the defendant hath received the conſideration-money for doing it.

2 Vern. 24. 2 Ch. Rep. 304.

On a ſubmiſſion by bond, an award was made not binding by form of law, by which the plaintiff was to pay the defendant 900 *l.* and to ſeal a releaſe to him; and the defendant was to aſſign ſeveral ſecurities he had from the plaintiff. The plaintiff ſold ſome lands to raiſe the 900 *l.* expecting the defendant to receive it, as he gave him intimation he would, and tendered him the 900 *l.* and a releaſe executed by the plaintiff; and though there was no other execution on the plaintiff's part, and though the award was extrajudicial, and not good in ſtrictneſs of law, yet the Lord Chancellor decreed it ſhould be performed in ſpecie.

1 Ch. Rep. 139.

On a bill of review to reverſe a decree confirming an award, the plaintiff aſſigned for error, that the cauſe was referred to four commiſſioners, and but three certified; that a leaſe which he then inſiſted upon, was not in iſſue in the cauſe; and that he never conſented to the certificate. But notwithſtanding theſe objections, as the decree had been acquieſced in ſixteen years without any attempt having been made to impeach it, the court refuſed to reverſe it.

Though

Though a court of equity will not hold a defendant to an award, where the plaintiff hath neglected to perform his part within the time limited by the terms of it; yet if the defendant after ſuch time accept part-performance from the plaintiff, in that caſe a performance on his part to the extent of what he has accepted from the plaintiff will be decreed. Ca. Tem. Finch, 22.

A. and *B.* co-partners ſubmitted differences between them to arbitration, and it was awarded that a part of the ſtock in trade ſhould be depoſited in the hands of a third perſon, part thereof to be delivered from time to time to either party who ſhould pay any debt due from the partnerſhip eſtate, the quantity to be in proportion to the money ſo paid by him. A moiety of the ſtock ſo depoſited was afterwards taken in execution by ſeparate creditors of *A.* as his property; upon which *B.* the other partner, and the partnerſhip creditors filed a bill to ſet aſide the execution, and to have the moiety of the ſtock ſo ſeized, appropriated to the payment of their debts, inſiſting, that it was ſpecifically bound by the award, and the execution. But Lord *Hardwicke* diſmiſſed the bill, becauſe the partnerſhip creditors were not parties to the ſubmiſſion, or at all privy to the tranſaction, or under any obligation of abiding by the award. Thompſon v. Noel, 1 Atk. 62.

Nor will a bill in equity lie to carry into execution an award on a voluntary ſubmiſſion, unleſs there has been an acquieſcence in it by the parties to the ſubmiſſion, or an agreement by them afterwards to have it executed. Ibid.

(K) In what Caſes, when, and in what Manner Awards may be relieved againſt.

WHEN an award is put in ſuit at law, no extrinſick circumſtance, nor any matter or fact *debors* can be given in evidence to impeach it: if it be open therefore to any objection of this kind, the defendant muſt apply for relief either to a court of equity by bill, or, if the ſubmiſſion has been made a rule of any court of law, to the ſummary and equitable juriſdiction of that court of which ſuch ſubmiſſion has been made a rule. Wills v. Maccarmick, 2 Wils. 148.

Theſe objections being in general founded on the miſtakes or miſconduct of the arbitrators, who are judges choſen by the party himſelf, are received by the courts at firſt with a degree of caution and reſerve; though, if made out to their ſatisfaction, relief is certainly afforded. 2 Vez. 315. 1 Atk. 64. 1 Salk. 73.

On a bill in equity to ſet aſide an award, Lord Chancellor ſaid, That if it appears that the arbitrators went upon a plain miſtake, either as to the law or the fact, the ſame is an error appearing on the face of the award, and is ſufficient to ſet it aſide: *alitèr*, on a doubtful point of law, though the court on deliberation ſhould be of a different opinion. 2 Vern. 705. 3 Atk. 495.

On a like bill, where it appeared that the arbitrator had made his award, notwithſtanding he had been deſired by one of the parties 3 P. Wms. 362.

ties to poſtpone it till he could ſatisfy him as to ſome facts which the arbitrator had conceived to be againſt him, Lord *Talbot* ſet the award aſide.

2 Atk. 64. Kyd, 240. So where the objection was that a part of the evidence had been ſhewn only to one of the arbitrators, and not to both, and the arbitrator to whom it had not been ſhewn, ſwore, that he believed if he had ſeen it, his award would have been different from what it was, Lord *Hardwicke* declared the award for that reaſon void.

2 Vern. 251. 485. 514. So where one of the arbitrators has had an intereſt in the matter in controverſy, or has been related to one of the parties; or where two of the arbitrators have by fraud or force excluded a third; or where they have heard one party, and refuſed to hear the other; or have choſen an umpire by lot; in all theſe caſes the awards have been relieved againſt.

2 Vez. 315. If one of the arbitrators uſe any expreſſions towards either party, which diſcover bias or prejudice in his mind, a court of equity will ſet aſide the award, though there be nothing to impeach the conduct of the other arbitrator who joined with him in it.

2 Vern. 100. Where the ſervant of an umpire had given out before the time allowed the arbitrators to make their award was expired, that he was ſure his maſter would give ſo much, and he afterwards did give ſo much, which was more than was awarded by either of the arbitrators; the court looked upon this as evidence of fraud and corruption, and therefore decreed the arbitration-bond to be delivered up.

Ward v. Periam, 1720, cited by Ld. Hardwicke in 2 Vez. 316. Where an award was made a rule of the court of K. B., and on a motion on one hand for an attachment, and on the other to ſet aſide the award, that court refuſed to interfere, and left the plaintiff to his remedy at law on the ſubmiſſion-bond, Lord *Macclesfield* conſidered this as a bare bond of award without being made a rule of court, and that therefore, as the one party was taking relief by his action, the other was entitled to take relief by bill in equity.

2 Atk. 155. A bill was filed to ſet aſide an award which had been made a rule of the court of K. B. for corruption in the arbitrator; the defendant pleaded the award, and ſubmitted to amend any errors. Lord *Hardwicke* ſaid, that the K. B. was the proper court to examine into the corruption and partiality of the arbitrator; but as the anſwer was very looſe and general, and there was an expreſs ſubmiſſion to amend any errors, he ordered the plea to ſtand for an anſwer, with liberty to except.

Ambl. 245. On a bill in equity to ſet aſide an award, the court will not let the party go into any legal objections, except for partiality and corruption; but if the bill is for an account, and prays to ſet aſide an award, there, in order to let in ſuch account, the plaintiff may make legal objections.

Caſ. Temp. Hardw. 54. Where the arbitrators took money of one of the parties alone for their charges without any bill delivered, and before the making of their award; Lord *Hardwicke* thought this a ſufficient reaſon

reaſon to ſet the award aſide; for, if ſuffered, it would be hard to diſtinguiſh what is corruption.

If a bill to ſet aſide an award for partiality or corruption be filed againſt arbitrators, the charges of partiality muſt not only be denied by way of averment in the plea; but the plea muſt be ſupported by an anſwer ſhewing the arbitrators to have been incorrupt and impartial. 2 Atk. 395. 501. 3 Atk. 529. 644. Mitf. Eq. Pl. 209.

But where the arbitrator has accepted of the office upon condition that the parties ſhould undertake not to bring any bill in equity againſt him; but a bill is afterwards brought againſt him, and corruption and partiality are charged; the court will order his name to be ſtruck out from being a party. 2 Atk. 396.

The miſconduct of the arbitrators cannot be urged in anſwer to a motion for an attachment, but is a ground upon which to move to ſet aſide the award. Andr. 299.

A motion to ſet aſide an award under the ſtatute, cannot be received till the ſubmiſſion is made a rule of court; and a conſent in the ſubmiſſion bond to make the award a rule of court, inſtead of the ſubmiſſion, it hath been adjudged, will not warrant the court's interpoſition. But ſee *Barnes*, 55. ſupra (*B*). Harriſon v. Grundy, 2 Str. 1178.

A motion to ſet aſide an award under the ſtatute for corruption, muſt be made before the laſt day of the next term after the award is publiſhed, elſe it is too late, and an attachment for non-performance may iſſue. Freame v. Pinneger, Cowp. 23.

So a motion to refer back ſuch an award to the arbitrator, though there be no charge of corruption, but merely upon the ground that he had not before had ſufficient materials, muſt be made before the laſt day of the next term. 2 Ter. Rep. 781.

It was holden by Lord *Talbot* that in awards under the ſtatute the confirmation of the ſubmiſſion muſt precede the making of the award; but this hath been over-ruled; and properly enough, for it may happen that the award may be made in the vacation, and before any term after the ſubmiſſion. 3 P. Wms. 362. 1 Barnard. 152. Kyd, 235.

The ſtatute of *W.* 3. being made to put arbitrations where no cauſe was depending upon the ſame footing as thoſe where there was one, and being only declaratory of what the law was in the latter caſe, it ſeems to follow, that objections which ariſe upon the face of the award may be made at any time; and that the limitation to the ſecond term is confined merely to ſuch objections as affect the conduct of the arbitrators. 2 Burr. 701. Barnes 56, 57. Id. 55. *contr.*

It was formerly holden, that, on a ſubmiſſion by conſent under an order of a court of equity, exceptions might be made to the award, as to a maſter's report. But Lord *Thurlow* diſapproved of this practice, conceiving that if it lay open to exceptions, it ſeemed rather a reference than an award: that the proper way is to move to ſet aſide the award; and the topicks in the exceptions will apply to ſuch a motion. Creſsly v. Carrington, 1 Vern. 409. 1 Ch. Ca. 186. Hide v. Cooth, 2 Vern. 109. Woodbridge v. Hilton, 1 Br. Ch. Rep. 378. Price v. Williams, 3 Br. Ch. Rep. 164. It is admitted that exceptions will lie to an award; but they muſt be only to ſuch matters as appear on the face of the award, not to the facts in the award, or any matter *debors*: an objection of that nature muſt be made upon motion to ſet aſide the award, ſupported by affidavit. Dick v. Milligan, 4 Br. Ch. Rep. 117.

Bunb. 265. 1 Barnard. 75. 152. To a bill in the Exchequer to ſet aſide an award, for undue practice, the defendants pleaded (among other things) that the ſubmiſſion was made a rule of the court of King's Bench, and that there had been no application to that court purſuant to the ſtatute of 9 & 10 *W.* 3. A queſtion therefore aroſe upon the ſtatute, Whether a court of equity were not precluded from examining into the award? The Lord Chief Baron and Baron *Comyns* were of opinion that it was not, (the time in B. R. being elapſed,) but Baron *Carter* that it was, Baron *Hale dubitante.* At laſt the whole court agreed, that the plea ſhould ſtand for an anſwer, with liberty of excepting to it.

3 Atk. 644. A bill in equity will not lie againſt an arbitrator for a diſcovery of the grounds upon which he made his award; but if there be any palpable miſtake, or miſcalculation, the party aggrieved may bring his bill againſt the party in whoſe favour the award is made, to have it rectified.]

Arrest.

Aſſault and Battery.

(A) What ſhall be ſaid to be an Aſſault.

(B) What ſhall be ſaid to be a Battery.

[(B 2.) In what Manner they are to be charged.]

(C) In what Caſes they may be juſtified, and what Pleas may be pleaded to them, and of the Manner of ſetting forth the Juſtification.

(D) In what Manner they are to be puniſhed.

(A) What ſhall be ſaid to be an Aſſault.

Fulton, 4. a. 6 Mod. 173. 2 Roll. Abr. 545. Vent. 256. Hawk. P. C. 263. AN aſſault is an attempt or offer with force and violence to do a corporal hurt to another, as by ſtriking at him with or without a weapon, or preſenting a gun at him at a diſtance to which the gun will carry, or pointing a pitch-fork at him, ſtanding within the reach of it, or by holding up one's fiſt at him, or by drawing a ſword and waving it in a menacing manner.

But

But if *A.* lays his hand on his ſword, and ſays, that *if it were not aſſize time I would not take ſuch language from you*; this is no aſſault, for it is plain he did not deſign to do him any corporal hurt at that time, and a man's intention muſt operate with his act in conſtituting an aſſault. Mod. 3. 2 Keb. 545. S. C. 10 Mod. 187. Law of Evid. 235. pl. 60. Gilb. Law of Evid. 256.

[The act of criminal converſation with another man's wife is an aſſault; force and violence being ſuppoſed in law to accompany this atrocious injury to the huſband, in reſpect of whom the conſent of the wife is as nothing.] 2 Salk. 552. 7 Mod. 81.

It ſeems agreed, that at this day no words whatſoever, be they never ſo provoking, can amount to an aſſault, notwithſtanding the many ancient opinions to the contrary *. Hawk. P. C. 263.

* But if very provoking language is given, without reaſonable cauſe, and the party offended is tempted to ſtrike the other, and an action brought, and the general iſſue pleaded, few juries would give damages to carry coſts, and few (if any) judges would certify.

Every battery includes an aſſault; therefore, if the defendant be found guilty of the battery, it is ſufficient. Salk. 384. pl. 36. Hawk. P. C. 263.

(B) What ſhall be ſaid to be a Battery.

ANY injury whatſoever, be it never ſo ſmall, being actually done to the perſon of a man, in an angry or revengeful, or rude or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violently joſtling him out of the way, are batteries in the eye of the law. 6 Mod. 149. 172. Mod. 3. 3 Lev. 404. Hawk. P. C. 263. [And the act cauſing the injury need not proceed from the *immediate* aſſault of the defendant: as where the defendant threw a lighted ſquib into a market-place, which being toſſed from hand to hand by different perſons, at laſt hit the plaintiff in the face, and put out his eye; it was adjudged that this was actionable as an aſſault and battery. *Per* three juſtices, *contr.* Blackſtone, J. Scott v. Shepherd, 2 Bl. Rep. 892. 3 Wilſ. 403. S. C. So if a perſon puſhes a drunken man againſt another, and hurts him. Short v. Lovejoy, *coram* Lee, Ch. J. Guildhall 1752. Bull. Ni. Pri. 16.]

But to lay one's hands gently on another whom an officer has a warrant to arreſt, and to tell the officer that this is the man he wants, is not a battery. 2 Roll. Abr. 546. Hawk. P. C. 264.

So if two by conſent play at cudgels, and one happens to hurt the other, as their intent was lawful and commendable, in promoting courage and activity, it does not ſeem to amount to a battery. Dalt. c. 22. Bro. Coron. 229. [But ſee the caſe of Boulter v. Clark, at *Abingdon* aſſizes *coram* Parker, C. B. who held that it was no defence to allege that the plaintiff and defendant fought together by conſent, the fighting itſelf being unlawful. Bull. *Ni. Pri.* 16. 4th ed. So if one licenſe another to beat him, ſuch licence is no defence, becauſe it is againſt the peace. Matthew v. Ollerton, Comb. 218.]

So if one ſoldier hurts another by diſcharging a gun in exerciſe, this cannot amount to a battery, though if it be done without ſufficient caution, he is liable to an action at the ſuit of the party injured. Hob. 134. 2 Roll. Abr. 548. [Nothing but inevitable neceſſity ſhall excuſe a treſpaſs. Dickenſon v. Watſon, Sir T. Jones, 205. Underwood v. Hewſon, Str. 595. Raym. 467. 2 Bl. Rep. 896.]

[Gibbons v. Pepper, 4 Mod. 405. 2 Salk. 637. S. C. 1 Ld. Raym. 38. S. C.

So if by a ſudden fright a horſe runs away with his rider, and runs againſt a man, it is no battery, and this may be given in evidence on the general iſſue: but if it were occaſioned by a third perſon whipping the horſe, ſuch perſon would be the treſpaſſer.]

[(B 2.) In what Manner they are to be charged.

Michell v. Neale, Cowp. 828.

THE declaration cannot lay the aſſault on a day certain, and *on divers other days and times*: for an aſſault is one entire individual act, and cannot be laid with a *continuando*; and upon ſuch a declaration the defendant could not prepare himſelf with a defence, becauſe he could not know whether the plaintiff meant to go for one or twenty aſſaults.

Amyon v. Shore, 1 Str. 621. (a) White v. Shaw, 2 Wilſ. 203. Douglas v. Hall, Barnes, 360. 1 Wilſ. 99.

In the King's Bench, where the action is by bill, the offence ſhould be charged poſitively, and not by way of recital, with a whereas, &c.: but this is not material in the Common Pleas (a), for in that court the writ being ſet out in the declaration, helps the want of a poſitive averment.

Newman v. Smith, 2 Salk. 642.

The plaintiff may lay in his declaration many things in aggravation, for which he himſelf could not maintain an action; as "for making an aſſault upon his ſervants."

Ruſſel v. Corne, 1 Salk. 129. 2 Str. 1094.

In an action by huſband and wife for a battery on her, *per quod* the huſband's buſineſs remained undone; on motion in arreſt of judgment, the declaration was holden good, becauſe the battery itſelf is actionable, and the *per quod* only aggravation; and *Holt* ſaid he would not intend the judge ſuffered that to be given in evidence.

Weſtbrook v. Stuttville, 1 Str. 79.

The defendant gave in evidence that he was married to the plaintiff; and to encounter that evidence the plaintiff was permitted to prove that ſhe had another huſband living when ſhe married the defendant.]

(C) In what Caſes they may be juſtified, and what Pleas may be pleaded to them, and herein of the Manner of ſetting forth the Juſtification.

Vide Hawk. P. C. 259. 264. and ſeveral authorities there cited.

IF an officer, having a warrant (b) againſt one who will not ſuffer himſelf to be arreſted, beat or wound him (c) in the attempt to take him, he may juſtify it. So if a parent in a reaſonable manner chaſtiſe his child; or a maſter his ſervant, being actually in his ſervice at the time; or a ſchoolmaſter his ſcholar, or a gaoler his priſoner; or even a huſband his wife; or if one confine a friend who is mad, and bind and beat him, &c. in ſuch a manner as is proper in his circumſtances; or if a man force a ſword from one who offers to kill another; or if a man gently lay

[(b) Where defendant juſtifies under a ſheriff's warrant, the

lay his hands on another, and thereby ſtay him from inticing a dog againſt a third perſon; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs me of my land (*d*) or goods, or of the goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my hands gently on him and diſturbing him; or if a man beat, wound, or maim one who makes an aſſault upon his perſon, or that of his wife, parent, child, or maſter; or if a man fight with, or beat one who attempts to kill any ſtranger; in theſe caſes it ſeems the party may juſtify the aſſault and battery (*e*).

production of it is not required: for it muſt be returned to the ſheriff. Bateman v. Woodcock, Cro. Ja. 372.

(*c*) But a battery cannot in this caſe be juſtified by the *mere arreſt*: the defendant muſt either plead that he gently laid his hands on the plaintiff in order to arreſt him, and that he actually did arreſt him; as in Patrick v. Johnſon, 2 Lutw. 927. 3 Lev. 403. though that way of pleading has been doubted of; or that the plaintiff made reſiſtance, and was going to reſcue himſelf, and by reaſon thereof he beat him in order to ſecure him: for though an arreſt implies an aſſault, yet it does not admit a battery; and further, an officer cannot juſtify beating a man without reſiſtance. Truſcott v. Carpenter, 1 Ld. Raym. 229. Williams v. Jones, Caſ. temp. Hardw. 298. 2 Str. 1049. S. C. (*d*) Where the injury is a mere breach of a cloſe in contemplation of law, the defendant cannot juſtify a battery *without a requeſt to depart*; but it is otherwiſe where any actual violence is committed, for there it is lawful to oppoſe force with force. Green v. Goddard, 2 Salk. 641. 2 Inſt. 316. Seeman v. Cuppledick, Owen, 150. (*e*) So a churchwarden may juſtify taking off the hat, or laying hands on a perſon who is diſorderly in church, and turning him out for diſturbing the congregation; but it muſt be by a *molliter manus impoſuit*: Howe v. Planner, 1 Saund. 13. So the defendant may juſtify even a *maihem*, if done by him as an officer in the army for diſobedience of orders, or other military offence; and he may give in evidence the ſentence of a council of war upon a petition againſt him by the plaintiff; and if by their ſentence the petition was diſmiſſed, it will be concluſive evidence in favour of the defendant. Lane v. Degberg, H. 11 W. 3. *per* Treby, C. J. Bull. *Ni. Pri.* 19.]

And on an indictment the party may plead not guilty, and give the ſpecial matter in evidence; but in an action of treſpaſs (*f*) he muſt plead it ſpecially.

6 Mod. 172.

[(*f*) Matter of excuſe may in ſuch caſe be either pleaded, or given in evidence under the general iſſue; but matter of juſtification muſt be always pleaded. Bull. *Ni. Pri.* 17. Co. Litt. 282. b. But where in an action for an aſſault and falſe imprisonment againſt the captain of a ſhip, who pleaded *not guilty*; the defendant croſs-examined the plaintiff's witneſſes as to expreſſions uſed by the plaintiff, which would have juſtified the impriſonment, they tending to create mutiny and diſobedience; though this evidence was objected to, yet the judge admitted it, holding *what was ſaid at the time* to be good evidence in mitigation of damages: for every thing which paſſed at the time was part of the tranſaction on which the plaintiff's action was founded, and therefore he could not be ſurpriſed by the evidence. Bingham v. Garnault *coram* Buller, J. London 1788. Eſpin. Ni. Pri. 317.]

[It is no plea that the defendant hath been convicted on an indictment for the ſame aſſault, and paid a fine to the king; for this ſuit is inſtituted for the private redreſs of the party injured. So *vice verſâ*.]

Bull. Ni. Pri. 16. 1 Str. 68.

In treſpaſs for aſſault and battery, the defendant juſtifies by a *molliter manus impoſuit* for due correction as his ſervant, and pleads over, that ſince the time the plaintiff *exoneravit et relaxavit* (without ſaying *per ſcriptum*) to the defendant the ſaid matter: to this plea it was ſpecially demurred for doubleneſs; and the opinion of the Court was, that it was double; for though the releaſe be not ſufficiently pleaded, yet it is pleaded ſo as iſſue may be taken upon it, which will make it double.

Blake v. Grove, 1 Sid. 175. 1 Keb. 661. S. C.

[A former recovery is a good plea, notwithſtanding ſubſequent damages: for the conſequence of the battery is not the ground of the action, but the meaſure of the damages.

Fetter v. Beale, 1 Salk. 11.

Yelv. 68. So if a battery be committed by ſeveral, and a recovery had againſt one, ſuch recovery may be pleaded in bar to an action for the ſame battery brought againſt another.

St. 21 J. 1. c. 16. Blackmore v. Tidderly, 2 Salk 423. The defendant may plead *not guilty within four years* next preceding the commencement of the ſuit: but *not guilty within ſix years* will be bad.

Co. Litt. 282. See the ſtatute 7 J. 1. c. 5. which empowers juſtices of the peace, &c. to plead the general iſſue, and give the ſpecial matter in evidence. This being a tranſitory action, in which the time or place are merely inducement, the place cannot be traverſed without ſpecial cauſe of juſtification, which extends to ſome certain place, as if a conſtable of a town of another county arreſts the body of a man that breaketh the peace there, he may traverſe the county, but he muſt not reſt there; he muſt traverſe all other places, ſaving in the town whereof he is conſtable.

Gibbon v. Pepper, 2 Salk. 637. Ld. Raym. 38. S. C. If the defendant *juſtifies* the aſſault and battery, he muſt *confeſs* it, or, on demurrer, the plaintiff ſhall have judgment.

Pendlebury v. Elmott, Cro. El. 268. Truſcott v. Carpenter, 1 Ld. Raym. 229. Jerome v. Phear, Cro. El. 93. *Son aſſault* goes to the whole declaration; but a juſtification in any other way applies only to thoſe parts, which it particularly takes notice of, and is therefore bad; nor will a general traverſe as to the reſt ſupply the omiſſion.

Dr. Groenvelt v. Dr. Burwell, 1 Ld. Raym. 472. To the *vi et armis*, battery, and wounding, the defendant pleaded not guilty; and as to the *reſidue*, juſtified; it was objected, that here was no anſwer to the aſſault: but the objection was over-ruled, for the reſidue includes the aſſault.

Barſoot v. Reynolds, 2 Str. 953. So in the caſe of a wife in defence of her huſband. Leward v. Baſely, 1 Ld. Raym. 62. In an action againſt a ſervant, if he pleads a juſtification in defence of his maſter, he muſt plead it thus: "That the plaintiff would have beaten his maſter if he had not interpoſed, "*prout ei bene licuit.*" For the ſervant can only ſtrike to prevent an injury, not by way of revenge; and therefore where the ſervant pleaded, "That the plaintiff having aſſaulted the maſter in "his preſence, he, in defence of his maſter, ſtruck the plaintiff," the plea was holden ill on demurrer, for the aſſault on the maſter might be over, when the ſervant ſtruck the plaintiff.

Hay v. Kitchin, 1 Wilſ. 171. S. C. 2 Str. 1271. by the name of Guy v. Kitchiner, Bull. *Ni. Pri.* 17. The plea of *ſon aſſault* admits an aſſault; and therefore where the memorandum was generally of the term, and the plaintiff, on the defendant's failure in his plea, went on and proved an aſſault on a day within the term, the Court held it well enough, for it was unneceſſary for him to give any evidence at all, unleſs to aggravate damages, and he ſhall not be nonſuited, becauſe it is amendable by a new bill. If this come out on the defendant's evidence, who has otherwiſe proved his plea, the defendant ought to have a verdict, unleſs plaintiff prove another battery previous, which in ſuch caſe ought to be deemed the foundation of the ſuit.]

Sid. 444. 2 Keb. 623. Vent. 70. In an action of battery the defendant pleads that he was maſter of a ſhip, and that the plaintiff being his carpenter and ſervant

ſervant in the ſhip, neglected his duty, and gave him ſaucy language, and that therefore *moderatè caſtigavit*; plaintiff replies *non moderatè caſtigavit*, and iſſue joined, and verdict for the plaintiff; and in arreſt of judgment it was inſiſted, that *moderatè caſtigavit* was not a pertinent negative, the proper iſſue being *immoderatè caſtigavit*; but the Court held it well enough, eſpecially after verdict. S.C. Aubre and James.

In an action of aſſault and battery, and wounding, it was laid with a *mutilavit & ſiniſtr' brach' fregit ita quod uſum ſiniſtri brachii amiſit*; to this the defendant pleaded *de ſon aſſault demeſne*; and on demurrer it was ſhewn for cauſe, that this being a heinous battery, and amounting to a mayhem, he ſhould have ſhewn to the Court that the aſſault was with ſuch violence, that he could not otherwiſe have defended himſelf but by maiming the plaintiff; and the pleading ſhould have been, that the plaintiff *mayhemaſſet & vulneraſſet* the defendant *niſi, &c.* But the Court held the plea good, and that it was matter upon evidence, whether the aſſault were proportionable to the battery; for if it were not, the iſſue would be for the plaintiff, although the plaintiff did make the firſt aſſault; for every aſſault will not juſtify every beating, but it muſt be ſuch a one as may draw a probable danger and fear upon the perſon upon whom it is made. Sid. 246. Keb. 884. 921. S. C. between Danny and Lucy. Cockcroft v. Smith, Ld. Raym. 177. 2 Salk. 642.

In aſſault, *&c.* the defendant pleaded *ſon aſſault demeſne*, and the plaintiff replied, that he was ſtanding at his gate, and that the defendant being on horſeback offered to ride over him, whereupon he *molliter* aſſaulted the plaintiff in defence of himſelf, *quæ eſt eadem, &c.* and on demurrer to this replication it was adjudged to be ill, becauſe he thereby had confeſſed that he had made the firſt aſſault; for he ſhould have pleaded *mollitèr manus impoſuit* to hinder the riding over him. Lev. 282. Sid. 441. Mod. 36. 2 Keb. 597. S. C. between Jones and Treſilian.

[In aſſault and battery, the defendant pleaded that he was ſeiſed of the rectory of *D.* in fee, and that the corn was ſevered from the nine parts, and for that the plaintiff would have carried away his corn, he ſtood in defence thereof, and kept the plaintiff from carrying it away; ſo that the harm which the plaintiff received was of his own wrong, *&c.* The plaintiff replied *de injuriâ ſuâ propriâ abſq. tali cauſâ*; and upon demurrer the replication was holden to be good, becauſe the plaintiff claimed nothing in the land or corn, but only damages for the battery, which is collateral to the title; and therefore a general replication was good; for in a mere aſſault and battery, the poſſeſſion only can be material; but it is otherwiſe when the right may come in queſtion. Taylor v. Markham, Cro. Ja. 224. Yelv. 157. S. C. 1 Brownl. 215. S. C.

To a plea of ſon aſſault, the plaintiff replied that the defendant attempted with his whole force to beat and wound a horſe which the plaintiff had in his care; and that in defence of the horſe he laid his hands upon the defendant, *prout ei bene licuit*: this replication was adjudged inſufficient; for it ought to have alleged that the defendant had actually beaten the horſe before the plaintiff laid his hands upon the defendant; as in the plea of *ſon aſſault*, in which the defendant always alleges that the plaintiff made an aſſault upon him, before he ſays that he defended himſelf, *&c.* Shingleton v. Smith, 2 Lutw. 1481.

King v. Tebbart, Skin. 387. S. C. Comb. 227. by the name of King v. Peppard.

A *mollitèr manus impoſuit* will include a battery where the cauſe is ſufficient; for to lay hands on another, againſt his will, is a battery: it will not indeed be a defence for a wounding: but if the battery be ſo outrageous, that a *mollitèr manus impoſuit* is not true, it ought to be ſpecially ſhewn by the plaintiff, elſe it ſhall be a good juſtification.

Ibid.

Where to a plea of *ſon aſſault*, the plaintiff replies *mollitèr manus impoſuit*, and the parties agree in the time, there is no occaſion for an averment that it is the ſame treſpaſs, *&c.*]

For damages in this action, ſee tit. *Damages*, D. E.; and for coſts, tit. *Coſts*, B 3.

(D) In what Manner they are to be puniſhed.

Hawk. P. C. 264. A defendant is not to be held to ſpecial bail, unleſs the battery be grievous; in which caſe the writ may be marked for ſpecial bail. Carth. 278. An action of aſſault and battery is within the ſtatute, which gives no more coſts than damages. Vent. 256. For the penalty for aſſaulting a ſervant of a knight or burgeſs in parliament, *vide* the ſtatute 5 H. 4. c. 6. For puniſhing thoſe who aſſault any coming to parliament, or to the king's council, 11 H. 6. c. 11. Concerning an aſſault on a privy counſellor in the execution of his office, 9 Ann. c. 11. For which *vide* tit. *Felony*. For beating or challenging to fight for money won at play, 9 Ann. c. 14. and tit. *Gaming*. For the offence of aſſaulting in a church or church-yard, ſee 5 & 6 E. 6. c. 4. And that church-wardens who whip boys for playing in the church, or put off the hats of thoſe who ſit there with them on, or who gently lay their hands on an excommunicated perſon to turn him out, are not within the ſtatute. Sand. 13, 14. Sid. 301. For ſtriking within the king's palace, ſee Hawk. P. C. 86.

EVERY perſon guilty of an aſſault or battery, is ſubject both to an action at the ſuit of the party, wherein he ſhall render damages, *&c.* and alſo to an indictment at the ſuit of the king, wherein he ſhall be fined according to the heinouſneſs of the offence.

Aſſignment.

AN aſſignment is the transferring and ſetting over to another of ſome right, title, or intereſt in things, in which a third perſon, not a party to the *aſſignment*, has a concern and intereſt. How far the privity of contract is deſtroyed by the aſſignment, and what remedies the parties may have againſt each other, is ſet down under the head of *covenants*; and therefore I ſhall here only conſider,

What Things are aſſignable.

Co. Lit. 214. Roll. Abr. 376. Skin. 6.

A Poſſibility, right of entry, or thing in action, or cauſe of ſuit, or title for a condition broken, cannot be granted or aſſigned over by law; for if this were permitted it would promote maintenance,

maintenance, and prove prejudicial to ſuch as, being able to contend with thoſe with whom the original contract was, might find themſelves depreſſed by a powerful adverſary. pl. 7. 26. pl. 1. [But all rights, titles, and actions may be releaſed to the terretenant, for this prevents ſuits and contentions. Lampet's caſe, 8 Co. 48. a.]

But though a bond, being a *choſe in action*, cannot be aſſigned over ſo as to enable the aſſignee to ſue in his (*a*) own name, yet he has by the aſſignment ſuch a title to the paper and wax, that he may keep or cancel it. Co. Lit. 232. (*a*) And by the modern practice he may ſue for it in the name of the obligee, as his attorney; but there ſhould be an expreſs authority, inſerted in the aſſignment. [The king was always an exception to this rule, and his aſſignee may ſue in his own name. Dy. 30. b. p. 208. Equity has ever protected aſſignments of choſes in action, 1 Vez. 411, 412. and courts of law will now take notice of them; as, where the obligee had aſſigned over a bond, and afterwards became a bankrupt, it was holden, that he himſelf might bring an action upon it, notwithſtanding the bankruptcy. Winch v. Keeling, 1 Term. Rep. 619. So it has been holden that in an action brought on a bond given to the plaintiff in truſt for another, the defendant may ſet off a debt due from the perſon beneficially intereſted in like manner as if the action had been brought by him. Bottimley v. Brooke, M. 23 G. 3. C. B. Rudge v. Birch, M. 25 G. 3. B. R. cited in 1 Term Rep. 621. and 4 Term Rep. 340. The aſſignment of a choſe in action is a good conſideration for a promiſe: 1 R. Abr. 29. Sid. 212. T. Jones, 222.; though the debt aſſigned be uncertain. Moulſdale v. Birchall, 2 Bl. Rep. 820.]

Alſo in equity a bond is aſſignable for a valuable (*b*) conſideration paid, and the aſſignee alone becomes entitled to the money, ſo that if the obligor after (*c*) notice of the aſſignment pays the money to the obligee, he will be compelled to pay it over again. 2 Vern. 595. (*b*) There muſt be a conſideration paid. 3 Chan. Rep. 90.

(*c*) 2 Vern. 540. But payment to the obligee without notice of the aſſignment, is good. Chan. Ca. 232.

An aſſignee muſt take it ſubject to the ſame equity that it was in the hands of the obligee; as if on a marriage-treaty the intended huſband enters into a marriage-brokage bond, which is afterwards aſſigned to creditors, yet it ſtill remains liable to the ſame equity, and is not to be carried into execution againſt the obligor. 2 Vern. 428. 692. S. P. 764. S. P.

If the adminiſtrator of a conuzee of a ſtatute extends the lands, and a *liberate* is returned, and before entry or recovery of the poſſeſſion the adminiſtrator aſſigns his intereſt, the aſſignment is void, for by the *liberate* he has accepted the poſſeſſion, and is eſtopped to ſay the contrary; and then by ſuffering the owner of the lands to continue in poſſeſſion, this turns his poſſeſſion into a right, which is not aſſignable before the poſſeſſion be regained by ejectment or re-entry, or ſome lawful means. 3 Lev. 312. Stephens and Hunham. 4 Mod. 48. Show. 290. 2 Salk. 563. S. C. pl. 1. Skin. 300. S.C. 1 Show. 290. S. C.

If there be a deviſe of a term to *A.* for life, remainder to *B.*, *B.* cannot in the life-time of *A.* aſſign his intereſt, becauſe he has but a bare poſſibility, for *A.* may outlive the number of years. 10 Co. 47. [But intereſts in contingency, reſpecting perſonal eſtates, are aſſignable in equity for a good conſideration. Goring v. Bickerſtaffe, 1 Ch. Caſ. 8. Cookes v. Bellamy, 1 Sid. 188. Wind v. Jekyll, 1 P. Wms. 572. Kimpland v. Courtney, 2 Freem. 250. Theobald v. Duffey, 9 Mod. 101. Higden v. Williamſon, 3 P. Wms. 132. Duke of Chandois v. Talbot, 2 P. Wms. 608. And a poſſibility, whether in real or perſonal eſtate, is tranſmiſſible and deviſable; Sheriff v. Wrotham, Cro. Ja. 509. Pinbury v. Elkins, 1 P. Wms. 566. King v. Withers, Ca. temp. Talb. 117. Chauncy v. Graydon, 2 Atk. 616. Peck v. Parrot, 1 Vez. 236.

Selwin

Selwin v. Selwin, 2 Burr. 1131. 1 Bl. Rep. 231. S. C. Dawſon v. Killet, 1 Br. Ch. Rep. 119. Barnes v. Allen, 1 Br. Ch. Rep. 181. Moor v. Hawkins, 1 H. Bl. Rep. 34. Roe v. Jones, 1 H. Bl. Rep. 30. 3 Term Rep. 88.]

(a) Truſtee cannot aſſign his truſt. 4 Inſt. 85. *vide* head of *Truſt*; nor a guardian. Vaugh. 180. Whether a pawnbroker, by reaſon of the ſpecial property he has in the pledge, can aſſign it, Q. & *vide* 1 Bulſt. 31. Owen, 124.

A perſonal truſt which one man repoſes in another, cannot be (a) aſſigned over, however able ſuch aſſignee may be to execute it.

(b) Barwicke v. Reade, 1 H. Bl. Rep. 627. (c) Lidderdale v. Duke of Montroſe, 4 Term Rep. 248. Flarty v. Odlam, 3 Term Rep. 681. *Contr.* Stewart v. Tucker, 2 Bl. Rep. 1137. By 1 G. 2. ſt. 2. c. 14. § 7. all aſſignments of ſeamen's wages are declared void.

[Neither the full (b) pay, nor the (c) half pay of an officer in the army, can be aſſigned.] *ſee postea title 5 33*

Several things are aſſignable by acts of parliament, which ſeem not aſſignable in their own nature; as promiſſory notes, by 3 & 4 *Ann. cap.* 9. bail-bonds by the ſheriff, by 4 *Ann. cap.* 16. *ſect.* 20. a judge's certificate for taking and proſecuting a felon to conviction, by 10 & 11 *W.* 3. *cap.* 23. *ſect.* 2. a bankrupt's effects by the ſeveral ſtatutes of bankruptcy.

Aſſiſe.

(d) For the derivation and ſignification of the word, *vide* Co. Litt. 153. b. 154. b. 159. b. It ſeems to have been of *Norman* extraction, *vide* Cuſtomier 16. and to have been introduced in the reign of H. 2. as a more eaſy and expeditious method of recovering the freehold than was obſerved in the writ of entry; hence the writ of entry was afterwards called a writ of entry in the nature of an aſſiſe. *Vide* Fleta, 214, 215. *Glanvil* ſays it was *regale quoddam beneficium clementia principis de concilio procerum populis indultum.* Glanvil, c. 7. fol. 17.

AN (d) aſſiſe is a remedy which the law hath appointed for the reſtitution of a freehold, of which the party has been diſſeiſed, and appears to have been in nature of a commiſſion to put the diſſeiſee in poſſeſſion by trial at one aſſiſes.

Aſſiſes are now ſeldom made uſe of except for the recovery of offices, being ſupplied by other actions leſs perplexed, and which yield a more expeditious remedy; but as they are ſtill in force, it may be proper to conſider the nature of them a little, under the following heads:

(A) Of the Nature of an Aſſiſe, and the Form of the Proceedings on it.

(B) In what Caſes an Aſſiſe lies.

(C) What Seiſin is ſufficient to maintain an Aſſiſe.

(D) How the Demandant muſt ſet forth his Title.

(A) Of the Nature of an Aſſiſe, and the Form of the Proceedings on it.

ASSISES (*a*) are twofold. Firſt, an aſſiſe of a man's own poſſeſſion, and that was called an aſſiſe of *novel diſſeiſin*, which was a commiſſion to the ſheriff to reſerve the tenements with the chattels found in them, and put them in peace till a jury had tried the cauſe, who were by ſuch writ authorized to be returned at the aſſizes by the ſheriff; and by the original practice in this aſſiſe, the ſheriff uſed to take the tenements, together with the chattels found in them, into his own poſſeſſion, till the right was tried; but becauſe this proved inconvenient, for that the ſheriff could not keep ſuch poſſeſſion, and turn it to the beſt advantage, eſpecially where ſuch an aſſiſe was long in dependence, therefore the practice altered, and the tenant was continued in poſſeſſion until judgment; and by ſuch writ the jury were empowered to inquire of damages, becauſe the ſheriff was to reſeize the chattels as well as the frank-tenement; and therefore ſuch damages being aſſeſſed by the jury were awarded to the tenant that recovered, as well as the frank-tenement.

F. N. B. 177. Fleta, lib. 4. c. 4. ſ. 222.

(*a*) For aſſiſes *in confinio comitatus*, *vide* Co. Litt. 153, 154. 7 Co. 3. b. 7 R. 2. c. 10. Kelw. 98. Booth, 211.

The ſecond ſort of aſſiſe is an aſſiſe of *mortdanceſtor*, which was, where the father, mother, brother, ſiſter, uncle, aunt, nephew, or niece died ſeiſed of the lands, and a ſtranger abated; then the heir had ſuch writ, and to ſuch writ was required an immediate deſcent, as from father to ſon, or from brother to ſiſter originally; and it ſeems by the ſtatute of *Glouceſter*, *cap.* 6. it extended to uncles and aunts, nephews and nieces, becauſe abatements had frequently happened upon the death of ſuch relations; but the more remote relations were left to purſue their writ of entry as at common law.

F. N. B. 195. 2 Inſt. 308. Booth, 206.

The firſt proceſs in this action is an original writ iſſuing out of Chancery, directed to the ſheriff, commanding him to return a jury (who are called the recognitors of the aſſiſe).

For the form of the writ, *vide* Reg. 197. Plow. 73. 415. F. N. B. 178. Booth, 210. 267. The demandant is to find ſurety to proſecute, and this he may do before the ſheriff, or in court, if the ſheriff returns that he hath not found pledges. Booth, 267.

Aſſiſes are to be taken in the *King's Bench*, or *Common Pleas* for the county in which they ſit, and for all others are to be arraigned in their (*b*) proper counties, but are to be adjourned for difficulty into the *Common Pleas*, as the court which has juriſdiction in all civil actions.

F. N. B. 117. Booth, 265.

(*b*) By *Magna Charta*, c. 12. aſſiſes are appointed to be taken *in proprio comitatu*; thereupon an adjournment *in banco propter difficultatem*, &c. is given; but it was held no adjournment could be made by virtue of this act, unleſs the jurors gave a verdict; whereupon by Weſtm. 2. c. 3. an adjournment is given in caſe of a foreign voucher in an aſſiſe of *Mortdanceſtor*, within the equity of which are all foreign pleas, demurrers, and other pleas and proceedings, either before or after verdict in an aſſiſe. 2 Inſt. 26. 423. *Vide* Roll. Abr. 131.

An aſſiſe is (*c*) *feſtinum remedium*, and to be (*d*) arraigned on the day the writ is returnable, on which day the demandant is to (*e*) count,

Style Reg. 88.

(*c*) It is

called *Feſtinum remedium.* 1. Becauſe the count, and the (*f*) tenant is to appear and plead (*g*) inſtantly, unleſs the Court thinks proper to allow him an imparlance, which it is ſaid cannot be without ſhewing good cauſe.

tenant ſhall not be aſſoined. 2. Shall not caſt a protection. 3. Shall not pray in aid of the king. 4. Shall not vouch any ſtranger, except he be preſent, and will enter preſently into warranty; ſo of receit. 5. The parol ſhall not demur for the nonage of the plaintiff or defendant. 8 Co. 50. Booth, 262. For the manner of arraigning an aſſiſe, *vide* 3 Mod. 273. Keb. 3. Comb. 173. (*d*) But where neither the recognitors nor plaintiff appeared on the firſt day, the Court adjourned the aſſiſe to the next. Salk. 82. pl. 1. (*e*) Otherwiſe he will be nonſuit. Salk. 82. pl. 1. (*f*) If there be ſeveral defendants, and any one of them do not appear the firſt day, the aſſiſe ſhall be taken by default againſt them. Salk. 83. (*g*) That the defendant may pray *oyer* of the writ and count, *vide* 2 Bulſt. 160. and ſhall have an imparlance to a ſhort day. Style's Reg. 88. But it muſt be on ſhewing good cauſe. Salk. 83. pl. 2.

Booth, 214. When the plaintiff counts, the defendant may plead in (*h*) abatement, and (*i*) over in bar, or may take the general iſſue *nul tort nul diſſeiſin.*

(*h*) And ſuch plea is not peremptory, though found againſt him, *vide* Finch of Law, 385. Dyer, 310. Jones, 413. Cro. Car. 520. (*i*) Muſt plead over in bar at the ſame time that he pleads in abatement. Salk. 83. pl. 2.

Booth, 313, 314. If the tenant pleads a plea, which ſhews that the aſſiſe ſhould not be taken, and ſuch plea is triable by a jury, the recognitors of the aſſiſe may try it, and then the aſſiſe is ſaid *tranſire in jurata*', and the aſſiſe and record adjourned into the *Common Pleas.*

Booth, 214. If a flat bar be pleaded to the aſſiſe, and iſſue is joined thereupon, the jury never inquire of the *ſeiſin* or *diſſeiſin*, but of the matter pleaded in bar, and of damages if the plea be found againſt the defendant.

Vide Booth, 214, 215. And for colourable But if the defendant pleads a colourable plea, then they are to inquire of the *ſeiſin* and *diſſeiſin*, which is called the taking the aſſiſe at large.

pleas, *vide* head of *Pleas and Pleadings*; and where the aſſiſe may or may not be taken at large, 10 Co. 90. Finch of *Law*, 416. Roll. Abr. 271 to 275.

Roll. Abr. 275. Alſo if an infant pleads a flat bar, and the bar is found againſt him, yet the aſſiſe ſhall be taken at large, becauſe the law not allowing the parol to demur in this action, which was *feſtinum remedium*, the *ſeiſin* and *diſſeiſin* was inquired of, that the infant's whole title might appear before the court.

Vide Booth, 215. 287. 4 Co. 4. b. 2 Inſt. 26. By *Weſtm.* 2. *cap.* 25. a certificate of aſſiſe is given, which is a writ for the party grieved, by a verdict or judgment given againſt him in an aſſiſe, when he had ſomething to plead, as a record or releaſe, which could not have been pleaded by his baily; or when the aſſiſe was taken againſt himſelf by default, to have the deed tried, and the record brought in before the juſtices, and the former jury ſummoned to appear before them at a certain day and place, for a further examination and trial of the matter.

(B) In what Caſes an Aſſiſe lies.

AN aſſiſe lies for any thing a *præcipe quod reddat* may be brought for at common law, therefore it lies for an (*a*) office. 2 Inſt. 412. 8 Co. 47. b.

(*a*) An aſſiſe lies for the office of regiſtrar of the admiralty; for though their proceedings are according to the civil law, yet the right of their offices is determinable at the common law. 8 Co. 47. 2 Inſt. 412. S. P. Of the maſterſhip of an hoſpital being a lay fee. 11 Co. 99. b. Of the office of ſilazer. Dyer, 114. b. And if a man be diſſeiſed of parcel of the profits of an office, he may have an aſſiſe of that parcel only. 8 Co. 49. b. 2 Inſt. 412. S. P. But for an office of charge and no profit, an aſſiſe does not lie. 8 Co. 47. b. 49. b. 2 Inſt. 412. S. P. (See however *poſt* D. 162.) An aſſiſe lies for an office for life as well as in fee. 8 Co. 47. a.

It lies for one ſeiſed of lands, tenements, (*b*) rents in fee-ſimple, tail, or for life, and for tenant by (*c*) *elegit*, ſtatute-merchant, ſtaple, or tenant by recognizance in nature of a ſtatute-ſtaple.

(*b*) Does not lie of an annuity. 1 H. 3. 2. Booth, 263.

8 Co. 50. (*c*) By the ſtatute of 13 E. 1. c. 18. which ſee explained, 2 Inſt. 396.

It lies of tithes, penſions, and other eccleſiaſtical duties in temporal hands; but of a rent iſſuing out of tithes barely, no aſſiſe lies. *Vide* Co. Litt. 159. 32 H. 8. c. 7. Vaugh. 204. *Vide* Danv. 578, 579.

There were at firſt but two forms of writs of aſſiſe of *novel diſſeiſin*, either an aſſiſe (*d*) *de libero tenemento*, or (*e*) *de communia paſturæ*. 2 Inſt. 411.

(*d*) So at this day for a *profit apprender* the writ muſt be general *de libero tenemento*, and the plaint ſpecial. 8 Co. 47. Co. Litt. 159. Becauſe no ſpecial writ is given by the ſtatute. Dyer, 83. (*e*) In ancient time they held themſelves ſtrictly to the forms in the regiſter; and therefore becauſe there there was no writ of common of turbary, &c. it was held no aſſiſe lay thereof. 8 Co. 48. a. b.

The aſſiſe *de libero tenemento* did lie of houſes, land, rent, or other things which lay in *render*, but for profits *apprender*, which conſiſted *in capiendo, colligendo, habendo, recipiendo & exercendo*, (*f*) no aſſiſe lay, but a *quod permittat*, in which there was great delay, and they who had but an eſtate for life could not maintain that writ. 2 Inſt. 411.

(*f*) But now by the ſtatute of Weſtm. 2. c. 25. a ſpeedy remedy is given in theſe caſes *de proficuis, &c. in certo loco capiend' &c.* An aſſiſe does not lie of a way over certain land, but a *quod permittat*, for it is but an eaſement; but otherwiſe if it were appurtenant to land. 8 Co. 46. 34 Aſſ. 13. For an aſſiſe *a ſovent diſtreſs*, *vide* Keilw. 20. 2 Inſt. 413, 414. F. N. B. 178.

(C) What Seiſin is ſufficient to maintain an Aſſiſe.

AS the writ of aſſiſe reſtores the party to the actual ſeiſin of his freehold, for ſo are the words of the writ, *facias tenementum illud ſeiſiri, &c.* conſequently the party that brings this writ muſt found it upon an actual ſeiſin, which he has been diveſted of, for otherwiſe this remedy is not commenſurate to his caſe. *Vide* 2 Roll. Abr. 463.

Therefore if there be lord and tenant by rent-ſervice, and the lord grants the ſervices to another, and the tenant attorns by a penny, Lit. ſect. 565. Co. Lit. 315.

4 Co. 9. 10 Co. 127. penny, this being given by way of attornment, is not ſufficient ſeiſin to ground an aſſiſe on; *ſecus* if the penny had been given by way of ſeiſin of the rent.

Vide Roll. Abr. 270, 271. Kelw. 110. If the leſſor dies, and after the leſſee for (*a*) years is ouſted, the heir of the leſſor ſhall have an aſſiſe of *novel diſſeiſin*, and not of *mortdanceſtor*, for the leſſee's continuing in poſſeſſion after the death of the leſſor, was in right of the heir.

(*a*) If tenant at will be ouſted, the leſſor may have an aſſiſe. 21 E. 3. 34.

Kelw. 109. If a man leaſes for years, the remainder over in fee, and after the tenant for years is ouſted of his term, he in the remainder may have an aſſiſe, becauſe the freehold was in him at the time of the diſſeiſin.

Roll. Abr. 270. The taking of 3*d.* of *A.* for a *capias* againſt *B.* is a ſufficient ſeiſin of the office of filazer *de banco*.

2 Lev. 108. Cragg and Norfolk. If one be committed by the Houſe of Commons to *A.* who before and long after was in poſſeſſion of the office of ſerjeant at arms to the houſe, and the priſoner compounds with *B.* for the fees, and gives him twenty ſhillings, this is a good ſeiſin of the office by *B.* for he cannot be diſſeiſed thereof but at his election; adjudged, and held likewiſe, that proving that *B.* being in the lobby of the Houſe of Commons, took hold of the door of the houſe, and laid his hands upon the mace, then being in the hands of *A.* to take it, but hindered by *A.*, was good evidence both of a ſeiſin and diſſeiſin.

Lev. 108. (*b*) If a tenant refuſes to do ſuit of court, and the lord recovers damages againſt him, this is a ſufficient ſeiſin of the ſuit, becauſe the damages are given as an equivalent, and in ſatisfaction for the ſuit. 4 Co. 9. b. So if a return irrepleviſable be awarded, that is a good ſeiſin of the rent for which the diſtreſs was taken; becauſe ſuch return is an abſolute condemnation of the pledges; and being given as an equivalent for the rent, ſhall be looked upon as the rent itſelf. 4 Co. 9. b. 2 Roll. Abr. 464. The ſerjeant of the mace to the Houſe of Commons in an action upon the caſe for a diſturbance, recovered damages; and whether this was a ſufficient ſeiſin, the damages being recovered in (*b*) ſatisfaction of the fees, and he then being out of poſſeſſion of his office, was doubted; ſome of the judges inclining one way, and ſome the other; and it was intended to have been found ſpecially; but the plaintiff being unwilling to ſtand to it, was non-ſuit.

(D) How the Demandant muſt ſet forth his Title.

Dyer, 84. (*c*) The plaint in an aſſiſe is as a count in other real actions, and muſt ſet forth ſeiſin and diſſeiſin within 30 years, purſuant to the ſtatute 32 H. 8. c. 2. Booth, 212. (*d*) Stile, 30. Like point *per Roll.* Ch. Juſt. (*e*) So though by default, and the damages releaſed; for by intendment they had the view before the aſſiſes. 2 Bulſt. 159. Godb. 247. Cro. Jac. 334. (*f*) But a plaint *de uno tenemento* is not good. Stile, 77. (It is uncertain, being a genus.) But in an aſſiſe the plaint may be *de annuo redditu unius robæ vel* 20 s. Dyer, 84. IT is a common learning, that in an aſſiſe the (*c*) plaint (*d*) need not be ſo certain as in other writs, becauſe the judgment is to (*e*) recover *per viſum recognitorum;* and if the plaint be but ſo (*f*) certain that the recognitors may put the demandant in poſſeſſion, it is ſufficient.

Jenk. 33. By all the judges of In an aſſiſe of rent in *D.*, the tenant cannot plead that in the ſaid county there are (*g*) two *D.'s*, without any addition to diſtinguiſh

diſtinguiſh them, becauſe the plaintiff ſhall recover *per viſum juratorum.* England. (g) So if two *D.'s*, and none without addition, *per* Dyer, 84. *b.*

In an aſſiſe for an office newly erected and conſtituted, the demandant in his plea muſt ſhew what fee or profit is granted for the exerciſe thereof, for this office cannot have a fee or profit appurtenant to it, as an ancient office may; and for an office without fee or profit no aſſiſe lies. 8 Co. 49. Webb's caſe.

But in an aſſiſe for an ancient office, the demandant in his plaint need not ſhew what fee or profit is belonging to it; for it ſhall be intended there is ſome fee or profit. 8 Co. 49.

In an aſſiſe for a rent-charge or ſeck, the demandant (*h*) muſt make a title in his plaint, otherwiſe in an aſſiſe of land, for there poſſeſſion without any other title is (*i*) ſufficient. Jenk. 42. (*h*) Dyer, 85. b. S. P. 6 Co. 56.

S.P. 1 Sid. 203. (*i*) Where in a writ of entry in nature of an aſſiſe, the demandant counted of a gift in tail to himſelf, and of his ſeiſin and diſſeiſin; but was compelled to declare upon a ſeiſin and diſſeiſin only, becauſe that was the ancient form. *Vide* 2 Ander. 100.

In an aſſiſe for a portion of tithes, the demandant in his plaint muſt make a title, for the ſeiſin only is not ſufficient, no more than in the caſe of a rent, or other profit in the ſoil or fee of another which commences againſt common right; for in all theſe caſes of neceſſity the commencement thereof muſt be alleged by him who will make title thereto, whether he be privy or a ſtranger; for it is againſt reaſon to charge the inheritance or freehold of another, without ſhewing ſome ſubſtantial foundation thereof. Dyer, 85. adjudged.

In aſſiſe for an office, the demandant in his plaint muſt ſet forth a title. 3 Mod. 373. Savier and Lenthal; by

which book it appears, that the demandant not being ready to ſet forth a title, the aſſiſe was adjourned till the next day, when he appeared and ſet forth a title, and proceſs was prayed againſt the defendants; but by Salk. 82. S. C. the demandant was nonſuited the ſecond day for not counting; and the Court told him he might bring a new aſſiſe. Comb. 173. S. C. and the plaintiff nonſuited. *Vide* Dyer, 114. pl. 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b. See 10 Mod. 125.

Aſſumpſit.

AN *aſſumpſit* is an action the law gives a party injured, by the breach or non-performance of a contract legally entered into: it is founded on a contract, either expreſs, or implied by law, and gives the party damages in proportion to the loſs he has ſuſtained by the violation of the contract. 8 Co. 92. Moor, 667. [The riſe and progreſs of this ſpecies of action is very accurately traced in the third and laſt volumes of Mr. Reeves' Hiſt. of the Law.]

But here it muſt be obſerved, that the law diſtinguiſhes between a general *indebitatus aſſumpſit* and a ſpecial *aſſumpſit*; for though they come under the denomination of actions on the caſe, and the party is to be recompenſed in damages alike in both, yet the firſt ſeems to be of a ſuperior nature, and will lie in no caſe but where (*a*) debt will lie; but for a particular undertaking, or collateral promiſe to diſcharge the debt or duty of another, a ſpecial *aſſumpſit* muſt be brought.

Salk. 23. 6 Mod. 128.

[(*a*) There is no foundation for this propoſition. It is much more plauſible to ſay, "That where debt lies an action on the caſe ought *not* to be brought." And that was the point relied upon in Slade's caſe, 4 Co. 92. but the rule then ſettled and followed ever ſince is, "that an action of *aſſumpſit* will lie in many caſes where debt lies, and in many where it does *not* lie. *Per* Ld. Mansfield, 2 Burr. 1008.]

Under this Head we will conſider,

(A) In what Caſes an Aſſumpſit is the proper Action.

(B) What Words create ſufficient Certainty in a Promiſe.

(C) What is a ſufficient Conſidaration to create an Aſſumpſit.

(D) Where the Conſideration ſhall be ſaid to be executed, or continuing.

(E) Where the Promiſe ſhall be void, the Conſideration being againſt Law.

(F) Where the Conſideration and Promiſe ſhall be ſaid to be ſufficiently ſet forth and averred.

(G) What may be pleaded as a good Diſcharge and Performance of the Promiſe.

(A) In what Caſes an Aſſumpſit is the proper Action.

Cro. Jac. 69. Yelv. 70. S. P. Roll. Abr. 7. S. P. Roll. Rep. 396. Moor, 854. 3 Bl. Com. 162.

IF *A.* and *B.* having dealings with each other, make up their accounts, and *B.* is found in arrear, and promiſes to pay the balance, an *aſſumpſit* lies againſt him, and *A.* need not bring a writ of account.

Salk. 9. pl. 1.

So if *A.* gives (*b*) money, or delivers goods to *B.* to merchandiſe therewith, and *B.* promiſes to render an account, *aſſumpſit* lies on this expreſs promiſe, as well as account.

(*b*) Where it was objected that a ſum of money given to merchandiſe with, could not be demanded of the party as a duty till he had neglected or refuſed to apply it according to the truſt, held, that it was aided after verdict. Salk.

Salk. 9. pl. 2. If a man receives a ſum of money to lay out to a particular uſe, and lays out part of it accordingly, an action of account only lies; but if no part of it is laid out, an *aſſumpſit* lies. 2 Show. 301. pl. 304. Ruled on evidence by Juſtice *Jones*, in the abſence of the chief juſtice. *Vide* head of *Account*.

So if a tenant, being in arrear for rent, ſettles an account of the arrears with his landlord, and promiſes to pay him the ſum in which he is found in arrear, an *aſſumpſit* lies on this promiſe. Roll. Abr. 9. Bro. *Account*, 81. Raym. 211. 2 Keb. 813. *Vide* Style, 131. 283. Cro. Jac. 602. A diverſity where the account was for rent alone, and where for that *inter alia*, and *vide* Allen, 73. Style, 473. 2 Lev. 110. Vent. 268. where it is ſaid, that the account alters the nature of the debt.

But if the obligor in a bond, without any new conſideration, as forbearance, *&c.* promiſes to pay the money, an *aſſumpſit* will not lie, but the obligee muſt ſtill purſue his remedy by action of debt (*a*). Roll. Abr. 8. Hutt. 34. Cro. Eliz. 240. ſeems *contra*.

[(*a*) Wherever a man reſorts to a higher ſecurity, the law will not raiſe an *aſſumpſit*. Touſſaint v. Martinnant, 2 Term Rep. 100. So a promiſe by a defendant to pay a judgment debt obtained againſt him, in conſideration that the plaintiff would ſtay execution thereon, is no ground for an *aſſumpſit*, for it is turning a judgment debt into a debt upon ſimple contract. But the promiſe would be ſufficient if made by a third perſon. Anon. Cowp. 129. *Aſſumpſit* may be maintained on an *expreſs* promiſe to pay the balance found due on the ſettlement of accounts upon the diſſolution of a partnerſhip, notwithſtanding a covenant in the articles of co-partnerſhip to account and pay the balance, and that notwithſtanding moſt of the items in ſuch ſettlement relate to partnerſhip tranſactions. Foſter v. Allanſon, 2 Term Rep. 479. Moravia v. Levy, *Ibid.* 483, notes. And the mere taking of a pledge by the lender of money for his ſecurity, will not preclude him from reſorting to an *aſſumpſit*; for, to diſcharge the perſon of the borrower, there muſt be a ſpecial agreement to ſtand to the pledge only. South-Sea Company v. Duncomb, 2 Str. 919. Where the obligor of a *reſpondentia* bond by indorſement thereon agreed to pay it *to any aſſignee*, it was determined that the aſſignee might maintain a general *aſſumpſit* for it. Fenner v. Meares, 2 Bl. Rep. 1269.]

So if a man leaſes for years, reſerving rent, an *aſſumpſit* will not lie, becauſe it favours of the realty. Roll. Abr. 7. So though the leaſe be determined. Roll. Abr. 7. *Q.* If there be an expreſs promiſe to pay the rent? and *vide* Cro. Car. 343. Style, 463. Sid. 279. 2 Keb. 8. Lev. 179. and 3 Lev. 150. where it is reſolved, that on an expreſs promiſe (where there is no deed executed under ſeal) *aſſumpſit* will lie, but not on a promiſe in law. *Vide* Roll. Abr. 8., where it is held clearly, that an *aſſumpſit* will lie on a promiſe to pay a ſum in groſs. [Where the demiſe is not by deed, the landlord is empowered by * ſtat. 11 Geo. 2. c. 19. § 14. to bring the action for the uſe and occupation; and if in evidence on the trial, any parol demiſe, or any agreement (not being by deed) whereon a certain rent was reſerved, ſhall appear, the plaintiff ſhall not, therefore, be nonſuited, but may make uſe thereof as an evidence of the *quantum* of damages to be recovered. Before the above ſtatute was paſſed, it was holden that this action was maintainable for uſe and occupation, where there was no ſtipulation for any expreſs rent. Maſon v. Welland, Skin. 238. 242. S. C. in 3 Mod. 73. by the name of Maſon v. Beldham. It ſeems, from the argument, though not directly ſtated by the reporters, that there was a demiſe by deed in this caſe, but no particular rent reſerved.]

If *A.* is poſſeſſed of a term for years in certain lands, under a certain rent, the inheritance whereof is in the wife of *B.*, and *C.*, in conſideration that *B.* will procure *A.* to aſſign this leaſe to him, aſſumes and promiſes that he will pay the rent to *B.* during the remainder of the ſaid term; if *B.* accordingly does procure *A.* to aſſign, and the rent is afterwards arrear, *B.* upon this promiſe may have an action againſt *C.* in his own right, notwithſtanding the rent grew due in the right of his wife. Leon. 43.

* This ſtatute ſeems to have eſcaped the recollection of the late Vinerian profeſſor, in his comment on this ſpecies of action. See 3 Woodd. 132, 3.

Cro. Jac. 598. If in an action on the caſe the plaintiff declares *quod locaſſet* to the defendant a certain warehouſe, the defendant promiſed to pay 8*s.* for every week he occupied the ſame, and avers that he occupied the ſame for 27 weeks, and had not paid, *&c.* the action lies, for this is not a rent, but a mere promiſe in conſideration of the occupation.

3 Lev. 261. Shuttleworth and Garret, 3 Mod. 239. S. C. 1 Show. 35. S. C. Carth. 90. S. C. If a lord of a manor aſſeſſes a fine upon a copyholder for his admittance, and dies, his executor upon the *aſſumpſit* in law may bring an action for it, becauſe it depends not upon the inheritance, but is *quaſi* a fruit fallen; adjudged by three judges againſt *Holt*, Ch. Juſt. who ſaid, that it being a duty ariſing out of an inheritance, cuſtom and tenure, it was not fit to be thruſt into a declaration in an *aſſumpſit*.

[Evelyn v. Chicheſter, 3 Burr. 1717. Whitfield v. Hunt, B. R. Hil. 24 G. 3. Dougl. 727, in not.]

2 Lev. 174. Mayor of London and Gory. Carth. 92. S. C. cited An *indebitatus aſſumpſit* (*a*) lies for money due by cuſtom for ſcavage: adjudged upon a ſpecial verdict, by which it was found, that the ſum demanded was due by cuſtom, but that there was no expreſs promiſe to pay it.

as good law, though the duty might be ſaid to be the inheritance of the lord mayor: but *per* Holt, it ariſes out of things in the perſonalty. Vent. 398. S. C. adjudged; though objected, the cuſtoms of the city are confirmed by parliament, and ſo this is a duty by record. An aſſignee of commiſſioners of bankrupts may bring an *aſſumpſit*, and yet the debt is aſſigned by virtue of an act of parliament. Vent. 298. *per Cur'*. 3 Keb. 677. [(*a*) That it will lie for tolls, ſee Mayor of Exeter v. Trimlet, 2 Wilſ. 95. Seward v. Baker, 1 Term Rep. 616. adjudged in the laſt caſe on a ſpecial demurrer.]

Rann v. Green, Cowp. 474. Dougl. 402. [An action of *aſſumpſit* is maintainable, where the demand ariſes by virtue of a publick or private act of parliament. *arguend.* Bell v. Burrows, C. B. E. 5 G. 3. Bull. *Ni. Pri.* 129.

Brown v. Bullen, Dougl. 407. An *indebitatus aſſumpſit* lies againſt the aſſignees of a bankrupt for a creditor's ſhare under an order of the commiſſioners for a dividend.

Crawford v. Whittal, Dougl. 4. in not. An *indebitatus aſſumpſit* may alſo be maintained on the judgment of a foreign court, without ſtating the original cauſe of action.

Debray v. Adair, Sittings after *Eaſter*, 4 G. 3. cited in 4 Term Rep. 343. *Debray*, an officer, drew a bill on the agent of a regiment payable out of the firſt money which ſhould become due to him, on account of arrears or non-effective money. The agent did not accept the bill, but marked it in his book, and promiſed to pay when effects came to hand. *Debray* dying before the bill was paid, his adminiſtratrix was allowed to maintain an action for money had and received againſt the agent, Lord *Mansfield* conſidering it as an aſſignment for valuable conſideration with notice to the defendant.

Marriot v. Lifter, 2 Wilſ. 141. Butcher v. Andrews, 1 Salk. 23. An *indebitatus aſſumpſit* will not lie for money *lent* to a third perſon at the requeſt of the defendant.]

2 Leon. 179. 2 Vent. 175. S. C. cited. If a man by grant of the king hath fines *pro licentiâ concordandi*, and one will not pay a fine, he may have an *indebitatus aſſumpſit* for it.

Neither

Neither debt nor a general *indebitatus aſſumpſit* will lie againſt the acceptor of a bill of exchange, for his engaging is but a collateral promiſe, on which a ſpecial action on the caſe lies, founded on the cuſtom of merchants: but debt on a general *indebitatus* may be brought againſt the drawer (*a*), as for money received for the uſe of the party.

Hard. 485, 486. and *per* Hale, if debt lay, an *indebitatus* would lie. Browne v. London, 1 Mod. 285.

1 Ventr. 152. S. C. 1 Freem. 14. S. C. 1 Lev. 298. S. C. 2 Keb. 695. 713. 758. 822. S. C. Hard's caſe, Salk. 23. S. P. agreed. 2 Lutw. 1594. S. P. agreed. [(*a*) Hodges v. Steward, Salk. 125. 12 Mod. 347. S. C. Skin. 346. Morg. Prec. 548. a declaration by adminiſtratrix of payee againſt drawer of a promiſſory note. So Ld. Mansfield held, that it may be brought by an indorſee againſt the perſon who indorſed it to him. Kiſſebower v. Tims, B. R. E. 22 G. 3. Bailey, 47.]

Alſo if *A.* delivers money to *B.* to pay over to *C.*, and gives *C.* a bill of exchange drawn upon *B.*, and *B.* accepts it, *C.* may have an *indebitatus aſſumpſit* againſt *B.* (*b*), as having received money to his uſe, but muſt not declare only on the bill of exchange accepted.

Vent. 153. (*b*) So if goods are received. Roll. Abr. 32. *Vide* title *Merchant and Merchandize.*

[*A.* being indebted to *B.* for brocage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the money due from *A.* to *B.* (the order not expreſſing how much, the *quantum* being then unaſcertained); whereupon *C.* lends *B.* a further ſum: the order was afterwards accepted by *A.* It was holden by Lord *Loughborough*, Ch. J. *Gould* and *Heath*, J., *Wilſon*, J. *diſſentiente*, that *C.* might maintain an action for money *had and received* to his uſe againſt *A.*: but the whole Court concurred in thinking that an action could be maintained on the *inſimul computaſſet*.

Iſrael v. Douglas, 1 H. Bl. Rep. 239.

An action for money had and received will not lie for ſtock.

Nightingal and others v. Deviſme, 5 Burr. 2589. 2 Bl. Rep. 684. S. C.

Where a man has received money for the tranſfer of ſtock to be made at a certain day, and fails therein, an action for money had and received will lie againſt him for the difference-money or damages ſuſtained by not transferring the ſtock at the limited time; but in ſuch action more than the conſideration-money cannot be recovered.

Dutch v. Warren, 1 Str. 406. 2 Burr. 1011.

Where money has been paid on a contract to transfer one ſpecies of ſtock, and the party contracting to do ſo transfers another ſpecies, an action for money had and received will lie to recover back the whole conſideration-money.

Anon. 1 Str. 407.

An *aſſumpſit* is a proper form of action where there has been an expreſs warranty, but a warranty cannot be tried on a count for money had and received only.]

Stuart v. Wilkins, Dougl. 18. Power v. Wells, Cowp. 818.

The plaintiff declared upon an *indebitatus aſſumpſit* for 20*l. quas ei ſolviſſe debuiſſet pro denar' per ipſum ad* (*c*) *jocum vocat' chartas pictas de defendente per querent' lucrat' & acquiſit';* and whether ſuch a general *indebitatus* lay for money won at play, *dubitatur*, upon a writ of error *in Cam. Scacc.* upon a judgment by default; and though a caſe was cited wherein *in B. R.* 32 *Car.* 2. it had been

3 Lev. 118. Eggleton and Lewin. (*c*) Where an *indebitatus* was brought for 20*l.* won at

a game called Hazard, 2 Vent. 175. it was adjudged it lay, and that it might as well as if *pro opere* and *labore*. *Vide* Salk. 23. and title *Gaming*.

been adjudged that ſuch action lay, and the greater part of the juſtices now inclined to be of that opinion; yet ſome of them ſaid, they would give no more encouragement to ſuch actions than needs muſt.

2 Lev. 252. Barber-Surgeons of London and Pelſon, adjudged upon demurrer.

An *indebitatus aſſumpſit* lies for 20*l.* forfeited by the ordinances and conſtitutions of a company, for not ſerving in the office of ſteward of the company, according to a by-law by them made.

Rex v. Bp. of Cheſter, 1 Term Rep. 403. (*a*) But *qu.* If the donative have been twice augmented, whether the licence be not neceſſary? *Ib.* (*b*) Powell v. Millbank, 1 Term Rep. 399. n.

[It lies by a perſonal repreſentative for the arrears due on a compoſition for ſmall tithes, and for the profits of a donative (*a*) before, and of a perpetual curacy (*b*) after the biſhop's licence.]

2 Mod. 260. adjudged upon a ſpecial verdict between Arris and Stukely. 2 Jones, 126, 127. 2 Lev. 245. S. P. between Howard and Wood, where the defendant, under pretence of title, received the fees belonging to the plaintiff, as ſteward of a court baron.

If the king grants the office of comptroller of the cuſtoms to *A.* and *B. durante beneplacito*, and *A.* dies, and afterwards the king grants the ſaid office to *C.*, and yet *B.* under pretence of ſurvivorſhip exerciſes the ſaid office, and receives the profit thereof, *C.* may have an *indebitatus aſſumpſit* for ſo much money had and received to his uſe.

2 Mod. 263. and there ſaid *per Cur'*. that wherever an account lies, an *indebitatus* will lie.

So if one receives my rent under pretence of title, I may have an *indebitatus aſſumpſit* againſt him (*c*).

[(*c*) But Q. Whether, when the defendant claims title, an action of *aſſumpſit* for the rents received will lie againſt him? Wilſon, J. in ſuch an action, nonſuited the plaintiff; and was of opinion that the mode of proceeding was either by ejectment; or in caſe that could not be brought, by an action againſt the tenant for the rent wrongfully paid by him to the perſon not entitled to it. Cunningham & Ux. v. Lawrents, Clk. *Worceſter* Spring Aſſizes 1788. An action for money had and received will not lie to recover back money paid for the releaſe of cattle *damage feaſant*, though the diſtreſs were wrongful; for various rights and queſtions may ariſe, which the defendant cannot in ſuch an action be prepared to meet or controvert. Lindon v. Hoſpet, Cowp. 414.]

Salk. 27. pl. 14. Jacob and Allen at Guildhall, *coram* Trevor, Ch. Juſt. [See *contra* Pond v. Underwood, 2 Ld. Raym. 1210. And where money is paid to a known agent, the action to recover it back ought to be againſt the principal, unleſs indeed it has been paid *malâ fide*, or under notice. Lady Windſor's caſe, 4 Burr. 1984. It will not lie againſt a revenue-officer for an over-payment, after he has paid it over. Whitbread v. Brookſbank, Cowp. 69. Greenway v. Hard, 4 Term Rep. 553. In

A. took out adminiſtration to a perſon ſuppoſed to have died inteſtate, and appointed *J. S.* his attorney, who received money, *&c.* and paid it to the adminiſtrator; afterwards a will appearing, the letters of adminiſtration were called in, and the executor brought an *indebitatus aſſumpſit* againſt the attorney; who objected, 1. That he acting only as attorney for him, who in fact was adminiſtrator, the receipt of the money was not his, but the adminiſtrator's: and 2dly, That the action ought to have been a ſpecial *aſſumpſit*, the money being received by ſpecial authority, and that expreſsly to the uſe of another. But the Court held, that the authority being void, it was a receipt of ſo much money for the uſe of the plaintiff on an implied contract, for which an *indebitatus aſſumpſit* well lies.

In the caſe of Campbell v. Hall, which was an action againſt a cuſtomhouſe-officer to recover back ſome duties, the duties were allowed by the attorney-general to remain in the officer's hands for the purpoſe of trying the queſtion with reſpect to the right of impoſing them. Cowp. 204. Where money had been paid to the clerk of a company, who had paid it over to the company, but not entered it in his books, Pratt, C. J. held that an action would not lie againſt him for it; but if he had not paid it over, it would have lain againſt him or the company. Cary v. Webſter, 1 Str. 480. Buller v. Harriſon, Cowp. 565. The depoſit-money paid to an auctioneer, whether paid over by him to his principal or not, may be recovered in an action againſt him, upon objection to the title, or concealment of circumſtances. Borough v. Skinner, 5 Burr. 2639.]

[But an authority given by *a Court having competent juriſdiction* (*a*) is not a *void* authority, though it may be afterwards vacated: therefore an action for money had and received will not lie, to recover back money which has been paid to an executor who has obtained probate of a forged will, notwithſtanding the probate be afterwards declared null, and adminiſtration be granted to the inteſtate's next of kin. But if the ſuppoſed teſtator be *living* at the time of granting the probate, ſuch action will lie, for in that caſe the authority is *void*, the eccleſiaſtical court having *no* juriſdiction.

Allen v. Dundas, 3 Term Rep. 125.

(*a*) Upon this principle money paid upon a judgment, afterwards reverſed for error, cannot be recovered back. Mead v. Death and Pollard, 1 Ld. Raym. 742.

And in all caſes where the authority is merely void, a payment made under it is no diſcharge. As where the defendant, who had a houſe both in *America* and *London*, drew two bills in *America* of the ſame tenor and date on their houſe in *London*, in favour of the plaintiffs; one of them being loſt, came into the hands of a third perſon, who *forged the payees' indorſement*, and received the amount of it from the defendants: afterwards the real payees ſued them on the other bill, and recovered.

Cheap v. Harley, cited in 3 Term Rep. 127.

Where *A.* pays a debt he owes to *B.* to the attorney of a perſon ſuing *A.* in *B.*'s name, but without any authority from *B.*, the attorney is in that caſe anſwerable to *A.* in an action for money had and received, though he has actually paid over the money to his employer; and though he conceived that he was acting under the real authority of *B.*

Robſon v. Eaton, 1 Term Rep. 62.

Where money was ordered by the High Commiſſion Court to be paid by the plaintiff to the defendant, it was allowed to be recovered back, as paid under a *void* authority. So it will if an agent has only given credit for it to his principal, in his books, or on an account between them.]

Newdigate v. Davy, 1 Ld. Raym. 742.

If a feme ſole marries a man, who in truth is married to another woman, and he makes a leaſe of her lands and receives the rents, ſhe may bring an *indebitatus aſſumpſit* againſt him for ſo much money received to her uſe: adjudged after verdict, though objected, that he having no right to receive, the tenant remained ſtill liable, and he had his remedy over againſt the huſband; but the Court held, that he being viſibly a huſband, the tenant was diſcharged, at leaſt that the recovery in this action would diſcharge the tenant, as it would be a ſatisfaction to the true leſſor.

Salk. 28. pl. 18. adjudged Hil. 6 Ann. in B. R. Haſſer and Wallis.

If a ſheriff levies money upon a *fieri facias*, the plaintiff may have an *indebitatus aſſumpſit* againſt him for ſo much money received to his uſe.

Comb. 430. *per* Holt Ch. Juſtice. Salk. 12. S. C.

Longchamp v. Kenny, Dougl. 137. Menetone v. Athawes, 3 Burr. 1592. Comb. 341. Dewberry and Chapman.

[*Aſſumpſit* for money had and received lies for the value of a maſquerade ticket, or ſuch like ticket.

A ſhipwright who had repaired a ſhip, which by accident was burnt while in defendant's dock, was allowed to recover in this action the amount of the repairs.]

If *A.* takes an apprentice, and receives 30*l.* with him, for which he is to teach him his trade, and make him free of the city of *London*, and being no freeman himſelf, the boy is bound likewiſe to a freeman; admitting that by the cuſtom of *London* the laſt binding will not make him free without actual ſervice, yet an *indebitatus aſſumpſit* will not lie, nor has the party any remedy, unleſs for the cheat, or on a ſpecial action on the caſe for not making him a freeman.

Salk. 22. pl. 2. Ruled by Treby Ch. Juſtice, at Guildhall, between Tomkins and Barnet. Skin. 411. pl. 7. S. C.

If three are bound in an uſurious obligation, and one of them pays part of the money, and afterwards the obligee brings debt againſt one of the obligors, who avoids the bond for uſury, yet the obligor who paid the money cannot (*a*) maintain an *indebitatus aſſumpſit* for it, for he is *particeps criminis*, and having parted with his money freely, he comes within the rule *volenti non fit injuria*.

6 Mod. 161. S. P. Comb. 447. S. P. [(*a*) It is difficult to diſcover what the action in this caſe was brought for: if it was merely to recover back what had been paid in ſatisfaction of principal and legal intereſt upon the uſurious contract, the determination may be ſupported; for ſo far as that went, the debtor was obliged, in natural juſtice, to pay; and therefore could not recover it back. But for all that had been paid beyond that, clearly an action would lie. Dougl. 696. Cowp. 200. And ſee Aſtley v. Reynolds, 2 Str. 915. *contr.* In caſes of this kind, the true diſtinction is this: if the act is in itſelf immoral, or a violation of the general laws of publick policy, there the party paying ſhall not have this action; for where both parties are equally criminal againſt ſuch general laws, the rule is, *potior eſt conditio defendentis*. The caſe of the Solicitor, cited in Salk. 22. Skin. 412. Lewis v. Bourdieu, Dougl. 468. Andrèe v. Fletcher, 3 Term Rep. 266. Browning v. Morrice, Cowp. 790. But there are other laws, which are calculated for the protection of the ſubject againſt oppreſſion, extortion, deceit, &c. If ſuch laws are violated, and the defendant takes advantage of the plaintiff's condition or ſituation, there the plaintiff ſhall recover. Smith v. Bromley, Dougl. 696. Cockſhott v. Bennet, 2 Term Rep. 763. Nerot v. Wallace, 3 Term Rep. 17. Jaques v. Golightly, 2 Bl. Rep. 1073. Jaques v. Withy, 1 H. Bl. Rep. 65. Clarke v. Shee and Johnſon, Cowp. 197. But if one of two parties concerned together in an illegal act, (illegal only as being *malum prohibitum*, not as *malum in ſe*,) pay money with the *privity*, and at the *expreſs requeſt* of the other, ſuch money may be recovered back; though in ſuch a caſe the law will raiſe no *implied* promiſe. Petrie v. Hannay, 3 Term Rep. 418. Faikney v. Reynous, 4 Burr. 2069. And where money has been paid for another on a *legal* tranſaction, an action will lie for the recovery of it, though ſuch tranſaction may be complicated with others that are illegal, and furniſh no ground for its ſupport. 3 Term Rep. 418. And with reſpect to the recovering back of money paid on illegal accounts, a diſtinction has obtained as to the ſtate of the tranſaction at the time of bringing the action, whether the contract be then *executed*, or only *executory*: in the former caſe, it cannot be recovered, in the latter it may. Lowry v. Bourdieu, Dougl. 468. Andrèe v. Fletcher, 3 Term Rep. 266.]

Salk. 22. pl. 2. (*b*) *Vide* Comb. 447, where a perſon pays money for fees which were not due.

But if *A.* pays money to *B.* upon a miſtake, as thinking that there was ſo (*b*) much due on account, &c. he may maintain an *aſſumpſit* for it.

Skin. 412. 6 Mod. 161. S. P. 2 Burr. 1010.

So if a man pays money upon a policy of aſſurance, (*c*) ſuppoſing a loſs, when in truth there was not any, he may bring an *indebitatus aſſumpſit* for ſo much money received to his uſe.

S. P. (*c*) And whether he parts with his money by miſtake, or through fraud in the receiver, it is the ſame thing. Skin. 412. Salk. 22. S. P. Whip v. Thomas, 1 G. 1. Bull. *Ni. Pri.* 130. [In this form of action a man may recover back money paid, under a warrant of diſtreſs upon a conviction,

viction, afterwards quaſhed, Feltham v. Terry, cited in Cowp. 565, or in conſequence of the judgment of a court not competent to enter into the merits of the caſe, Moſes v. Macfarlane, 2 Burr. 1005. 1 Bl. Rep. 219. S. C., and wherever the conſideration on which it has been paid happens to fail, Shove v. Webb, 1 Term Rep. 732; but the contract muſt be entirely reſcinded, Towers v. Barrett, 1 Term Rep. 133, for if it be ſtill open, the plaintiff can only recover damages for the breach of it, and therefore muſt ſtate it ſpecially, Weſton v. Downes, Dougl. 23. Power v. Wells, Cowp. 818. And the contract, where it does not determine by the orignal terms of it, but requires ſome act of the plaintiff to put an end to it, muſt be reſcinded within a reaſonable time, elſe he will be entitled only to damages, Compton v. Beſt, cited in 1 Term Rep. 136. Eſpin. 13.]

So if *A.* gives money to *B.* to pay *C.* upon *C.*'s delivering up writings, *&c.* and *C.* will not do it, an *indebitatus* will lie for *A.* againſt *B.* for ſo much money received to his uſe. 6 Mod. 161. *per* Holt, Ch. Juſt. who ſaid, that many ſuch actions have been maintained for earneſts in bargains, *&c.*

If one be named a commiſſioner to examine witneſſes in a cauſe depending in Chancery or Exchequer, who officiates accordingly, he may bring an *aſſumpſit* for his labour and pains; for though he is to be conſidered as an officer of the court, yet he is not compellable to attend againſt his will, nor does the truſt repoſed in him make his taking a reward bribery, for the party is to take care to name ſuch as will ſerve, and it is but reaſonable it ſhould be at the charge of him for whom he officiates. Carth. 208. Hil. 3 W. and M. Stokeld v. Collingſon, Comb. 186. S. C.

The gentlemen uſhers and daily waiters to the king brought an *aſſumpſit* againſt the defendant, in which they declared, that all gentlemen uſhers, daily waiters, *&c.* time out of mind, had uſed to have a fee of 5*l.* of every perſon who voluntarily accepted the honour of knighthood, and that the defendant (on ſuch a day) had voluntarily accepted knighthood, and thereupon became indebted to them in 5*l.*, and in conſideration thereof had promiſed to pay the money, which he had not performed; and upon a demurrer to this declaration, it was adjudged this action would lie for this duty. Carth. 95. Duppa and Gerrard. Show. Rep. 78. S. C. Lies for fees due to the uſher of the black rod. 2 Stra. 747. See 12 Mod. 607.

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *aſſumpſit* for the money is the proper action, for *trover* will not lie for the goods, becauſe the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree upon a price for preſent money, and the buyer takes the goods away without payment, *trover* lies, becauſe the property is not altered, and therefore the taking away the goods without payment of the money, is an injurious taking, for which the action lies; but if a man ſell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, trover lies, becauſe the property is in the buyer. *Vide* title *Trover and Converſion.*

If a man and a woman, being unmarried, mutually promiſe to marry each other, and afterwards the man marries another woman, by which he renders himſelf incapable of performing his contract, an *aſſumpſit* lies, in which the woman ſhall recover damages; for though matrimonial cauſes are regularly cognizable in the ſpiritual courts, yet the contract in the preſent caſe being executory, Carter, 233. Dickenſon and Holecroft. Roll. Abr. 22. S. P. Leon. 147. S. P. Stile, 295.

S. P. Keb. 866. S. P. Sid. 180. S. P. adjudged. 6 Mod. 172. S. P. *Vide* Carth. 467. Salk. 24. pl. 5. Ld. Raym. 386. 12 Mod. 214. 5 Mod. 511.

ecutory, and revoked by the huſband by the ſubſequent marriage, could not be enforced by eccleſiaſtical cenſures, as a contract *in præſenti* may; hence therefore, there being no adequate remedy in the ſpiritual courts, and marriage being an advantage, and the loſs of it a temporal loſs, it is fit that there ſhould be a remedy in the temporal courts, otherwiſe there would be a failure of juſtice.

Where on ſuch a contract the man brought an action againſt the woman; and it was objected that it would not lie, becauſe marriage was no advancement to him as it was to a woman; but this diſtinction was exploded. Such promiſes are good, though the time of marriage be not agreed on; but in ſuch caſe it is neceſſary, to entitle the party to his action, to allege that he offered to marry her, and that ſhe refuſed. Carth. 467. * This action muſt be founded on reciprocal promiſes; and therefore, if the promiſe be on one ſide only, it does not bind, being only *nudum pactum*. Salk. 24. But if a man of full age, and a female of fifteen, promiſe to intermarry, and afterwards he marries another, an action lies againſt him; for though ſuch promiſe may be ſaid to be voidable as to the infant, yet it ſhall be good againſt the perſon of full age, who ſhall be preſumed to have acted with ſufficient caution; otherwiſe this privilege allowed infants of reſcinding and breaking through their contracts, which was intended as an advancement to them, might turn greatly to their prejudice. Trin. 3 Geo. 2. adjudged between Holt and Ward, 2 Stra. 850, 937. Barnard. K. B. 209. Fitzgib. 175. 275. *Vide* head of *Infants*. Theſe contracts are not within the ſtatute of frauds. Cork v. Baker, Str. 34.

* This muſt mean where the defendant remains ſole at the time of commencing the action.

(B) What Words create ſufficient Certainty in a Promiſe.

ALL promiſes and contracts are to receive a favourable interpretation; and ſuch conſtruction is to be made, where any obſcurity appears, as will beſt anſwer the intent of the parties; otherwiſe a perſon, by obſcure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promiſes ſhall be taken moſt ſtrongly againſt the promiſor, and are not to be rejected, if they can by any means be reduced to a certainty: Therefore,

Poph. 148. 2 Roll. Rep. 104. S. C. [See a ſimilar caſe, 1 Roll. Rep. 193. Cro. Ja. 417.]

If *A.*, in conſideration that *B.* will marry his daughter, aſſumes and promiſes to give with her a child's part, and that at the time of his death he will give to her as much as to any of his children, except his eldeſt ſon; this is a good promiſe, for though a (*a*) child's part in itſelf is altogether uncertain, yet being to give as much as to any of his children, the promiſe is certain enough, it being averred what the younger ſon had.

(*a*) But if a citizen of London promiſes a child's portion, this of itſelf is certain enough; for by the cuſtom there it is known how much each child ſhall have. 2 Roll. Rep. 104. *per* Montague, Ch. Juſt.

Roll. Abr. 6. p. 1. (*b*) But by Noy, 11. S. C. adjudged, becauſe the words in the declaration were *aſſeruit* and *publicavit*, and it was not averred or ſhewn to whom.

But if there be a diſcourſe between the father of *A.* and *B.*, in relation to a marriage between the ſaid *A.* and the daughter of *B.*, and *B. tunc & ibidem* affirms and publiſhes to the father of *A. quod daret ei qui maritaret* his ſaid daughter with his conſent 100*l.*, and after *A.* marries the daughter of *B.* with his conſent; yet this affirmance and publication of *B.* ſhall raiſe no promiſe upon which an action upon an *aſſumpſit* may be brought, (*b*) becauſe theſe words do not include any promiſe.

When a promiſe *firmam facere*, *Anglice*, to make good a portion,

portion, amounts to a promiſe to pay. *Vide* 2 Roll. Abr. 738. pl. 2. Cro. Car. 202. Pilchard v. Kingſton.

If a bill of exchange be drawn on a merchant, and he ſets his name to it, this, by the cuſtom of merchants, (*a*) amounts to a promiſe to pay it. Roll. Abr. 6. Cro. Jac. 306. S. C.

(*a*) Where to warrant a debt amounts to a promiſe to pay it, *vide* 2 Roll. Abr. 738.

If a man promiſes another, in conſideration that he will aſſign to him a certain term, to pay him 10*l.*, this is a good *aſſumpſit*, though the time of aſſignment and payment be not appointed; for the 10*l.* ſhall be paid in a convenient time after the aſſignment, which alſo muſt be done in convenient time, and he ſhall not have time during his life. Roll. Abr. 14, 15. Barnard and Simon.

So if *A.* be indebted to *B.* for certain things to him ſold, and *C.* comes to *B.*, and promiſes him that if *A.* do not pay him the money, that then he himſelf will pay it, an action upon the caſe lies for *B.* againſt *C.* upon this promiſe, if *A.* does not pay the money in a convenient time *. Roll. Abr. 15. 27. S.C. * *Qu.* If an action will lie, the conſideration being executed, and the promiſe ſeeming to be within the ſtatute of frauds, 29 Car. 2. c. 3.? See *poſt* D. and *ſupra* tit. *Agreements*. [If *A.* promiſe to pay *B.* ſuch a ſum, if *C.* does not, there *A.* is but a ſecurity for *C.* But if *A.* promiſe that *C.* will pay ſuch a ſum, *A.* is the principal debtor, for the act done is upon his credit, and not upon *C.*'s. *Per* Lee, J. Fitzg. 303.]

If *A.* is indebted to *B.* in 10*l.*, and upon this *C.* promiſes that in conſideration that he will forbear *A.* till ſuch a day, if *A.* does not pay him the ſaid day, he himſelf will pay him the ſaid day; this is a good promiſe, upon which *B.* may have an action againſt *C.*, for though *A.* had the whole day to pay it, and ſo it was impoſſible for *C.* to pay it the ſame day, if he did not pay it, yet the ſubſtance of the promiſe is to pay, and the time limited being impoſſible, is void, and then it ought to be paid on requeſt. Roll. Abr. 15.

If *A.* is indebted to *B.* in 10*l.* by obligation, and *A.* dies, and makes *C.* his executor, and *C.* having aſſets, *&c.* in conſideration *quod daret diem ſolutionis pro uno anno*, promiſes payment; an action on this promiſe will lie againſt him (*b*), for though in proper ſenſe a day cannot be given upon the bond, yet it ſhall be taken according to common parlance, *viz.* deferring the day of payment. Cro. Eliz. 643.

(*b*) The plaintiff declared upon a promiſe to aſſign the ſhop of the defendant, and *transferre negotiationem*, *&c.* All. 67. Stile, 111.

If *A.*, in conſideration that *B.* will marry his daughter, aſſumes and promiſes to give to *B.* twenty *French* pieces; this is a good promiſe, for this, according to our uſual ſpeech, ſhall be intended *French* crowns, which are the common coin of *France*, and here known. Cro. Car. 194. Pointer and Pointer, adjudged.

If the plaintiff declares, that whereas there was a communication between the plaintiff and defendant, concerning the bark of certain wood, and that thereupon it was agreed that the defendant ſhould give to the plaintiff two ſhillings *per* ſeam for all the bark of ſuch wood as the plaintiff ſhould cut, and that thereupon the defendant aſſumed and promiſed to have ready upon a certain day articles purporting the agreement, and an obligation for the performance, Sid. 270. Pleaſe and Palfrey. Keb. 776. S. C.

(a) Hob. 69, 70. Like point adjudged. Brownl. 11. S. P. adjudged.

performance thereof, &c. the declaration is not good, becauſe not ſaid in what ſum the obligation was to be; and a certain ſum cannot be intended, becauſe the number of ſeams are altogether uncertain; but being (a) after verdict upon the general iſſue, it was adjudged for the plaintiff; but *per Cur'*, upon demurrer, or the ſpecial iſſue, it had been naught.

Sid. 270. *per Cur'*. (b) So upon a covenant to enter into a bond that *B.* ſhall enjoy ſuch lands, it ſhall be intended in a ſum to the value of the land. Samon's caſe, 5 Co. 78. a. Cro. Eliz. 432. (c) Of double the value. Cro. Jac. 116. adjudged. Hetl. 89. like point *dubitatur*.——When for payment of money. Lev. 88.

But if there be an (b) agreement to enter into an obligation for performance of a thing of certain value, without mentioning in what ſum, it ſhall be (c) according to the value.

Lev. 33. Keb. 56. S. C.

In an *aſſumpſit*, the plaintiff declared that the defendant in conſideration, &c. ſix months before the return of king *Charles* the Second, aſſumed to pay 20*l.* to the plaintiff, if *Charles Stewart foret Rex Angliæ infra* 12 *menſes tunc prox' ſequent'*; and adjudged a good promiſe, for the words ſhall be taken according to the ſubject matter, *viz.* that the king that was then out of poſſeſſion, ſhould be in poſſeſſion within ſix months.

(C) What is a ſufficient Conſideration to create an Aſſumpſit.

Dyer, 336. b. Hardr. 72. 2 Bl. Com. 443.

CONſideration is defined a cauſe or occaſion meritorious, that requires a mutual recompence in fact or in law.

Doctor and Stud. 191. Kelw. 50. Roll. Abr. 9, 10.

Therefore if a man promiſes ſo much money at a day to come to (d) build a houſe, without conſideration, this is a naked promiſe, and will not oblige.

[So where a carpenter had undertaken to build a houſe, and had not done it, it was holden that an action would not lie. 2 H. 4. 3. b. 11 H. 4. 33. Ld. Raym. 919. & 5 Term Rep. 149. S. C. cited and agreed. It does not indeed appear that this caſe was decided upon the ground of its being a mere *nudum pactum* for want of any conſideration, though Broke in his abridgement of it, tit. *Act. ſur Caſe* 40, has ſtated it to be ſo: the want of a written covenant, and the repugnance which the judges of thoſe times felt to extending an action of treſpaſs to inſtances of mere non-feazance, are the only reaſons for the judgment aſſigned by the report.] (d) But if a carpenter promiſes to repair my houſe before a certain day, and he does not do it, by which my houſe falls, I ſhall have an action upon the caſe. 19 H. 6. 49. Roll. 9. S. C.——So if a carpenter undertakes to build a houſe for me, and does it ill, an action on the caſe lies againſt him. Roll. Abr. 9. Kelw. 78. S. P. So if a perſon undertakes to remove a quantity of brandy from *Brook-market* to *Water-lane*, and, by reaſon of his neglect, one of the caſks breaks, an *aſſumpſit* lies againſt him, though it is not averred that he was a common porter, or that he had any reward. Salk. 26. pl. 12. 2 Ld. Raym. 909. Com. Rep. 133. 3 Salk. 11. *Coggs* and *Barnard*. *Vide* title *Bailment*.

2 Bulſt. 269.

Alſo idle and inſignificant conſiderations are looked upon as none at all; for wherever a perſon promiſes without a benefit ariſing to the promiſor, or loſs to the promiſee, it is looked upon as a void promiſe.

Stile, 305. ſaid. Hard. 73. S. P. cited as having been adjudged.

If a leſſee for years, in conſideration the leſſor will forbear to diſtrain corn in the ſhocks, aſſumes and promiſes to pay all ſuch rent as is arrear, the conſideration is void, (e) becauſe ſuch corn is not diſtrainable.

[A promiſe to pay the debt of a perſon illegally arreſted, in conſideration of his being ſet at liberty,

liberty, Randal v. Harvey, Godb. 358. or to pay money upon forbearance of a ſuit, when in point of law there is no cauſe of action, Lloyd v. Lee, 1 Str. 94. or to revive a ſecurity, which is void in its creation, Cockſhott v. Bennett, 2 Term Rep. 763. or to fulfill an engagement entered into by an agent beyond the extent of his commiſſion, Fenn v. Harriſon, 3 Term Rep. 757. all theſe are promiſes without a conſideration: for the conſideration is the *material cauſe* of the contract, Fulb. Paral. 5, 6. and of courſe cannot be predicated of a nullity.] (*e*) *Vide* title *Diſtreſs*, that ſuch corn is now diſtrainable, therefore an action would lie.

If the plaintiff declares, that in conſideration the defendant was indebted to him in 20*l.*, the defendant did aſſume and promiſe to deliver ſeveral cattle to *J. S.* to the uſe of the plaintiff, and that the defendant had not delivered the cattle accordingly, *&c.* the conſideration is void, becauſe it does not appear that the debt was to be diſcharged thereby; and if not, the plaintiff notwithſtanding might bring his action for the money, ſo that the promiſe is but *nudum pactum*. Stile, 330. adjudged between Godwin and Butlin.

If *A.*, in conſideration that *B.* will deliver to him a recogniſance to read over, aſſumes and promiſes within ſix days to re-deliver the ſame to *B.*, or to pay him 1000*l.*; this is a good promiſe, upon which *B.* may have an action againſt *A.*, for the conſideration is ſufficient. Leon. 297. Cro. El. 138. Like point cited.

If *A.* demiſes certain lands to *B.* rendering rent, and *B.* aſſigns to *D.*, after which rent becomes due, and *D.* in conſideration that *A.* will ſhew him a deed, by which it may appear that ſuch rent is due, aſſumes and promiſes to *A.* forthwith to pay the ſame; if *A.* does ſhew *D.* the indenture of leaſe, by which it appears that ſuch rent is due, *A.* ſhall have an action upon this promiſe againſt *D.*; for when any thing, though never ſo ſmall, is to be done by the plaintiff, it will be a conſideration ſufficient to ground an action. Cro. El. 67. 150. S. C. adjudged; but the promiſe there was in conſideration, *&c.* to pay a rent-charge. Cro. Car. 70. like point adjudged.

If *A.* is lord of a manor, and a controverſy ariſes between *A.* and *B.*, concerning a certain copyhold which *B.* claims to hold of the ſaid manor, whereupon they ſubmit to the judgment and award of *J. S.*; and in conſideration that *A.* (*a*) had promiſed to abide thereby, *B.* aſſumes and promiſes that if the ſaid *J. S.* ſhall adjudge the copy inſufficient, that then he the ſaid *B.* will forthwith deliver up to *A.* the poſſeſſion thereof; this is a good conſideration, the promiſe being (*b*) reciprocal, and to avoid variances and ſuits. Leon. 103. 4 Leon. 31. S. C. adjudged. (*a*) Note; Both promiſes muſt be made at the ſame inſtant, elſe they will be *nuda pacta*. Hob. 88.

Cro. El. 137. 2 Jones, 168. (*b*) 4 Leon. 3. the like point. March, 75. like point, *per Cur'*. Cro. El. 543. like point adjudged, 889. like point *per Cur'*. Hob. 88. like point adjudged. 2 Mod. 33. like point adjudged. Thorpe v. Thorpe, Comyns, 98. pl. 67. Ld. Raym. 235. 662. S. C. Salk. 171. pl. 3. S. C. 12 Mod. 452. S. C.

If the father of *A.* and *B.* lying ſick, declares his intention to deviſe a rent of 4*l. per ann.* to his younger ſon during his life, and thereupon *A.* the eldeſt ſon, in conſideration that the father will not charge his lands therewith, aſſumes and promiſes to *B.* to pay the ſaid rent; whereupon the father forbears to charge the land, and dies, and the land deſcends to *A.* diſcharged of the ſaid rent, this is a good conſideration. Leon. 192. adjudged. Cro. El. 163. S. C. adjudged.

If *B.* the daughter of *A.* be heir apparent to *C.*, and *D.* promiſes to *A.* the mother, in conſideration that ſhe would (*c*) conſent Roll. Abr. 19. Moor, 857. S. C. ad-

judged by three againſt one. Brownl. 18. S. C. adjudged. Hob. 10.

ſent and agree that the ſaid *B.* her daughter ſhould marry his ſon, that he would give to the ſaid *A.* 100*l.* upon which *A.* conſents, and the marriage takes effect; this is a good conſideration, for nature has given the power of diſpoſing to parents, and in nature their childen are bound to obey them.

S. C. adjudged by three againſt one. Hut. 39. S. C. cited. (*c*) In conſideration the plaintiff would give his good will and furtherance to a marriage. Moor, 595. pl. 808. —Where marriage brokage bonds, and other conſiderations, to procure marriages are made void in equity, *vide* Abr. Eq. 89, 90. and tit. *Marriage.*—In conſideration the plaintiff would procure the conſent of her maſter for the defendant to have a ſhop in his houſe, *&c.* a good conſideration. Godb. 216.—In conſideration the plaintiff would procure the conſent of the leſſor, that the leſſee might aſſign his term, *&c.* Hut. 39. adjudged a good conſideration.—In conſideration that the mother of *A.* would permit her ſon to ſerve him for ſuch a time. Roll. Abr. 20. adjudged.

Roll. Abr. 21, 22. adjudged.

If *A.*, being on a treaty with *B.* for the purchaſe of certain lands from *B.*, comes to *B.*'s wife, and promiſes her in conſideration that ſhe would not hinder the bargain, that he would give her 10*l.* or a riding-ſuit; this is a good conſideration, and the huſband and wife may have an *aſſumpſit* on this promiſe.

Roll. Abr. 22. (*a*) Cro. El. 856. S. P. *cont.* but 2 Roll. Rep. 435. like point adjudged. Vent. 211, 212. like point adjudged. Hard. 366. S. P. *dubitatur.*

If *B.* in conſideration that *A.*, at the ſpecial inſtance and requeſt of *B.*, would permit *B.* to have and hold a meſſuage and land, then in the occupation of *B. una cum proficuis & commoditatibus inde provenientibus* to his own uſe, promiſes to pay him 13*s.* at *Michaelmas* after, for rent for the premiſes, and alſo at the ſaid feaſt to deliver the poſſeſſion of the premiſes to *A.* in as good repair as they were at the time of the demiſe; this is a good conſideration to maintain an action, though it does not appear that *A.* had (*a*) any eſtate therein at the time of the promiſe, and though it appears that *B.* was then in poſſeſſion thereof.

4 Leon. 2. like point adjudged. *Vide* 2 Keb. 182. Sid. 323. Lev. 204. like point adjudged. But upon evidence it muſt be proved what eſtate the plaintiff had, ſo that it may appear that there was a conſideration. 2 Roll. Rep. 435. [But Q. for the action is founded merely upon the contract, and the leſſor's title cannot be controverted in it. 2 Wilſ. 218.] But after a verdict for the plaintiff, the court will intend it was proved. Vent. 211. Lev. 179.

Roll. Abr. 23. Poph. 183. S. C. cited.

But if *A.* in conſideration that *B.* will make an eſtate at will to him, ſuch as counſel ſhall deviſe, promiſes, *&c.* this is no good conſideration, for that he may preſently after the eſtate made determine it.

3 Leon. 88. adjudged between Smith and Smith. *Vide* 3 Leon. 129. (*b*) But if one executor, in conſideration the other will relinquiſh the executorſhip, aſſumes, *&c.* this is good Bulſt. 185.

If *A.*, having ſeveral young children, lies ſick, and *B.* in conſideration that *A.* after his death will commit the education of his children, and the diſpoſition of his goods, during their minority, to him, aſſumes and promiſes to *A.* to procure certain cuſtomary lands to be aſſured to one of the children; whereupon *A.* appoints *B.* overſeer of his will, and that his goods ſhould be under the diſpoſition of *B.* *A.* dies, and *B.* by virtue thereof, takes poſſeſſion of the ſeveral goods of *A.*; if *B.* does not procure ſuch lands to be aſſured accordingly, yet ſhall the executor of *A.* have no action againſt *B.*, for here is no conſideration, inaſmuch as the power which *B.* had given him, was only *pro educatione liberorum*, and no (*b*) profit to himſelf; and though ſuch overſeers too often make their advantage, yet that is contrary to their truſt, and ſuch a fraud as the law will not preſume.

If

If there be certain controverſies between *A.* and *B.* and they ſubmit to the award of *J. S.*, who among other things is about to award that *B.* ſhall deliver up to *A.* two ſeveral obligations, wherein *A.* was bound to *B.*; whereupon *B.*, in conſideration that upon the requeſt of *A.* the clauſe in relation to the delivery up of the obligations ſhall be left out of the award, aſſumes and promiſes to *A.* to deliver them up to *A. gratis*, &c. this is a good conſideration, the clauſe being omitted *ad ſpecialem inſtantiam ipſius A.* 3 Leon. 105. adjudged.

If *A.* pawns goods to *B.* upon condition of redemption at a day certain, and after the day the goods being not redeemed, *B.* ſays he will ſell them, upon which *D.* ſays, if he will ſtay the ſale of them but for three days, he will pay the money and have the goods; if *B.* does ſtay the ſale accordingly, *B.* may have an action againſt *D.* upon this agreement, for this was in nature of (*a*) a ſale; and if *D.* had paid the money, he might have brought *detinue* for the goods. Roll. Rep. 215. adjudged, Capper and Dickenſon. (*a*) So where *A.* in conſideration that he had paid and delivered to the defendant twenty pieces of hammered money, being twenty old ſhillings, at his requeſt, he the defendant promiſed to pay him twenty ſhillings new money; and it was objected that the property was not altered; *ſed non allocat*'; for a delivery, in conſideration of being paid the value, is a ſale. Salk. 25. pl. 11. 2 Ld. Raym. 895.

If *A.* and *B.* are both ſolicitors for the office of under-ſheriff, and *A.*, in conſideration that *B.* will deſiſt, aſſumes and promiſes to *B.* that if he the ſaid *A.* obtains the ſaid office, that he the ſaid *A.* will pay unto *B.* 20*l.* for a horſe, &c. this is a good conſideration. Cro. Jac. 612. Parker and Brown, adjudged.

A. has lands in *D.*, of which pariſh *B.* is rector, and *B.* in conſideration that *A.* will plant his lands with hops, and ſo better the tithes, aſſumes and promiſes to allow him 40*s.* for every acre ſo planted; and whether this is a good conſideration, becauſe the tithes cannot be bettered by the planting of the hops, but by the growing of them, *dubitatur* *. Winch. 80. * It ſeems a ſtrange reaſon; muſt not the *planting* imply the *growing*?

If *A.* together with *B.* is bound to *C.* for the proper debt of *B.* &c. and *A.* pays the money, and *B.* dies and makes *D.* his executor, and *D.*, in conſideration that *A.* will forbear to ſue him till ſuch a time, aſſumes and promiſes to repay him; this (*b*) conſideration is good, though *D.* was liable in equity only †. Sid. 89. adjudged between Scot and Stevens. Lev. 71. S. C. Roll. Rep. 27.

S. P. *per* Croke. (*b*) So if the conſideration be, that the plaintiff ſhall releaſe an equitable intereſt only. *Wells* and *Wells*, Vent. 40. 1 Lev. 272. Thorpe v. Thorpe, Lord Raym. 662. In conſideration the plaintiff would forbear to ſue for a legacy. 2 Lev. 3. Vent. 120. † *Qu.* Was not *D.* liable in an action of *aſſumpſit*, for money laid out and paid by *A.* for teſtator in his lifetime?

If the plaintiff declares that he was poſſeſſed of ſeveral ſeamens' tickets for wages due to them, and had ſolicited the treaſurer of the navy to pay them, who had ordered the defendant his clerk to pay them, and the defendant, in conſideration the plaintiff would not give his ſaid maſter any further trouble about the payment thereof, aſſumes to pay them; this is a good conſideration; for though it does not appear the plaintiff had any intereſt in the money, or authority to receive it; and it was objected, though he might not trouble the maſter further, yet the owners Lev. 257. Bolton and Fenner, adjudged. Sid. 392. S. C. adjudged.

owners might; yet after verdict for the plaintiff, it was adjudged for him; for it cannot be intended but that the plaintiff had an intereſt in the tickets, or authority to receive the money, elſe the treaſurer would not have ordered the payment thereof.

Mod. 25. adjudged between Smith and Bowen. 2 Str. 939. S. C. cited and agreed.

If *A.* in conſideration that *B.* an infant, hath promiſed to permit *A.* to carry away ſo much of his graſs, *&c.* aſſumes and promiſes to pay *B.* 6*l.* the conſideration is good, and *B.* may maintain an action againſt *A.* upon this promiſe, notwithſtanding *B.* may avoid his promiſe.

Vent. 51. S. C. adjudged. 2 Keb. 581. S. C. Yelv. 134. like point *per Cur'*. Sid. 41. Keb. 1. S. P. *vide* head of *Infants*.

Vent. 297. adjudged between Curtis and Cullingwood. 2 Lev. 119. S. C. adjudged, the conſideration being that the biſhop would abſolve the mother of the defendant at the requeſt of the defendant, which the biſhop would not have done, if the plaintiffs had not accepted the promiſe of payment.

If *A.* and *B.* are churchwardens of *D.*, and *C.* at the proſecution of *A.* and *B.* is excommunicated for not paying a tax for the reparation of the church of *D.*, and *C.* in conſideration that the biſhop, at the requeſt of *A.* and *B.* would abſolve him, aſſumes and promiſes to pay unto *A.* and *B.* ſo much; if *C.* is accordingly abſolved, *A.* and *B.* may have an action upon this promiſe againſt *C.*, for it cannot be intended but the abſolution was at the inſtance of *A.* and *B.*, and by reaſon of the promiſe to pay them the money.

Roll. Abr. 29.

If *B.* is indebted to *A.* in 20*l.* and *C.* is indebted to *B.* in the like ſum, and *C.* promiſes *A.* in conſideration that he is content to accept the ſaid ſum by the hands of *C.*, and to ſtay for this for four days, that he will pay him the ſaid ſum; this is a good conſideration for *A.* to maintain an action upon the caſe againſt *C.*

Roll. Abr. 26. But where a promiſe by an executor or adminiſtrator, or an heir, to pay on forbearance, makes a good conſideration, *vide* the ſeveral titles.

If *A.* is indebted 20*l.* to *B.*, and dies, and his executor, in conſideration that *B.* will forbear him for a reaſonable time, promiſes to pay him the debt; this is a good conſideration to have an action, with an averment that he forbore him for a certain time.

2 Bl. Com. 445. Hawkes v. Saunders, Cowp. 290. Trueman v. Fenton, Cowp. 544.

[If a debt be due in conſcience, though the remedy at law for recovering it may be gone, it is a good conſideration for a promiſe. Thus a promiſe to pay a debt barred by the ſtatute of limitations; a promiſe by a man when he comes of age to pay a meritorious debt contracted during his minority, though not for neceſſaries; and a promiſe by a certificated bankrupt to pay the whole of his debts; all theſe ſhall bind, for the obligation in conſcience is not extinguiſhed.

Harriſon v. Cage, Salk. 24. Blaxton v. Pye, 2 Wilſ. 309.

Mutual promiſes muſt be both binding as well on the one ſide as on the other, elſe they will be *nuda pacta*. Where an action was brought on a bet of 14 guineas to 8 guineas on a horſe-race, it was holden, that as the plaintiff might have refuſed under the ſtatutes of 16 *Car.* 2. *c.* 7. and 9 *Ann. c.* 14. to pay the 14 guineas, if he had loſt; there was no mutuality in the wager, and therefore he could not recover the 8 guineas.

So

So where *A.*, having propoſed to ſell goods to *B.*, gave him a certain time at his requeſt to determine whether he would buy them or not, within which time *B.* determined to buy them, and gave notice thereof to *A.*; *A.* is not liable to an action for not delivering them; for *B.* not being bound by the original contract, there was no conſideration to bind *A.*] Cooke v. Oxley, 3 Term Rep. 653.

(D) Where the Conſideration ſhall be ſaid to be executed, or continuing.

A Conſideration altogether executed and paſt is not good to maintain an *aſſumpſit*; but if it were moved by a precedent requeſt, it is good, and amounts to a promiſe; for it is not reaſonable that one man ſhould do another a kindneſs, (*a*) and then charge him with a recompence; for this would be obliging him whether he would or no, (*b*) and bringing him under an obligation without his own concurrence. Roll. Abr. 11, 12. Several caſes to this purpoſe. Bull. *Ni. Pri.* 145. 4th ed. Stokes v. Lewis, 1 Term Rep. 21.

[(*a*) If a man work for another merely with a view to a legacy, he cannot afterwards reſort to an action upon an implied *aſſumpſit*. Oſborn v. Governors of Guy's Hoſpital, 2 Str. 728. (*b*) If a perſon pay money which another was under a *legal* or *moral* obligation to pay, *though without his knowledge or requeſt*, the law raiſes an *aſſumpſit*: as in the caſe of goods diſtrained by the commiſſioners of the land-tax, if a neighbour ſhould redeem the goods, and pay the tax, he may maintain an action againſt the owner for the money ſo paid: ſo if a perſon bury the wife or child of another, he may recover back the expences incurred by it from the father or huſband. Jenkins v. Tucker, 1 H. Bl. Rep. 90. Church v. Church, B. R. 1656, cited in Sir T. Raym. 260. Nor is it any bar to ſuch an action againſt the huſband, that the wife lived apart from him, and had a ſeparate maintenance, for at her death the ſeparate maintenance is at an end. Anon. B. R. M. 31 Geo. 3. reported in Vaillant's edition of Dyer, 272. b. note b.]

Therefore if the ſervant of *A.* be arreſted in *London* for a treſpaſs, and *J. S.*, who knows *A.* bails him, and after *A.* for his friendſhip, promiſes to ſave him harmleſs, and *J. S.* comes to be charged; yet this is no conſideration to ground an *aſſumpſit* on, becauſe the bailing, which was the conſideration, was paſt and executed before. Dyer, 272. Roll. Abr. 11. 2Leon. 225. Owen, 144. Yelv. 41. 2 Stra. 933. 2 Barnard. K. B. 55. 3 Burr. 1663.

(*c*) But it had been otherwiſe if the maſter had before requeſted him to become bail for his ſervant, and the bailing had been after. Dyer, 272. Roll. Abr. 11. (*c*) Hob. 106.

S. C. and S. P. cited and agreed, becauſe the promiſe is not naked, but couples itſelf with the precedent requeſt, and the act of the party procured by that requeſt. 2 Leon. 225. S. C. cited and agreed. Cro. Car. 409. S. C. cited *arguendo*, and S. P. agreed to *per Curiam*.

So if a man requeſts another to labour for his pardon, &c. and after he has done his endeavour, if the other ſays, in conſideration that he has laboured for his pardon at his own charge, he promiſes to pay him ſo much, &c. this is a good conſideration. Roll. Abr. 11. Moor, 866. S. C. Brownl. 8. S. C. Hob. 105. S. C. Stile, 465. S. P.

If *A.* ſerves *B.* for a year, but has (*d*) nothing for his ſervice, and afterwards at the end of the year, *B.*, for his good and faithful ſervices, aſſumes to pay him 10*l.*; *A.* may have an action upon the caſe, upon this promiſe, againſt *B.*, for the conſideration is good. 2Leon. 225. Godb. 32. S. C. Cro. Eliz. 42. S. C.

(*d*) But if a ſervant has wages given him, and after his ſervice ended, his maſter *ex abundantiâ* promiſes to pay him 10*l.* more, he

he ſhall not have an action on this promiſe, becauſe there is no precedent conſideration. 2 Leon. 225. Hutt. 84.

Leon. 102. Pearl and Edwards adjudged. Cro. El. 94. S. C. adjudged, and ſaid the conſideration that he was in poſſeſſion, and had paid, and was to pay his rent, was a ſufficient cauſe for *A.* to defend his poſſeſſion for the time to come.

If *A.* leaſes lands to *B.* for a certain term of years, rendering rent, and after ſome of the years expired, and the rent paid, *A.*, in conſideration that *B.* had occupied the land and paid his rent, aſſumes to ſave him harmleſs againſt all perſons for his occupation paſt and to come; if afterwards the cattle of *B.* are diſtrained *damage-feaſant*, he may have an action upon this promiſe againſt *A.* for the occupation, which is the conſideration, continues.

2 Leon. 111. adjudged between March and Rainsford. Leon. 102. S. P. (*a*) A good conſideration to raiſe an uſe, but not an *aſſumpſit*. Cro. Eliz. 756. agreed *per Cur'*. Cart. 141. *arguendo*. (*b*) Marriage is always a continuing conſideration. 2 Leon. 224. *per* Anderſon, Godb. 31. Cro. Car. 409. Hut. 84. Cro. Eliz. 741. (*c*) A ſerjeant at law gives counſel to *A.* who afterwards, in conſideration thereof, aſſumes to pay him 20*l.*, an action lies thereupon. 2 Leon. 111. *per* Popham. Cro. Eliz. 59. ſaid. [Q. of this?]

If there be a communication between *A.* and *B.* concerning a marriage to be had between *A.* and the daughter of *B.* upon which *B.* offers him 200*l.* with his daughter in marriage; but they cannot agree upon the day of payment, and afterwards *A.* ſteals away the daughter of *B.*, and marries her without the conſent or knowledge of *B.*, and after *B.* agrees thereto, and in conſideration of this marriage aſſumes to pay 100*l.* to *A.*; this is a good promiſe, upon which *A.* may have an action againſt *B.* for the (*a*) natural affection of the father, and the (*b*) advancement of the daughter, make this a conſideration (*c*) continuing.

2 Keb. 99.

In conſideration that he had paid money for the defendant, and obtained a releaſe of his debt, was held a continuing conſideration, becauſe the benefit of it was continuing to the party.

Warren v. Morſe, Cro. El. 338.

[Where the plaintiff declared, that, in conſideration he had bought three parcels of land on ſuch a day, the defendant afterwards promiſed to make him a ſufficient aſſurance; the conſideration was adjudged not to be abſolutely paſt, for the aſſurance was the ſubſtance of the ſale.]

Where the Promiſe ſhall be void, the Conſideration being againſt Law.

AS all conſiderations are deemed inſignificant and void, that are not of ſome benefit to the promiſor, or loſs to the promiſee; ſo if they are wicked and ill in themſelves, or unlawful by being prohibited by ſome act of parliament, they are void; therefore,

Roll. Abr. 16. Roll. Rep. 313. S. P. adjudged, the conſideration being, that he would ſerve a *ne exeat regno*. [(*d*) The like law on a promiſe of a bribe to a bailiff for taking bail. Stoteſbury v. Smith, 2 Burr. 924. 1 Bl. Rep. 204. S. C.]

If an officer, who by the duty of his office is obliged to execute writs, promiſes, in conſideration of money paid him, to ſerve a certain proceſs, an *aſſumpſit* will not lie on this promiſe (*d*); for the receipt of the money was extortion, and the conſideration unlawful.

So

So if an executor ſues execution by *elegit*, and *B.* a ſtranger, as a friend to the executor, in conſideration that the ſheriff would forthwith execute the ſaid *elegit*, and of 6*d.* to him by the ſheriff paid, promiſes to pay him 60*l.*, upon which the ſheriff executes the writ; yet no action lies, becauſe the conſideration is (*a*) againſt law; for the ſheriff ought to do his duty without reward, and this 60*l.* is no diſcharge of the fees due to the ſheriff, being given by a (*b*) ſtranger, and not expreſſed for them. Roll. Abr. 16. Cro. Jac. 103. S. C. adjudged.

(*a*) So if a ſheriff ſuffer one that he has arreſted to eſcape, on the promiſe of a ſtranger, to be paid ſo much money, yet no action lies on this promiſe. Salk. 28. pl. 17. *Vide* head of *Sheriff*. (*b*) Otherwiſe where given by the plaintiff himſelf. Roll. Abr. 26. [But the caſe in Rolle does not warrant this; it is as follows:—"If *A.* delivers an execution to the ſheriff at his ſuit againſt *B.*, and in conſideration that the ſheriff without any fee will execute it, promiſes the ſheriff to pay to him a certain ſum, which is as much as the ſheriff is allowed to take by the ſtatute of 28 Eliz.; though it be admitted that the ſheriff cannot have any remedy for his fees, yet becauſe it was lawful for the ſheriff to take his fees, and he made the execution at the plaintiff's requeſt, and this is for his benefit, this is a good conſideration." By the reports of this caſe in Moore and Croke it appears, that the ſheriff declared for the money, as for his lawful fees of office under the ſtatute: in the other caſe in the text, he declared for a groſs ſum for executing the writ; thence the difference between the caſes as to the *legality* of the conſideration, the preſent ſubject of inquiry; for it would not affect the conſideration in that reſpect, whether the promiſe were made, or the money were to be paid by the plaintiff himſelf, or a ſtranger. Cro. El. 654. Mo. 468. p. 669. 699. p. 972.]

But if a man brings a *capias* that he has againſt *A.* to the ſheriff, and prays him that he will make *J. S.* his ſpecial bailiff, and promiſes him, if he will make him his ſpecial bailiff, that if *A.* eſcapes from the bailiff, he will bring no action for the eſcape againſt him; this is an *aſſumpſit* upon which an action lies, if he brings any action againſt the ſheriff for the eſcape. Roll. Abr. 16. Leon. 132. 3 Leon. 227. Cro. El. 178. Owen. 97. S. C. adjudged. 4 Ter. Rep. 119.

So where the ſheriff takes goods in execution upon a *fieri facias*, and a ſtranger promiſes the officer to pay him the debt, in caſe he will reſtore them; this is a lawful conſideration, for by the *fieri facias* he may ſell the goods, and this in effect is doing no more. Salk. 28. pl. 17. adjudged on demurrer. Love's caſe.

If *A.*, in conſideration of ſome benefit, promiſes not to ſet up or follow the ſame trade with the plaintiff in ſuch a town, this is a good promiſe; but if the promiſe were not to ſet up or follow the ſame trade in any part of the kingdom, it would be void. *Vide* Roll. Abr. 16, 17. Cro. Jac. 326. 596. 2 Bulſt. 136. Jones, 13. Forteſc. 297.

March, 77. 2 Roll. Rep. 201. 2 Ld. Raym. 1456. 2 Stra. 739. 3 Br. P. C. 349.

If *A.*, being a clerk, promiſes *B.*, in conſideration that *B.* will procure him to be rector of a donative church, with cure of ſouls, to pay 10*l.* to *B.*; this is no good conſideration to maintain an action, for this is ſimony, and an offence againſt the laws of God and man. Roll. Abr. 18. Cro. Car. 337. 353. 361. S. C. 1 Jon. 341. S. C.

[Where *A.* was in poſſeſſion of an office in a dock-yard, and *B.*, in order to induce him to procure himſelf to be ſuperannuated, and retire on the uſual penſion, agreed (without the knowledge of the navy-board to whom the appointment belonged) in caſe he (*B.*) ſhould ſucceed him to allow him his extra pay from the yard-books; and *B.* was afterwards appointed to the office; it was holden, that an *aſſumpſit* would not lie upon this Parſons v. Thompſon, 1 H. Bl. 322.

agreement, the conſideration being illegal, as a fraud upon the publick, and an injury to the ſervice.

Garforth v. Fearon, M. 27 G. 3. 1 H. Bl. Rep. 327.

So where *A.*, who was appointed by the intereſt and on the application of *B.* to be cuſtomer of a port, had previouſly ſigned an agreement declaring that his name was uſed on the application in truſt for *B.*, that he would appoint ſuch deputies as *B.* ſhould nominate, and would empower *B.* to receive the profits of the office to his own uſe; it was holden, that the conſideration in this caſe would not ſupport an *aſſumpſit*, being equally againſt the principles of the common law, and the ſtatutes of 12 *R.* 2. *c.* 2. and 5 & 6 *E.* 6. *c.* 16.

Stackpole v. Earle, 2 Wilſ. 133.

So a promiſe to pay 2*l. per cent.* to procure a purchaſer of defendant's place in the cuſtoms is bad, and will not raiſe an *aſſumpſit*.]

Cro. El. 230. Mead and Bigot adjudged. 3 Leon. 236. S. C. adjudged.

If *A.* levies a plaint in the court of *Stepney* againſt *B.*, upon which a precept is directed to *C.* the bailiff there, to attach the goods of *B.*, and thereupon *C.* attaches certain of the goods of *B.*, and *A.*, in conſideration that *C.* will deliver thoſe goods to him to deliver at the next court, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* the conſideration is void, being againſt law; for the bailiff ought not to deliver them to the plaintiff.

Cro. El. 551. Barrow and Gray. * *Qu.* As to what is alleged, reſpecting a ſtranger?

If *A.* being ſeiſed of lands in fee, enters into a recognizance to *B.*, and after makes a feoffment of thoſe lands to *C.*, who, in conſideration that *B.* will aſſign to him the recognizance, aſſumes and promiſes to pay him 80*l.*; this is a good promiſe, for the conſideration being to aſſign to the ter-tenant, it operates by way of diſcharge, and is clearly lawful; otherwiſe of an aſſignment to a ſtranger *.

Hut. 55. adjudged between Fletcher and Harcourt. Winch. 48. S. C. adjudged; but Hobart ſaid, perhaps there may be a diverſity where a publick officer, and where a private man (as in the principal caſe) makes the arreſt; but becauſe the defendant had pleaded *non aſſumpſit*, which implied that the impriſonment was lawful, he agreed judgment ſhould be given for the plaintiff.

If *A.* brings *B.* to a common inn, of which *C* is hoſt, and affirms to *C.* that he hath arreſted *B.* by virtue of a commiſſion of rebellion, and in conſideration that *C.* will keep *B.* as a priſoner by the ſpace of one night, aſſumes and promiſes to ſave *C.* harmleſs, *&c.* if *B.* recovers againſt *C.* in an action of falſe impriſonment, *C.* may have an action againſt *A.* upon this promiſe; for though the conſideration, *viz.* the keeping of *B.* was unlawful, yet becauſe it did not appear to *C.* to be ſo, the promiſe to ſave him harmleſs was good.

Hut. 56. Winch. 49. S. C. and S. P.

But if it appears that the act which is to be done is unlawful, as if *A.*, in conſideration that *B.* will beat *C.*, promiſes to ſave *C.* harmleſs, the conſideration is void.

per Hutton. 2 Lev. 174. like point adjudged, where the defendant, in conſideration of 20*s.* aſſumed to pay 40*s.* if he did not beat *J. S.* out of ſuch a cloſe. [So where two boxed for a wager of five guineas; on *aſſumpſit* for that ſum brought by the winner, it was holden the action would not lie, that act being a breach of the peace. Webb v. Biſhop, Gloſter aſſ. 1731. Bull. *N. P.* 16.]

1 Leon. 180. 3 Term Rep. 17. S. P.

[If *A.* promiſe *B.* money in conſideration that he will not give evidence in a cauſe, ſuch promiſe cannot be enforced, for it is unlawful and iniquitous ſo to ſuppreſs teſtimony.]

If *A.* is in execution at the ſuit of *B.*, and *C.*, in conſideration that the gaoler will permit *A.* to go at large, aſſumes and promiſes to (*a*) him that *A.* ſhall pay the debt at a certain day, and that he, the ſaid *C.*, will ſave the gaoler harmleſs, the promiſe is void, becauſe the conſideration is againſt law. Yelv. 197. adjudged between Marten and Blithman. 2 Bulſt. 213. and Godb. 250. S. C. adjudged, the promiſe being to pay the gaoler money. Het. 175. S. P. S. P. agreed *per* Wray, Ch. Juſt. and that if ſuch promiſe was not void by the common law, it is made void by the ſtatute 23 H. 6. c. 9. Cro. Eliz. 199. adjudged. 3 Leon. 208. adjudged. [It could not be void by the ſtatute, for that does not extend to parties in execution, but ſpeaks only of perſons arreſted on meſne proceſs. 1 Term Rep. 421.] (*a*) But ſuch promiſe to the plaintiff is good, for he may lawfully diſcharge him. Cro. Eliz. 190. adjudged. 10 Co. 102.

If *A.* is arreſted, and *C.*, in conſideration that the bailiff will ſuffer *A.* to continue in the houſe of *C.* till the next morning, aſſumes and promiſes then to deliver him in ſafe cuſtody to the bailiff; the conſideration is lawful, for it ſhall not be intended that the bailiff was ever abſent from *B.*, ſo that it could be no eſcape. Sid. 132. Keb. 483. S. C. Lev. 98. S. C. adjudged, *niſi*, the promiſe being to deliver him or pay 10*l.* and the action being brought by the plaintiff himſelf, who declared upon a promiſe to the bailiff *ex parte queren'*; ſo that if he was out of cuſtody, it muſt be intended by the aſſent of the plaintiff, becauſe the promiſe was made to the bailiff *ex parte querentis*; and by bringing the action he hath affirmed his aſſent. [The reaſon is, that the promiſe being made to the plaintiff, or to one on his behalf, is not within the ſtatute of 23 H. 6. c. 9., for the illegality of the conſideration in this caſe ariſes merely upon that ſtatute. *Therefore* it is, that undertakings by attornies for the appearance of a defendant are enforced by the courts, for they are given to the plaintiffs in the action. But where any engagement is entered into for this purpoſe with the ſheriff, it muſt be in the particular form chalked out by the ſtatute, otherwiſe it is void. Accordingly it was holden, that an agreement in writing to put in good bail for a perſon arreſted on meſne proceſs at the return of the writ, or ſurrender the body, or pay debt and coſts, made by a third perſon with the bailiff of a ſheriff, in conſideration of his diſcharging the party arreſted, was void by the ſtatute of H. 6.; for, ſince the paſſing of that ſtatute, the uſage has been to take the ſecurity by bond; and that bond, by the words of the ſtatute, muſt be entered into to the ſheriff, or to ſuch officer as has the return of proceſs; whereas here was no bond, but a mere ſimple contract, and that with the ſheriff's officer; and farther, the bond muſt be given only for the appearance of the party, and for no other purpoſe. Rogers v. Reeves, 1 Term Rep. 418.]

If the father of *A.* was indebted to *B.*, and *A.* promiſes *B.* that if he will bring two witneſſes before a juſtice of peace, who upon their oaths ſhall depoſe that the father of *A.* was ſo indebted to *B.*, that then he will pay it; if *B.* does produce his witneſſes, *&c.* he may have an action upon this promiſe againſt *A.*, for the conſideration is not unlawful, nor the oath prophane; adjudged by two judges againſt *Vaughan*, who held that ſuch an oath, illegally adminiſtered and taken, was within the ſtatute of prophane ſwearing. Mod. 166. Gilb. Evid. 68. Cro. Eliz. 469. 470. *bis.* Like point, where the conſideration was to take ſuch oath before the mayor of *London*. Brett and Pretiman, like point, Sid. 283. adjudged. Raym. 153. adjudged. Keb. 26. 44. adjudged; where the conſideration was to take ſuch oath before a maſter in chancery. 2 Sid. 123. like point adjudged; where the oath was to be taken before a maſter in chancery; and a like point there cited to have been adjudged, where the oath was to be taken before a judge of aſſiſe.

If *A.* obtains a judgment againſt *B.* in the marſhal's court, and afterwards, in conſideration of money in hand paid, aſſumes and promiſes to aſſign this judgment to *C.*; this is a good promiſe, for it is lawful ſo to do, and the intent muſt be that it ſhall be aſſigned according to common uſage, *viz.* by letter of attorney, ſo that *C.* may take out execution in the name of *A.*, which may be done without any maintenance. Sid. 212. Keb. 744.

2 Jones, 29. adjudged between Morris and Chapman. Carter, 223. S. C. adjudged.

If *A.* obtains a judgment againſt *B.*, and thereupon takes out an *elegit*, and delivers it to the under-ſheriff, who by virtue thereof ſeizes certain goods of *B.*, and afterwards the under-ſheriff, in conſideration that *A.* will take out a new *elegit*, and deliver it to him, promiſes to cauſe and procure the ſaid goods to be found by inquiſition, and to deliver the ſame to ſuch perſon as *A.* ſhall appoint, *&c.*; this promiſe is againſt law, being to do a thing againſt the duty of his place, by which he is bound to return an indifferent jury; and though part of the promiſe was to do a lawful act, yet ſince that depended upon the other part, which was illegal, the whole is naught.

Gallini v. Laborie, 5 Term Rep. 242.

[If a perſormer engage to dance at the King's Theatre in the *Hay Market*, yet no action will lie againſt him for a breach of the agreement, if it appear that the theatre was not licenſed purſuant to the 10 *Geo.* 2. *c.* 28. But in ſuch caſe the performer may recover from the manager the ſalary which he had ſtipulated to pay him; for being engaged and ready to execute the agreement on his part, he ought not to ſuffer for the want of a licence which it was the manager's buſineſs to have procured.

Barjeau v. Walmſley, 2 Str. 1249. Robinſon v. Bland, 2 Burr. 1080. Alcinbrook v. Hall, 2 Wilſ. 309.

Money lent for the purpoſe of paying a gambling debt may be recovered back, for the ſtatute of 9 *Ann. c.* 16. only annuls the *ſecurity*, and not the *contract*.

Holman v. Johnſon, Cowp. 341.

Where the plaintiffs, who were merchants living at *Dunkirk*, ſold tea to the defendant *there*, and delivered it to him *there*, though this tea was ſo ſold for the purpoſe of being ſmuggled into *England*, and that purpoſe was known to the plaintiffs at the time; yet they not being concerned in the ſmuggling, and it being a fair ſale as to them, and good by the laws of the country where they lived, they were allowed to recover the price of the tea in *England*.

Biggs v. Lawrence, 3 Term Rep. 454.

But where the plaintiffs were four partners, three of whom lived in *England*, and the fourth in *Guernſey*, and this laſt ſold brandy at *Guernſey*, packed up in a particular manner for the purpoſe of ſmuggling, but without the privity or perſonal participation of the others; in an action brought for the price of this brandy, they were nonſuited: for in this caſe the parties were natives of *England*, and the contract was made in contravention of the laws of *England*; whereas in the caſe of *Holman* v. *Johnſon* the contract was made abroad by foreigners, who are not bound to take notice of the revenue laws of this country.

Clugas v. Penaluna, 4 Term Rep. 466.

So where the plaintiff, an inhabitant of *Guernſey*, ſold goods to the defendant in *Guernſey*, which it appeared were to have been ſmuggled into *England*, and the defendant gave bills, on which an action was brought for the price; it was adjudged, that the plaintiff could not recover, for the bills were given on an illegal contract, and to a ſubject of this country.]

(F) Where the Conſideration and Promiſe ſhall be ſaid to be ſufficiently ſet forth and averred.

THE plaintiff muſt ſet forth every thing eſſential to the giſt of the action, with ſuch certainty, that it may appear to the court that there were ſufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court, whether the damages given by the jury were in proportion to the demand, or whether the party was at all entitled to a verdict.

But for this, *vide* head of *Pleas and Pleadings*. [Where there is a ſpecial contract or agreement, the plaintiff ought to declare upon it, for the defendant ſhould have notice that he is ſued on it; but if the plaintiff fails of proving the caſe ſtated in the ſpecial count, after an attempt for that purpoſe, it is now the courſe to permit him to go into evidence on the general counts, if he have given notice that he means to rely on them as well as the other ſpecial ground, the neceſſity of which notice is in order to prevent a ſurpriſe on the defendant. Dougl. 651. 24. 1 Term Rep. 134. Bull. *Ni. Pri.* 153.]

Therefore in an action upon the caſe, the plaintiff (*a*) cannot declare *quod cum* the defendant was indebted to the plaintiff in ſuch a ſum, and that the defendant, in conſideration thereof, *ſuper ſe aſſumpſit* to pay, &c. without (*b*) ſhewing the cauſe of the debt.

10 Co. 77. For this point, *vide* Hob. 5. Godb. 186. Cro. Jac. 207. 213. 642. Hob. 18. Moor, 854. pl. 1167. Hetl. 106. Roll. Rep. 391. Bulſt. 67. 3 Bulſt. 207. Cro. Jac. 397. Hard. 132.; but Palmer 171. *per* Croke and Chamberlain, there is a diverſity where the promiſe is to pay at a day to come, and where not; for the promiſe to pay at a day to come, implies a forbearance in the mean time; and *vide* Roll. Rep. 396. (*a*) Such a declaration is not made good by verdict. Cro. Car. 6. 31. Sid. 182. and *vide* Brownl. 14. Poph. 31. Jenk. 293. (*b*) The plaintiff declared that the defendant was indebted to the teſtator of the plaintiff in 20 *l.*, *quas ei ſolviſſe debuit ſecundum agreement' inter eos habit'*. 2 Lev. 152. Judgment was ſtaid after verdict, for the agreement might be by deed. *Vide* Carth. 276.

So if in an *aſſumpſit* the plaintiff declares that, in conſideration *quod procuravit J. S.* to ſurrender a meſſuage, &c. the defendant *ſolveret* to the plaintiff 10 *l.*, the declaration is not good, for there is no promiſe laid, *ſuper ſe aſſumpſit*, or *agreavit* being omitted; and nothing here that imports a promiſe or contract.

Sid. 246. adjudged: Lev. 164. S. C. adjudged *niſi*. Raym. S. C. 123. adjudged *niſi*. Keb. 878. [See Lee v. Welſh, 2 Str. 793. 2 Ld. Raym. 1516. S. P.]

Super ſe aſſumpſit on an *inſimul computaſſet* was left out, and a difference was endeavoured to be taken where the law raiſes the promiſe, and where it is a ſpecial promiſe; and that in the firſt it ſhould not be needful; but the Court held it neceſſary in both, for the law does not (*c*) create a promiſe in any caſe in pleading, but gives ſufficient evidence to a jury to find a promiſe.

2 Keb. 97. Sid. 306. (*c*) 6 Mod. 131. S. P. *per* Holt. *Vide* head of *Pleas and Pleadings*.

But in this action the law requires no greater certainty in the allegations than the nature of the thing requires; therefore if a contract be made in general terms, the declaration may likewiſe be general. Hence a *quantum meruit* for *diverſa veſtimenta & omnia alia materialia adinde ſpectantia*, is good.

So if in an *aſſumpſit* the plaintiff declares that, in conſideration the plaintiff would find and provide for a ſick man all ſuch neceſ-

3 Bulſt. 31. adjudged between Crips

and Bainton. Roll. Rep. 173. S. C. adjudged; and that rather becauſe it was after

ſaries as he ſhould want, the defendant aſſumed and promiſed to pay, &c., and avers that he had found him neceſſaries amounting to ſuch a ſum, &c.; this is a good declaration, without ſhewing in particular what thoſe neceſſaries were, for that would make the record too prolix.

verdict. Vide tit. *Error*. This manner of declaring is certainly good, and every day's practice.

Hob. 5. adjudged and affirmed upon a writ of error in *Cam. Scacc.* Roll. Rep. 24. S. C. adjudged and affirmed.

If in an *indebitatus aſſumpſit* the plaintiff declares that the defendant was indebted to the plaintiff in 10*l.* for the (*a*) feeding and agiſtment of beaſts, and for wheat & *aliis* (*b*) *mercimoniis per prædict'* the defendant *habit' & recept'*; this is a good declaration; for though it be not ſufficient to ſay that he was indebted generally, becauſe that may be for rent upon leaſes, or debts upon ſpecialties, yet this is certain enough, for as well the wares and merchandizes, as the paſturing and wheat, are perſonal things, for which an *aſſumpſit* may be brought.

(*a*) *Indebitatus* for tithes, Wright and Beal, Lev. 141. Sid. 223. after verdict adjudged good, and intended ſevered, upon a ſpecial contract. (*b*) So an *indebitatus* lies *pro opere per antea facto*. Sid. 425. Vent. 44. 2 Keb. 552. Mod. 8. adjudged. *Pro præmio*, on a policy of inſurance. 2 Lev. 153. [In an aſſumpſit on the judgment of a foreign court, it is not neceſſary to ſtate in the declaration the grounds and cauſe of action upon which the judgment was founded. Crawford v. Whittal, Dougl. 4.]

Carth. 276. adjudged. Paſch. 5 W. & M. in B. R. between Hibbert and Courthope. Vent. 44. S. P. Sid. 425. S. P. 2 Keb. 552. Mod. 8. S. P.

So in an *aſſumpſit* the plaintiff declared *pro opere & labore* generally, without ſetting forth what ſort or manner of work or labour it was; and though it was objected that it ſhould be ſet forth particularly, ſo that it may appear to the court to be lawful work, yet the court held it well enough; and that the only reaſon why the plaintiff is obliged to ſhew wherein the defendant is indebted, is, that it may appear to the court that it is not a debt on (*c*) record or ſpecialty, but only upon ſimple contract; and any general words, by which that may be made to appear, are ſufficient.

10 Mod. 81. 295. 12 Mod. 16. 250. 308. 324. Fitzgib. 302. (*c*) For damages recovered in an *aſſumpſit*, will be no bar to an action of debt grounded on a record or ſpecialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242.

Moor, 854. adjudged. Roll. Rep. 391. S. C. adjudged.

If in an *aſſumpſit* the plaintiff declares, that whereas the defendant had received 24*l.* of ſeveral perſons, to the uſe of the (*d*) plaintiff, in conſideration thereof the defendant did aſſume and promiſe to pay, &c.; this is a good declaration, without (*e*) ſhewing of what perſons in particular he received the money, (*f*) becauſe the conſideration is executed, and not traverſable *.

(*d*) So an *indebitatus* for money received by the hands of *J. S.* to the uſe of the defendant, Mod. 42. adjudged good after verdict; and ſaid, they would intend it money lent. 2 Keb. 615. adjudged, and *vide* Roll. Rep. 391. Cro. Jac. 690. (*e*) So an *indebitatus* lies for 40*l. pro diverſis denar' ſummis ei præſtitis ac pro diverſis denariorum ſummis de ead'* the plaintiff *recept' & habit' ac pro quadam pecuniæ ſumma*, by the plaintiff, at the requeſt of the defendant, to *J. S. ſolut'*, without ſhewing in particular how much he was indebted for each cauſe, for that is not material, he being indebted ſo much *in toto*. Cro. Jac. 245. Yelv. 517. Brownl. Ent. 71. (*f*) Where the conſideration is executed, it is only inducement, and needs not preciſely be alleged as to time or place. Cro. El. 715.

* The common method now uſed is to declare for money had and received by the defendant to the uſe of the plaintiff, without mentioning of whom, or by whoſe hands received; and this is the beſt method of declaring, as the plaintiff may give in evidence all money received, which, under a particular declaration could not be done, if any of the payers were omitted. This general form of action is, in many caſes, equivalent to a bill in equity, for an account, &c.

If

If in an *aſſumpſit* the plaintiff declares *quod cum* there were ſeveral reckonings and accounts between the plaintiff and defendant; and at ſuch a day, &c. *inſimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the ſaid account was found to be in arrear the ſum of 20*l.*, in conſideration whereof the defendant promiſed to pay, &c.; this is a good declaration, without ſhewing it was *pro mercimoniis*, or otherwiſe, wherefore he ſhould have an account; for an account may be for divers cauſes, and ſeveral matters and things may be included and compriſed therein, which *in pede compoti* are reduced to a ſum certain, and thereupon being indebted to the plaintiff, it is ſufficient to ground an action. Cro. Car. 116. Holmes and Savil adjudged. Hetl. 106. 113. S. C. adjudged. Poph. 177. Latch. 141. Palm. 442. Yelv. 70. Roll. Rep. 396. S. P.

If in a *quantum meruit* for meat, &c. the plaintiff declares upon a promiſe, to pay ſo much *quantum rationabiliter valerent*; this is a good declaration, though general; and though objected that it ought to have been *valebant*. 3 Mod. 190. adjudged. 3 Keb. 469. S. P. adjudged.

If in an *aſſumpſit* the plaintiff declares, that the defendant, in conſideration of, &c. *inter alia*, did aſſume to pay, &c. this is no good declaration, becauſe he ought to ſet forth the whole promiſe which is entire. All. 5. adjudged. *Vide* March, 100.

[Where the plaintiff declared upon two conſiderations, and failed in a proper averment of the performance of the one; the judgment was arreſted, for the *aſſumpſit* of the defendant muſt be preſumed to be founded on the two conſiderations taken together. Leneret v. Rivet, Cro. Ja. 503.

If a defendant undertake to pay money in conſideration of the plaintiff's executing a releaſe; here the releaſe is a condition precedent, and the plaintiff muſt aver that he has executed a releaſe, or was ready to do it, elſe the declaration will be bad on demurrer, and in arreſt of judgment, if the judgment be by default; though it would be helped by a verdict. Collins v. Gibbs, 2 Burr. 899.

Where the plaintiff declared in conſideration of a promiſe that the defendant ſhould hold an eſtate clear of a rent-charge granted to *J. S.*, without moleſtation of the plaintiff; but did not ſhew any title in himſelf to the rent-charge; the declaration was holden ill after verdict; for the promiſe, as it ſtood, was a promiſe not to do a thing which the promiſer could not do, and was therefore merely *nudum pactum*. Courtney v. Strong, 2 Ld. Raym. 1217. 1 Salk. 364. S. C.

Where the declaration ſtated that the defendant became, and was tenant to the plaintiff of a certain farm, in conſideration whereof, he undertook to manage it in a huſbandlike manner; it was objected that there was no conſideration, becauſe it was not alleged that the defendant had become tenant on the terms of cultivating the farm in a good and huſbandlike manner; *ſed non allocatur*, for the bare relation of landlord and tenant is a ſufficient conſideration for ſuch a promiſe.] Powley v. Walker, 5 Term Rep. 373.

If in an *aſſumpſit* the plaintiff declares, that, in conſideration the plaintiff had promiſed to deliver a cow to the uſe of the defendant, the defendant did aſſume and promiſe, &c. this is a Hob. 88.

good declaration, without (*a*) any averment of the delivery of the cow, (*b*) becauſe there is (*c*) promiſe for promiſe.

(*a*) And if in ſuch caſe the plaintiff doth aver a performance, the defendant can take no iſſue thereupon. Cro. Eliz. 543. And an il[l] averment will not hurt. Lev. 88. 293. (*b*) Where there are mutual promiſes, the plaintiff need not aver a performance of his part. Yelv. 134. Roll. Rep. 336. Vent. 41. Hard. 102, 103. March, 75. Cro. Eliz. 703. Lev. 20. 293. Cro. Eliz. 137. Leon. 186. Salk. 29. pl. 30. (*c*) Both theſe promiſes ought to be made at the ſame time, elſe they will be *nuda pacta*. Hob. 88. Cro. Eliz. 137. Leon. 186.

Martindale v. Fiſher, 1 Wilſ. 88.

[The *aſſumpſit* laid was, that the plaintiff had agreed to deliver ſo much cloth to the defendant, and the defendant agreed on a certain contingency happening to pay 5*l.* for it; but, if the contingency did not happen, it was agreed that he was to pay nothing: the contingency did happen, and on action brought the plaintiff had a verdict; when it was moved in arreſt of judgment that the plaintiff had not averred the delivery of the cloth; but it was reſolved that this being promiſe for promiſe, no ſuch averment was neceſſary: but if the defendant had undertaken to pay if plaintiff *would deliver* ſo much cloth, in that caſe an averment would have been neceſſary.

Lutton v. Robinſon, Dougl. 620.

Aſſumpſit on an agreement to forfeit a depoſit of five guineas, and to pay a further ſum of 10*l.*, if the defendant did not accept the poſſeſſion of certain premiſes from the plaintiff, and alſo pay for certain fixtures therein at a fair appraiſement by two appraiſers. In an action on this agreement, it was adjudged on a ſpecial demurrer, that the declaration was ill, becauſe the plaintiff had not ſhewn his right to the premiſes, ſo that he could have delivered poſſeſſion according to his agreement, and, as each was to name an appraiſer, that he had named one.

Gregory v. Nevill, Cro. El. 292.

In *aſſumpſit* on an agreement to pay 30*l.*, in conſideration of the plaintiff's relinquiſhing a rent-charge to the defendant, the plaintiff averred that he did relinquiſh the rent, and did not claim it; but the judgment was arreſted, becauſe he did not ſhew *how* he had relinquiſhed the rent, for it might be by words, which was no diſcharge.

Auſtin v. Jervoiſe, Hob. 69. 77.

The defendant promiſed to deliver a horſe to the plaintiff, on the plaintiff's becoming bound to him by writing obligatory in 11*l.*; the plaintiff in his declaration only averred *his offer* to become bound, upon which, judgment was arreſted, for he ſhould have averred a tender of the bond ready ſealed to the defendant, and alſo the ſum he was bound in, that the Court might judge of the performance.

Marriot v. Liſter, 2 Wilſ. 141. Butcher v. Andrews, 1 Salk. 23. But a declaration for money *lent to the defendant's wife*, at his requeſt, is good; for a loan to the wife, at the huſband's requeſt, is a loan to the huſband himſelf. Stevenſon v. Hardy, 3 Wilſ. 388. 2 Bl. Rep. 872. S. C.

Where the plaintiff declared for money *lent* by him to one *J. S.*, at the requeſt of the defendant, the judgment was arreſted, for the word *lent* is a technical term, and imports a loan to *J. S.*; if ſo, *he* was the debtor, and therefore the *defendant* could not alſo be the debtor, for there cannot be a double debt on a ſingle loan. But it had been otherwiſe, if the plaintiff had declared for money *delivered* to ſuch a perſon at the defendant's requeſt; for then the loan would have been to the defendant himſelf.]

(G) What may be pleaded as a good Diſcharge and Performance of the Promiſe.

AN *aſſumpſit* is an action founded on a contract, the non-performance of which is a fraud and injury to the plaintiff; and therefore the defendant muſt ſhew that there was no contract, or that the contract was void and without conſideration, or that he hath performed it, and is therefore diſcharged.

Vide head of *Pleas and Pleadings*. Where infancy, coverture, a releaſe, the ſtatute of limitations, or more money loſt at gaming than the ſtatute allows, are good bars, *vide* the ſeveral titles; and where they muſt be pleaded, or may be given in evidence, title *Evidence*. [The general iſſue to this action is, "that the defendant did not undertake and promiſe in manner and form alleged." But as the action is an action of *treſpaſs* upon the caſe, the plea of "not guilty" was formerly uſed as the general iſſue; Elrington v. Doſhant, 1 Lev. 142. and it is ſtill effectual after verdict, though it will not be allowed on demurrer. Marſham v. Gibbs, Ca. temp. Hardw. 173. 2 Str. 1022. S. C.]

If in a *quantum meruit* for medicines, the defendant pleads that he had paid the plaintiff (*a*) *tot. & tantos denariorum ſummas*, as the ſaid medicines were worth, without ſhewing what ſum in (*b*) certain he hath paid; this is no good plea *.

March, 77. (*a*) In an *aſſumpſit* for fees and money laid out, the plaintiff avers that he had laid out 27 *l.*; and the defendant pleads that he had paid all fees and money laid out, without ſhewing what he had paid. Rob. Ent. 56. (*b*) Where the defendant may plead generally, that the plaintiff *exoneravit eum* of the ſaid promiſe. Cro. Car. 383. 2 Roll. Abr. 408. pl. 1.

* *Qu.* If on ſpecial demurrer, ſuch plea is not bad, as amounting to the general iſſue?

If in an *aſſumpſit* the plaintiff declares that the defendant did aſſume and promiſe to pay to the plaintiff ſo much money, and alſo to carry away certain wood before ſuch a day; the defendant as to the money cannot plead that he paid it, and as to the carriage of the wood *non aſſumpſit*; (*c*) for the promiſe being (*d*) entire cannot be apportioned †.

March, 100. adjudged, and after a verdict for the plaintiff upon *non aſſumpſit*, a repleader was awarded. (*c*) Brownl. Ent. 58, 59. In an *aſſumpſit* to pay 24 *s. per* hogſhead for ale, *&c.* the plaintiff ſhews, *licet*, 48 *s.* was due to him *ſecundum ratam prædict'*, *&c.* and the defendant *quoad* 24 *s. de*, *&c.* pleads *non aſſumpſit*, and as to the reſidue a tender, and thereupon iſſue is joined; and *vide* Thomp. Ent. 66. Rob. Ent. 40. (*d*) ** The defendant pleads the promiſe was conditional, and traverſes that it was abſolute, as the plaintiff had declared. Thomp. Ent. 74. Rob. Ent. 97. ‡

† *Qu.* Therefore, if he ſhould not have pleaded *non aſſumpſit* to the whole? ** *Non aſſumpſit* to part, and tender to the reſidue, is good. ‡ *Qu.* If ſuch plea is good, if it does not amount to the general iſſue, and if the general iſſue would not have been the proper plea?

If the plaintiff declares upon an *indebitatus aſſumpſit*, and upon a *quantum meruit*, and the defendant pleads, that after the ſaid ſeveral promiſes made, and before the action brought, the plaintiff and defendant came to an account concerning divers ſums of money, and that the defendant was found in arrear to the plaintiff 30 *l.*; and thereupon, in conſideration that the defendant promiſed to pay the ſaid 30 *l.*, the plaintiff likewiſe promiſed to releaſe and acquit the defendant of all demands; this is a good plea, for by the account the firſt contract is merged.

2 Mod. 43, 44. adjudged. Milward and Ingram, 1 Mod. 205. S. C. adjudged: But North, Chief Juſt. there ſaid, that if there had been but one debt between them, the entry into an account for that would not determine the contract. *Vide* Ld. Raym. 680. [A ſtated account is no plea to a debt on ſimple contract; for both being equal, the latter is not merged in the former. Roades v. Barnes, 1 Burr. 9. 1 Bl. Rep. 65. But a plea that the defendant indorſed a promiſſory note, of which he was the payee, to the plaintiff "for and on account of the debt," is good. Kearſlake v. Morgan, 5 Term Rep. 513. So is a plea that the plaintiff

plaintiff and defendant accounted together; and that the defendant drew a bill of exchange upon himself in favour of the plaintiff, for the ſum he was found in arrear, and delivered it to the plaintiff. Richardſon v. Rickman, B. R. M. 16 G. 3. cited in 5 Term Rep. 517.]

Roll. Abr. 32. 2 Roll. Rep. 39. S. P. adjudged. Cro. Jac. 483. S. C. adjudged.

The defendant cannot plead that he revoked his promiſe; as if *A.* is in execution at the ſuit of *B.*, and *J. S.* deſires *B.* to let him go at large, and that he will ſatisfy him; to which *B.* agrees, though *J. S.*, before any thing is done in purſuance of this promiſe and agreement, comes to *B.* and tells him, that he revokes his promiſe, and that he will not ſtand to it; yet ſuch revocation cannot be pleaded in bar to the action.

3 Lev. 244. adjudged between How and Beech, upon a writ of error in *Cam' Scacc'*, and the firſt judgment affirmed accordingly.

So if in an *aſſumpſit* the plaintiff declares, that in conſideration the plaintiff would ſolicit a buſineſs for the defendant, which he had with *J. S.* & *finem adinde poneret*, the defendant did aſſume, &c. and that he had ſolicited and employed much care and pains, &c. but before he could *finem inde ponere*, the defendant countermanded him, the action lies; though it was objected, that ſuch employment is always countermandable; and if the plaintiff had beſtowed pains, and in part done the thing before the countermand, he might have had a *quantum meruit* for what he had done, but not an *aſſumpſit* for the whole; yet it was reſolved by the court, that if after part done the defendant countermands it, the plaintiff ſhall have an action for the whole, and upon the trial the jury ought to give as much in damages as the buſineſs done deſerves.

Yelv. 22. Shelbur and Scotford adjudged. 2 Roll. Rep. Like point *dubitatur*.

If *A.*, being poſſeſſed of a horſe, lends him to *B.*, and *B.* aſſumes and promiſes to re-deliver the horſe to *A.* by a day, before which day the true owner of the horſe *contra voluntatem B.* (*a*) takes him from *B.*; this matter, by reaſon of the precedent property, is *quaſi* an eviction of the horſe from the poſſeſſion of *B.*, and ſhall (*b*) diſcharge *B.* of his promiſe.

(*a*) So if the horſe dies. Jones, 179. (*b*) If one aſſumes to purchaſe lands at the beſt price he can, the promiſe to purchaſe is abſolute; but the price muſt be as reaſonable as he can. Lev. 3. *per* Twiſden. But *per* Foſter, Ch. Juſt. he is not bound to purchaſe unleſs the owner will ſell.

Attachment.

ſee 4. Blackſt. Comm. 283.

Lamb. Eiren. lib. 1. cap. 16. [(*c*) If for a contempt in the face of the court, the commitment is by rule of court, unleſs

AN *attachment* is a proceſs that iſſues at the diſcretion of the judges of a court of record, againſt a perſon for ſome contempt (*c*), for which he is to be committed; and may be awarded by them upon a bare ſuggeſtion, or on their own knowledge, without any appeal, indictment, or information; for though by the ſtatute of *magna charta*, none are to be impriſoned *ſine judicio parium, vel per legem terræ*, yet this ſummary method of proceeding being abſolutely neceſſary to the furtherance and execution of juſtice,

juſtice, ſeems to have been long practiſed, and is certainly now eſtabliſhed as part of the law of the land. the party eſcape out of court before he is ſecured. Jac. Law Dict. tit. *Attachment.*] *Vide* 2 Weſtm. 2. c. 3.

As ſeveral matters relating to this Head fall more properly under others, I ſhall only in this place conſider,

(A) In what Caſes an Attachment is to be granted.

(B) How the Perſon againſt whom it is granted is to be proceeded againſt, and how to be diſcharged.

(A) In what Caſes an Attachment is to be granted.

ALL courts of record have a diſcretionary power over their own officers, and are to ſee that no abuſes be committed by them, which may bring diſgrace on the courts themſelves; therefore if a ſheriff, or other officer, be guilty of a corrupt practice in not ſerving a writ; as if he refuſe to do it unleſs paid an unreaſonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his perſon or effects, in order to prevent the ſervice of any writ; the court which awarded it may puniſh ſuch offences, in ſuch manner as ſhall ſeem proper, by attachment. Dyer, 218. 2 Hawk. P. C. 215. *Vide* head of *Sheriff.*

But if there be no palpable corruption, nor extraordinary circumſtance of wilful negligence or obſtinacy, the judgment whereof is to be left to the diſcretion of the court; it ſeems not uſual to proceed in this manner, but to leave the party to his ordinary remedy againſt the ſheriff, either by action, or by rules to return the writ, or by an *alias* and *pluries*, which if he have no excuſe for not executing, an attachment goes of courſe. Hob. 62. 264. Noy, 101. F. N. B. 38. Finch, 237. 1 Bl. Rep. 6. [In contempts to inferior juriſdictions, the court of B. R., it ſeems, never interpoſes. Rex v. Burchett, 1 Str. 567. But it will, for diſobeying an order of ſeſſions, confirmed in B. R. Rex v. Holland, Ca. Tem. Hardw. 160.]

Sheriffs and other officers are liable to an attachment for an oppreſſive or illegal practice in the execution of a writ; as uſing needleſs force, violence, or terror, treating perſons under an arreſt baſely and inhumanly, extorting money from them, &c. or making an arreſt without due authority; as, by colour of a blank (*a*) warrant, filled up without the privity or ſubſequent agreement of the ſheriff. 11 H. 6. 42. (*a*) Noy, 101. Moor, 770. 2 Roll. Abr. 278. But there may be ſome ſpecial circumſtances which may induce the court to excuſe it, as that the practice was ſo, and that it was done to prevent the party's having notice of the arreſt. 2 Hawk. P. C. 215.

An attachment is grantable for a corrupt practice, in not executing a writ effectually; as if a ſheriff having levied a debt on an execution embezzles the money. 2 Hawk. P. C. 215.

Alſo

Hawk. P. C. 215. [(*a*) An attachment was granted againſt a

Alſo an attachment is grantable in diſcretion for a falſe return to a writ, (*a*) but this is not (*b*) uſually done without ſome viſible corruption, or extraordinary circumſtances of malice, hardſhip, or oppreſſion.

mayor for making a return to a *mandamus* in the name of the town-clerk and burgeſſes without their knowledge or conſent. Rex v. Hoſkins, Ca. Tem. Hardw. 188. If coroners do not return an attachment of contempt againſt the ſheriff, an attachment will be granted againſt them in the firſt inſtance directed to eliſors. Andrews v. Sharp, 2 Bl. Rep. 911. The King v. Peckham, *id.* 1218.] (*b*) For an action on the caſe lies againſt the ſheriff; *vide* title *Sheriff*. [For the ſame reaſon an attachment will not be granted againſt him for neglecting to take a replevin-bond. The King v. Lewis, 2 Term Rep. 617.]

Vide title *Attornies*, and 2 Hawk. P. C. 217. (*c*) But may detain money or writings till paid his juſt fees. Salk. 87. pl. 5. (*d*) Cro. Car. 74. Dyer, 241.

Attornies are liable to an attachment, and have been puniſhed in this manner in numberleſs inſtances; as for proſecuting or defending a ſuit without directions from the party, for baſe and unfair dealings towards their clients, in the way of buſineſs; as for protracting ſuits by little ſhifts, demanding money for buſineſs never done, (*c*) detaining their clients' writings, or their money recovered and received by them; for barely attempting to (*d*) forge a writ, or other matter of record; for giving (*e*) directions to a ſheriff what perſons he ſhall return on a panel; or for endeavouring to impoſe on the court.

pl. 50. 244. pl. 58. (*e*) Moor, 882. pl. 1237. [A notice of action given in compliance with the requiſition of a penal ſtatute, is not ſuch a commencement of the ſuit, as will ſubject a plaintiff or his attorney to an attachment for miſbehaviour before ſuing out the writ. Gordon v. Powis, 2 Bl. Rep. 781. *per* three Judges, *dubit.* Blackſtone, J.]

Vide 2 Hawk. P. C. 220. And how jurors are puniſhable, *vide* head of *Juries*.

And all other officers of courts of record are in like manner puniſhable for diſobeying the commands of ſuch courts, or for executing them oppreſſively, or otherwiſe miſdemeaning themſelves in their offices.

[A bailiff refuſing to make affidavit of ſervice of proceſs will be attached. Rex v. Rudge, 1 Bl. Rep. 432.]

[(*f*) No attachment againſt a gaoler for a voluntary eſcape, but an information.

Gaolers are puniſhable in this ſummary way, for groſs miſbehaviour in their offices, (*f*) by the courts to which they more immediately belong; alſo by diſobeying a *habeas corpus* iſſuing out of a court which has authority to award it; and by the court of *King's Bench*, for uſing priſoners barbarouſly and inhumanly.

The gaoler of Shrewſbury caſe, 1 Str. 532.] 2 Hawk. P. C. 227. *vide* title *Gaol and Gaoler's*
[A conſtable in any part of England refuſing to execute a warrant of a judge of B. R. for apprehending one charged with felony, is puniſhable by attachment. Rex v. White and others, Ca. Tem. Hardw. 42.]

Keb. 484. Palm. 564. 6 Mod. 90. *vide* title *Courts*, and their juriſdiction in general.

The court of *King's Bench*, as it hath a ſuperintendency over all inferior courts, may grant an attachment againſt the judges of ſuch courts, for oppreſſive, unjuſt, or irregular practice, contrary to the obvious rules of natural juſtice; as for denying a defendant a copy of the declaration, or going on to trial without giving him notice, or time to make his defence, or for compelling him to give exorbitant bail, or for taking unreaſonable diſtreſſes, or for taking money for vicious pleading; for proceeding after a prohibition, *certiorari*, &c.

Attachments have been granted for ſpeaking contemptuous words concerning the rules of the court, and that in the firſt inſtance,

ſtance, (*a*) without any rule made on the party to ſhew cauſe why ſuch attachments ſhould not be granted; for it would be in vain to ſerve him with a ſecond rule, who had deſpiſed the firſt.

[(*a*) Tho' contemptuous words were ſpoken of a *ſubpœna*, and the perſon ſerving it ſeverely beaten; yet as theſe facts were proved by only one witneſs, the court of Chancery would not order the party to ſtand committed in the firſt inſtance, but only granted a rule upon him to ſhew cauſe why he ſhould not be committed. 3 Atk. 219. Lord Hardwicke was inclined to adopt the ſame rule, and to require two affidavits to ground an attachment in the firſt inſtance at law. North v. Wiggins, 2 Str. 1068.]

An attachment is the proper remedy for diſobedience of the rules of court; as of thoſe made in ejectment (*b*), arbitrament, &c. So where a defendant in account, being adjudged to account before auditors, refuſes to do it, unleſs they will allow matter diſallowed by the court before; or where one refuſes to pay coſts taxed by the maſter, whoſe taxation the law looks upon as a taxation by the court (*c*).

Mod. 21. 10 Mod. 333. 525. 533. 585. Stra. 695. 2 Wms. 450. Salk. 71. pl. 6. 2 Burr. 1256.

[(*b*) Attachment in the firſt inſtance, for non-delivery of poſſeſſion purſuant to rule of court in ejectment. Davies v. Doe, 2 Bl. Rep. 892. (*c*) Attachments for non-performance of an award, or non-payment of coſts, are not granted now as for contempts, but are in the nature of a civil execution. Rex v. Stokes, Cowp. 136. Rex v. Myers, 1 Term Rep. 265. 1 Bl. Rep. 638. S. P.]

But an attachment is not uſually granted for diſobedience of a rule of *niſi prius*, unleſs it be firſt made a rule of court; nor for diſobedience of a rule made by a judge at his chambers, unleſs it be entered; nor for diſobedience of any rule without perſonal ſervice (*d*).

Salk. 84. pl. 3.

[(*d*) Therefore it hath been adjudged that the affidavit to ſupport a rule for an attachment for contempt, muſt ſhew that the defendant was ſerved perſonally with a copy of the rule, and that the original rule was ſhewn to him at the ſame time. The King v. Smithies, 3 Term Rep. 351. But where a *mandamus* was granted for the election of a mayor, under 11 G. 1. c. 4. ſ. 2., and a rule made that publick notice ſhould be affixed in the market-place, which was done accordingly, an attachment was granted for diſobedience of the *mandamus* againſt a member of the corporation who was ſerved with a copy of the rule, notwithſtanding neither the original *mandamus*, nor rule was ſhewn him at the time; for the publick notice by the act is *primâ facie* ſufficient. But the application for an attachment might be well anſwered, if the party could ſhew that he had no notice of the *mandamus*. The King v. Edyvean, 3 Term Rep. 352. Motions for attachments in civil ſuits are proceedings on the civil ſide of the court of K. B. till the attachments iſſue, and therefore the affidavits on which they are grounded are to be entitled with the names of the parties; but when the attachments iſſue, the king is to be named as proſecutor, for the proceedings are then on the crown ſide. 3 Term Rep. 253. Wood v. Webb.]

An attachment is proper for abuſes of the proceſs of the court; as for ſuing out execution where there is no judgment; bringing an appeal for the death of one known to be alive; making uſe of a proceſs of a ſuperior court, as a ſtale to bring a defendant within the juriſdiction of an inferior one, and then dropping it; uſing ſuch proceſs in a vexatious, oppreſſive, or unjuſt manner, without colour of ſerving any other end by it.

2 Hawk. P. C. 231. Forteſ. 267.

[Granted againſt the plaintiff in an action, and his attorney, for entering up judgment on a bond and warrant of attorney executed whilſt the defendant was under arreſt, and without calling in his attorney. Woodin v. Colledge, Ca. Tem. Hardwicke, 177. The inſtituting a ſuit, though there be a real demand, either for the purpoſe of injuring a third perſon, or of getting the opinion of the court, is a contempt puniſhable by attachment. Coxe v. Phillips, Ca. Tem. Hardw. 237. Da Coſta v. Jones, Cowp. 729. Hoſkins v. Lord Berkley, 4 Term Rep. 402. So is putting in bail by feigned names, no ſuch perſons being in exiſtence. Str. 384. Or aſſigning for error the death of the plaintiff in ejectment. Moore v. Goodright, 2 Str. 899. Or arreſting a plaintiff whilſt attending arbitrators under a rule of court in order to injure his cauſe. Rex v. Hall, 2 Bl. Rep. 1110. Or the mere ſerving of proceſs on a party attending his cauſe in a court of juſtice. Cole v. Hawkins, 2 Str. 1094. Andr. 275. S. C. Or bringing a writ of error, after having obtained an injunction on the

the terms of giving a releaſe of errors. 3 Atk. 297. Where the court will puniſh for contempts in the challenging of juries, ſee 1 Str. 593. 2 Lord Raym. 1364. 8 Mod. 245. 2 Str. 1001. An attachment was granted againſt a perſon for threatening the life of a proſecutor, who had indicted another for perjury, in an affidavit on which an information had iſſued againſt him. Rex v. Carroll, 1 Wilſ. 75.—It is a high contempt of a court puniſhable by attachment, either to ſcandalize the court itſelf, or to abuſe parties who are concerned in cauſes in it, or to publiſh any thing in order to prejudice mankind againſt parties before the cauſe is heard. 2 Atk. 469. 2 Vez. 520.]

King v. Clifton, 5 Term Rep. 257.

[If a defendant in a penal action obtain a rule to ſtay proceedings, on paying a ſum agreed upon between him and the plaintiff, the court will grant an attachment againſt him, if he refuſe to pay ſuch ſum.]

(B) How the Perſon againſt whom an Attachment is granted is to be proceeded againſt, and how diſcharged.

2 Hawk. P. C. 141. Salk. 84. pl. 3. 2 Jones, 178.

ATTACHMENTS are uſually granted on a rule to ſhew cauſe, unleſs the offence complained of be of a flagrant nature, and poſitively ſworn to; in which laſt caſe the party is ordered to attend, which he muſt do in perſon; as muſt every one againſt whom an attachment is granted; and if the party attending the court upon ſuch a rule to anſwer it, or appearing upon an attachment, be apparently guilty, the Court in diſcretion, on conſideration of the nature of the crime, and other circumſtances, will either commit him immediately, in order to anſwer interrogatories to be exhibited againſt him (*a*), concerning the contempt complained of, or will ſuffer him to enter into a recognizance to anſwer ſuch interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance diſcharged; otherwiſe he muſt anſwer them, though exhibited after the four days; but in all caſes, if he fully anſwer them, he ſhall be diſcharged as to the attachment, and the proſecutor ſhall be left to proceed againſt him for the perjury (*b*), if he thinks fit; but if he deny part of the contempts only, and confeſs other part, he ſhall not be diſcharged as to thoſe denied, but the truth of them ſhall be examined, and ſuch puniſhment inflicted, as from the whole ſhall appear reaſonable; and if his anſwer be evaſive as to any material part, he ſhall be puniſhed in the ſame manner as if he had confeſſed it.

[The court will never grant an attachment for one party at the ſuit of another, where the affidavits on which it is moved for are ſworn before the proſecutor's agents. Rex v. Wallace, 3 Ter. Rep. 403.

(*a*) But he cannot come in and confeſs the contempt till after the interrogatories are filed, unleſs in the caſe of a reſcue, or a contempt in the face of the court. Rex v. Edwards, 4 Burr. 2105. 1 Bl. Rep. 637. S. C. Rex v. Elkins, 1 Bl. Rep. 640. In the caſe of a reſcue, however, it has been ſince adjudged, that he muſt anſwer interrogatories, if the proſecutor inſiſt upon it, R. v. Jane Horſley, 5 Term Rep. 362. In the King's Bench the interrogatories muſt be ſigned by counſel. *Reg. gen.* Mich. 1793, 5 Term Rep. 474., and are referred to the Maſter of the Crown-office to examine the party upon them; and he is to report to the court whether in contempt or not. Ca. Temp. Hardw. 239. But the party may demur to improper interrogatories, ſuch as may tend to convict him of any other offence, R. v. Barber, 1 Str. 444., or ſubject him to a penalty. Ca. Temp. Hardw. 239. If reported in contempt, he immediately receives ſentence, unleſs the court, by conſent, wave giving judgment, and order the recognizance to be diſcharged, Rex v. James Wheeler. 3 Burr. 1256.; or the attorney-general conſent that he may be continued on his recognizance. R. v. Beardmore, 2 Burr. 797.—It is not uſual to allow coſts to a party who purges himſelf of a contempt which he is charged with: but where the charge has appeared quite groundleſs and vexatious, the court has given them. R. v. Plunket, 3 Burr. 1329. (*b*) R. v. Vaughan, Dougl. 516. It is a rule of the court of K. B. that the maſter's report cannot be moved for on the laſt day of term, without previous leave of the

the court, except in extraordinary caſes; and there muſt be always a perſonal ſervice of notice. R. v. Wheeler, 1 Bl Rep. 311. But attachments for non-payment of coſts, and not returning the writ, are expreſsly excepted out of this rule. 1 Burr. 651.]

[By a rule of the Court of K. B., *Eaſter* 34 *G.* 3., it is ordered, "That in future, whenever any writ of attachment ſhall iſſue "in order to compel any perſon to anſwer upon interrogatories, "and on which judgment ſhall not be given in the courſe of the "term, the name of the cauſe ſhall be inſerted in the liſt of mo- "tions appointed to come on peremptorily in the enſuing term, "in order that the Court may be informed what ſhall have been "done in proſecution of ſuch writ."

In Chancery, if a corporation is in contempt, there is no remedy by way of proceeding for a contempt perſonally, againſt the real parties who offend; but the mode of compulſion is by ſequeſtration. At law a corporation cannot be attached for contempt in their corporate character for not returning a writ directed to them, but an attachment in the nature of a *pone* is the proper way to compel an appearance. But where a *mandamus* goes to a corporate body to compel an election, the Court of B. R. it ſeems will attach the individuals who refuſe to proceed to it.]

Rex v. Dr. Windham, Cowp. 377. London v. Lynn, 1 H. Bl. Rep. 208. Biſhop of Chicheſter v. Harward, 1 Ter. Rep. 652.

Attorney.

AN attorney is one ſet in the place of another, and is either publick, as an attorney at law, whoſe warrant is *talis ponit loco ſuo talem attornatum*; or private, who has authority given him to act in the place and ſtead of him by whom he is delegated, in private contracts and agreements; which authority muſt be by deed, that it may appear that the attorney has purſued his commiſſion. Of this all perſons are capable, and therefore may be executed by monks, infants, feme coverts, perſons attainted, outlawed, excommunicated, villains, aliens, *&c.*; for this being only a naked authority, the execution of it can be attended with no manner of prejudice to the perſons under ſuch incapacities or diſabilities, or to any other perſon, who by law may claim any intereſt of ſuch diſabled perſons after their death.

But the perſon (*a*) here treated of is an attorney at law, who is appointed to proſecute and defend for his client, and is conſidered as an officer belonging to the courts of juſtice; concerning whom there are ſeveral ſtatutes and reſolutions.

Co. Lit. 52. 8 Co. 58. Hob. 9. Roll. Rep. 3. Of a *reſpondjalis* and his power, and how diſuſed ſince the ſeveral ſtatutes that have given power to make attornies, *vide* Co. Lit. 128. a.

(*a*) For private attornies *vide* tit. *Authority and Power.*

(A) Of

(A) Of admitting Perſons to act as Attornies, and the Qualifications neceſſary for ſuch Perſons.

(B) Who may appear by Attorney, and in what Caſes.

(C) Of retaining an Attorney, what ſhall be an Appearance; and therein of the Warrant of Attorney.

(D) Of the Power of an Attorney, when appointed; and the Regularity of his Proceedings.

(E) Of the Determination of his Power; and herein of diſmiſſing or changing him.

(F) Of his Fees and Diſburſements, and the Remedy for the Recovery of them.

(G) Of the Privileges which an Attorney has.

(H) Of Offences and Miſbehaviours for which he is puniſhable; and herein of the Form of the Proceedings againſt him.

(A) Of admitting Perſons to act as Attornies, and the Qualifications neceſſary for ſuch Perſons.

Vide 2 Inſt. 249. 377. Co. Lit. 128. 8 Co. 58. 2 Mod. 83. When firſt

BEFORE the ſtatute *Weſtm.* 2. *cap.* 10. all attornies were made by letters patent under the great ſeal, commanding the juſtices to admit the perſon to be attorney to ſuch an one; ſince which there have been ſeveral (*b*) ſtatutes and rules made for the better regulation of attornies.

of record, *vide* ſtatute 4 H. 4. c. 18. and Roll. Rep. 3. (*b*) 3 E. 1. c. 42. which ſee explained 2 Inſt. 249. 6 Ed. 1. c. 8. explained 2 Inſt. 311. 13 Ed. 1. c. 10. explained 2 Inſt. 377. 27 Ed. 1. 7 R. 2. 14. 3 H. 7. 1. 23 H. 8. c. 3. 29 El. c. 5. 31 El. c. 10. relating to caſes in which perſons may proſecute or defend by attorney; by the 4 H. 4. c. 18. are to be inrolled, and ſworn to execute their office truly. By the 1 H. 5. c. 4. no under-ſheriff to practiſe as an attorney. 33 H. 6. c. 7. For reſtraining the number of attornies in *Norfolk*, *Suffolk*, and *Norwich*, *vide* 2 Inſt. 250. 32 H. 8. c. 30. 28 El. c. 14. 4 An. c. 16. relating to the filing of warrants of attorney. By the 3 Jac. 1. c. 7. are to ſign bills of fees, and produce tickets of money given to counſel; *vide poſtea* letter (F. 190.) By the 13 W. 3. c. 6. muſt take the oaths. By the 12 G. 1. c. 29. made perpetual by 21 G. 2. c. 3. acting as an attorney after a conviction for forgery or perjury, to be tranſported.

Vide the ſtatute, and the ſame clauſes with reſpect to ſolicitors practiſing in

By the 2 *Geo.* 2. *cap.* 23., made perpetual by 30 *Geo.* 2. *cap.* 19. *ſect.* 75., it is enacted, "That no perſon from and after the "firſt day of *December* 1730, who was not duly admitted as an "attorney, purſuant to the directions of the ſtatute, ſhall be "permitted

" permitted to act as an attorney, or to ſue out any writ or " proceſs, or to commence, carry on, or defend any action or " actions, or any proceedings, either before or after judgment " obtained, in the name or names of any other perſon or perſons, " in any of his majeſty's courts of record, unleſs ſuch perſon " ſhall have been bound, by contract in writing, to ſerve as a " clerk, for and during the ſpace of five years, to an attor- " ney duly and legally ſworn and admitted; and unleſs ſuch " perſon ſhall have continued in ſuch ſervice during the ſaid " term of five years; and unleſs ſuch perſon ſhall be allowed of, " admitted, and enrolled by a judge of the ſaid courts, and ſhall " have taken the following oath: *I* A. B. *do ſwear, that I will* " *truly and honeſtly demean myſelf in the practice of an attorney, ac-* " *cording to the beſt of my knowledge and ability.* And in caſe any " perſon ſhall in his own name, or in the name of any other " perſon, ſue out any writ or proceſs, or commence, proſecute, " or defend any action or ſuit, or any proceedings in any of the " courts of law or equity, as an attorney or ſolicitor, for or in " expectation of any gain, fee, or reward, without being admit- " ted and enrolled (*a*); every ſuch perſon for every ſuch offence " ſhall forfeit and pay 50*l.* to the uſe of ſuch perſon as ſhall " proſecute him for the ſaid offence, and is hereby incapable to " maintain any action or ſuit in any court in law or equity, for " any fee, reward, or diſburſements, on account of proſecuting, " carrying on, or defending any ſuch action, ſuit, or proceeding; " and that no attorney or ſolicitor ſhall have more than two " clerks at a time, except the prothonotaries and ſecondary of the " King's Bench, who may have three clerks. Alſo a ſworn at- " torney, ſuffering any to act in his name, ſhall himſelf be diſ- " abled to act in any court, and his admittance in any court " ſhall from thenceforth ceaſe and be void: Provided, (*b*) That " an attorney or ſolicitor ſworn in any one court may, by the " conſent of an attorney or ſolicitor ſworn in any other court, " which conſent muſt appear in writing, ſigned by the attorney " or ſolicitor, in the name of ſuch attorney ſue any writ, pro- " ceſs, or commence, carry on, proſecute, or defend any action " or actions, or any other proceedings in ſuch court, notwith- " ſtanding ſuch perſon is not ſworn or admitted to be an attor- " ney of ſuch court."

courts of equity; and 23 G. 2. c. 26. ſ. 15. whereby ſolicitors may be admitted attornies without ſtamp or fee. [But attorney of B. R. cannot be admitted of C. B. without a new ſtamp. Barnes, 38.] Taking a turnkey for an articled clerk diſallowed, and the articles cancelled. Burr. Rep. 291. Frazer's caſe. [(*a*) A ſolicitor in Chancery may practiſe in the equity ſide of the Exchequer without being admitted a ſolicitor in that court. Meddowcroft v. Holbrooke, 1 H. Bl. Rep. 50.] (*b*) Attorney who gives another leave to practiſe in his name, is anſwerable for what he does in his name. 12 Mod. 666.

[By 12 *Geo.* 2. *c.* 13. § 7. None but regular attornies ſhall act in the county courts, under a penalty of 20*l.*

By the ſame, § 8. Quakers may be admitted upon their affirmation.

By 22 *G.* 2. *c.* 46. § 34. An affidavit of the actual execution of the articles of clerkſhip ſhall be made and filed within three months by the maſter and clerk, and none ſhall be admitted before ſuch affidavit ſhall be produced and read in open court. § 10. Affidavit ſhall be made by the clerk or maſter, of actual ſervice to ſuch maſter or his agent for the term of five years.

§ 7. None ſhall take or retain any clerk after diſcontinuing buſineſs.

§ 10. A clerk, in caſe of his maſter dying, or diſcontinuing buſineſs, or of his being diſcharged, if he ſerves the reſidue of his time in the manner preſcribed by the act to another, and makes the proper affidavits, may be admitted.

§ 16, 17. Sworn clerks in Chancery, or their clerks bound and actually ſerving for five years, or being admitted and ſerving as a waiting clerk the two laſt years, may be admitted ſolicitors; and ſo if their maſters die, and they ſerve under articles with others.

§ 18. No ſworn clerk to have more than two clerks.

§ 19. This act not to extend to the officers in the king's remembrancer's, treaſurer's remembrancer's, pipe office, or office of pleas in the Exchequer.

§ 11. Attornies acting as agents for unqualified perſons, or permitting them to uſe their names, to be ſtruck off the roll, and committed to priſon for any time not exceeding one year.

§ 12. None ſhall act as attornies at the ſeſſions who have not been admitted according to 2 *Geo.* 2. *c.* 23., under a penalty of 50*l.*, with treble coſts; and attornies ſuffering ſuch perſons to practiſe in their names ſhall incur the like penalty.

§ 13. The attornies of the duchy court of *Lancaſter*, or of the great ſeſſions in *Wales*, or of the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, acting within their reſpective juriſdictions, are exempted.

§ 14. No clerk of the peace or his deputy, or under-ſheriff or his deputy, ſhall act as attornies at the ſeſſions for the county, &c. where they ſhall execute ſuch offices, under the like penalty of 50*l.*

By 25 *Geo.* 3. *c.* 80. it is enacted, "That every ſolicitor, attorney, notary, proctor, agent, or procurator admitted, enrolled, or regiſtered in any of his majeſty's courts at *Weſtminſter*, or in any eccleſiaſtical court, or in any of the courts of admiralty, or cinque ports, or in any of his majeſty's courts in *Scotland*, the great ſeſſions in *Wales*, or in any courts in the counties palatine, or in any other court in *Great Britain*, holding pleas where the debt or damage ſhall amount to forty ſhillings or more, ſhall, previous to his commencing any ſuit or proſecution, take out annually a certificate of ſuch his admiſſion, enrolment, or regiſter: That for and upon every ſuch certificate ſo taken out by any ſolicitor, &c. who ſhall reſide in any of the inns of court, or in the cities of *London* or *Weſtminſter*, the borough of *Southwark*, the pariſh of *Saint Pancras*, and *Saint Mary-le-Bone*, or within the bills of mortality, or within the city of *Edinburgh*, there ſhall be charged a ſtamp-duty of five pounds: That for and upon every ſuch certificate ſo taken out by any ſolicitor, &c. who ſhall reſide in any other part of *Great Britain*, there ſhall be charged a ſtamp-duty of three pounds." And by § 6. "Any ſolicitor, &c. reſiding forty days or more in any one year within the limits of the higher duties, ſhall

"be

" be liable to the payment of thoſe duties, notwithſtanding he " may at other times, in ſuch year, reſide elſewhere without " thoſe limits."

In order to obtain ſuch certificate, § 3. directs, That every acting ſolicitor, *&c.* ſhall annually deliver into ſome one of the courts in which he ſhall have been admitted, ſworn, enrolled, or regiſtered, a paper or note in his proper hand-writing, containing his name and uſual place of reſidence, and marked and ſtamped with the proper mark or ſtamp of the duty by this act impoſed upon certificates, according to the place of his reſidence, and thereupon every ſuch ſolicitor, *&c.* ſhall be entitled to have a certificate (if the ſame ſhall be required) in manner next hereafter mentioned.

§ 4, and 5. The officers appointed to enrol attornies by 2 *G.* 2. *c.* 23. § 18. ſhall, upon payment of the fee of one ſhilling, enter, in alphabetical order, the name and place of reſidence of every ſuch attorney and ſolicitor, enrolled an attorney or ſolicitor in the ſaid courts reſpectively, (who ſhall have delivered in ſuch paper or note in writing duly ſtamped, and required a certificate of his enrolment as aforeſaid,) in rolls or books to be provided and kept for that purpoſe in the ſeveral offices in the act mentioned; and ſhall, at the time of making ſuch entry, ſubſcribe to every ſuch paper or note in writing ſo delivered in, a certificate ſigned by every ſuch officer, according to the form of the ſchedule annexed to the act; to all which rolls or books all perſons may, at reaſonable times, have acceſs without fee or reward: certificates ſhall then be iſſued to the perſons requiring the ſame, which ſhall bear date the day on which they are iſſued, and ſhall continue in force for one year, and be renewed every year at leaſt ten days before the expiration of the year for which they were granted.

By § 7. Every perſon acting in his own name, or in that of another, without a certificate, or giving in a falſe place of reſidence, with intent to evade the payment of the higher duties, ſhall forfeit fifty pounds, and is made incapable of maintaining any action for the recovery of any fee, reward, or diſburſement, on account of proſecuting, carrying on, or defending any ſuit or proceeding in which he hath ſo acted. But by § 8. Perſons who have taken out certificates may act for others who have alſo taken them out. And by § 9. Any perſon who hath duly obtained a certificate in one court, may act in any other court in which he is ſworn, without taking out a certificate in that court.

By § 10. It is required, that none of thoſe perſons who are expreſsly excepted out of the act of 2 *G.* 2. *c.* 23., by the 26th, 27th, and 28th ſections of that act, touching their admiſſion and enrolment, ſhall act as attorney or ſolicitor, unleſs they ſhall for the purpoſes of this act cauſe their name to be enrolled, and take out a certificate in like manner as required of ſworn attornies and ſolicitors. And § 11. extends this requiſition to all officers and clerks of any of the courts excepted in ſtat. 2 *G.* 2. But § 12. exempts from the payment of this duty all clerks in court who are charged with the land-tax in reſpect of their offices, whilſt they act merely officially.

By a rule of the court of *King's Bench*, Tr. 31 *G.* 3. (in aid and furtherance of the diſpoſitions of the legiſlature mainfeſted in the above acts,) It is ordered, "That, from and after the laſt day of "*Michaelmas* term then next enſuing, no attorney, who ſhall be "retained or employed as a writer or clerk by any other attorney, "ſhall, during the time of ſuch employ, take or have any clerk un-"der articles; and that no ſervice to any ſuch attorney under articles "during the time that ſuch attorney ſhall be ſo employed by any "other attorney ſhall be deemed good ſervice. And it is further or-"dered, That, from and after the ſame laſt day of *Michaelmas* term, "no perſon who ſhall enter into articles with an attorney or attor-"nies ſhall be at liberty to ſerve the agent or agents of ſuch attor-"ney or attornies, under ſuch articles, for a longer time than one "year of his clerkſhip, and that any ſuch ſervice to an agent or "agents beyond that time ſhall not be deemed good ſervice. And "to the intent that better information may be obtained, touching "the fitneſs and qualifications of perſons applying to be admitted "attornies, it is further ordered, That, from and after the ſame, "*&c.* every perſon who ſhall apply for admiſſion as an attorney in "that court, and who ſhall not have been admitted an attorney or "ſolicitor of any other court, ſhall, for the ſpace of one full term, "previous to the term in which ſuch perſon ſhall apply to be ad-"mitted, cauſe his name and place of abode, and alſo the name or "names and place or places of abode of the attorney or attornies to "whom he ſhall have been articled, written in legible characters, "to be affixed on the outſide of the court of *King's Bench*, in ſuch "place as publick notices are uſually affixed, and alſo in ſome "conſpicuous place in the chambers (*a*) of each of the judges of "that court, and in the *King's Bench* office; and that no perſon "who ſhall not have regularly complied with this order ſhall in "future be admitted an attorney of that court."

This rule has been ſince adopted by the court of C. P.

(*a*) But inſtead of fixing up his name and place of abode in the judges' chambers, it is ordered by a ſubſequent rule, Tr. 33 G. 3. That he ſhall enter, or cauſe to be entered, in a book to be kept for that purpoſe at each of the judge's chambers of that court, his name and place of abode, and alſo the name and place of abode of the attorney or attornies to whom he ſhall have been articled; and that no perſon who ſhall not have complied with this rule ſhall in future be admitted an attorney.

As a further means of reducing the number of this body of men, by ſtat. 34 *G.* 3. *c.* 14. the legiſlature have impoſed a duty of 100*l.* upon every contract in writing, to ſerve as a clerk, in order to admiſſion as a ſolicitor or attorney in any court at *Weſtminſter*, and a duty of 50*l.* upon every ſuch contract, in order to admiſſion into any court of great ſeſſions in *Wales*, *Cheſter*, *Lancaſter*, or *Durham*, or in any court of record in *England* holding pleas, where the debt ſhall amount to forty ſhillings. And § 2. no clerk can be admitted unleſs the indenture or writing containing the contract be enrolled, together with an affidavit of the due execution thereof, in the court in which ſuch clerk propoſes to be admitted, within ſix months next after the execution thereof; and in default of enrolment within that time the ſervice ſhall be deemed to commence from the time of the enrolment, and not from the execution of the indentures. And by § 3. every perſon ſhall, previous to his being permitted to practiſe, make an affidavit of the payment of the duty, and ſpecify in it the ſum paid, and the name and place of abode of the perſon or

perſons

perſons with whom the contract of ſervice was entered into, the time of the execution thereof, and of the enrolling of it; and, in caſe he ſhall have been previouſly admitted a ſolicitor or attorney in ſome other court, ſhall ſpecify in ſuch affidavit the court in which he has been ſo admitted, and time of his admiſſion, and cauſe the ſame to be filed in the court in which he propoſes to be admitted; which affidavit ſhall be produced and openly read in the court in which he propoſes to be admitted before he ſhall be enrolled therein.

The § 4. impoſes a penalty of 100*l.* upon any perſon, other than ſuch as ſhall have been admitted in one of the courts of great ſeſſions in *Wales*, *&c.* by virtue of a contract made before the 5th and 10th days of *February* 1794, and a ſervice in purſuance thereof, who ſhall in his own name, or that of any other perſon, ſue out any writ or proceſs, or commence, proſecute, or defend any action or ſuit, or any proceedings in any of the courts at *Weſtminſter*, without being admitted in one of them according to the directions of the ſeveral acts now in force for the better regulation of attornies; and further incapacitates him from maintaining any action for the recovery of his fees, *&c.* on account of ſuch proceedings.

But by § 5. perſons admitted in any court at *Weſtminſter*, who ſhall have paid the 100*l.* duty, may be admitted in any other court mentioned in the act without paying any further duty; and by § 6. a ſimilar proviſion is made for the admiſſion of thoſe who have paid the 50*l.* duty into any other court but thoſe at *Weſtminſter*. And by § 7. any perſon admitted in any of the above courts, by virtue of a contract and ſervice thereunder, before the ſaid 5th and 10th days of *February*, may be admitted to any of the other courts without the payment of the duties impoſed by this act. And § 8. protects articled clerks who ſhall have paid the duty from the payment of it again, upon any new contract with other maſters.]

An attorney ſworn and admitted in any of the courts at *Weſtminſter* may practiſe in any inferior court, unleſs ſuch court by charter or preſcription is reſtrained to a certain number of attornies, and has a power to exclude all others. Vent. 11. Sid. 410. Mod. 23.

Alſo if an attorney of any inferior court is refuſed the privilege of acting, or turned out by the judge or ſteward, a *mandamus* will lie to reſtore him. Lev. 75. Sid. 94. Keb. 349. Raym. 14. *vide* tit. *Mandamus*.

[An apprentice to a man as a ſcrivener, though he be alſo an attorney, cannot be admitted. Barnes, 39.

A barriſter cannot be admitted an attorney: if he is deſirous of being ſo, he muſt firſt apply to his ſociety to be diſbarred. *Ex parte* Cole, Dougl. 113.

An attorney who had at his own inſtance been ſtruck off the roll, and had been put into the commiſſion of the peace, and made a commiſſioner of the land-tax, moved to be reſtored; and on an affidavit ſetting forth his reaſons, the motion was granted, he conſenting to take no advantage of any action pending, if there ſhould be any.] Moody's caſe, Barnes, 42.

(B) Who may appear by Attorney, and in what Caſes.

2 Inſt. 924. Co. Lit. 128. 8 Co. 58. 2 Mod. 83. Of infants appearing in perſon, by guardian or attorney, *vide* head of *Infants*.

THE ſtatute of *Weſtm.* 2. *cap.* 10. gives to all perſons a liberty of appearing by attorney without any letters patent, which it ſeems they were formerly obliged to take out, otherwiſe they were to appear each day in court in their proper perſon (*a*); for the command of the writ being to appear, was always intended to be in proper perſon.

[(*a*) By reaſon whereof, Lord Coke obſerveth, there were but few ſuits. Co. Lit. 128. a.]

(*b*) 2 Hawk. P. C. 387. *Vide* Roll. Rep. 190. 2 Bulſt. 299. (*c*) 3 Inſt. 312. That the appellant and appellee muſt both appear in perſon. 3 Mod. 268. 4 Mod. 99. 2 Jones, 210. (*d*) 2 Hawk. P. C. 213.; and *vide* title *Appeal*.

But in a (*b*) capital caſe the party muſt always appear in perſon, and cannot plead by attorney: alſo in criminal offences, where an act of parliament requires that the party ſhould appear in perſon; ſo in (*c*) appeal, or on an (*d*) attachment.

Lev. 146. Kelw. 165. Dyer, 346. Cro. Jac. 462. 3 Inſt. 125. 2 Hawk. P. C. 273.

On an indictment, information, or action for any crime whatſoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceedings after, till conviction.

A clerk in court may confeſs an indictment for his client. 6 Mod. Rep. 16.

By the 18 *Eliz. cap.* 5. *par.* 1. it is enacted, "That every informer upon any penal ſtatute ſhall exhibit his ſuit in proper "perſon, and purſue the ſame only by himſelf, or by his attorney in court, and that he ſhall not uſe any deputy or deputies "at all."

By the 29 *Eliz. cap.* 5. *par.* 21. it is recited, "That divers of "her majeſty's ſubjects dwelling in the remote parts of the "realm, had been many times maliciouſly troubled upon informations and ſuits exhibited in the courts of the *King's Bench*, "*Common Pleas*, and *Exchequer*, upon penal ſtatutes, and had "been drawn up upon proceſs out of the countries where they "dwell, and driven to attend and put in bail, to their great "trouble and undoing; for reformation thereof it is enacted, "That if any perſon or perſons ſhall be ſued or informed againſt "upon any penal law, in any of the ſaid courts where ſuch perſon or perſons are bailable by law, or where by the leave or "favour of the court ſuch perſon or perſons may appear by attorney; in every ſuch caſe the perſon or perſons ſo to be empleaded or ſued, ſhall and may, at the day and time contained "in the firſt proceſs ſerved for his appearance, appear by attorney of the ſame court where the proceſs is returnable, to anſwer and defend the ſame, and not be urged to perſonal "appearance, or to put in bail for the anſwering of ſuch ſuits."

If

If one be outlawed upon an indictment for not repairing a bridge, and thereupon admitted to bring a writ of error, he (*a*) muſt appear, and in perſon aſſign his error; ſo adjudged and agreed by all the clerks of the crown-office in Sir *William Read*'s caſe; and though the court greatly pitied Sir *William*, becauſe he was ninety years of age, and very infirm, and had kept his chamber for a year and more, yet they held that it could not be done by attorney, being againſt the courſe of the court, and doubted whether the king's privy ſeal would help him; and he was thereupon brought from his houſe ten miles from *London*, in an horſe-litter, upon men's ſhoulders to the bar, and came into court and aſſigned his error, and put in bail to proſecute. Cro. Jac. 616. Sir William Read's caſe. (*a*) But if an adminiſtrator brings error upon an outlawry of his inteſtate for murder, he may appear by attorney; for though the party himſelf muſt have appeared in perſon, that he might have ſtood *rectus in curia*, and anſwer the matter of fact; yet in this *caſe*, that reaſon fails. March, 113. *vide* the ſtatute 7 H. 4. c. 13. By which a judge may examine into the inability of a perſon outlawed, to appear, and the court diſpenſe with a perſonal appearance; and Cro. Jac. 462. where on affidavit of ſickneſs, the court allowed of an appearance by attorney; *vide* the 4 & 5 W. & M. cap. 18. That perſons outlawed may appear by attorney, except for treaſon or felony, and reverſe the ſame without bail. 2 Salk. 496. acc. *Vide* tit. *Outlawry*.

If huſband and wife are ſued, the huſband is to make an attorney for her. 2 Sand. 213. Bridg. 73. See title *Baron and Feme*. *Vide* 6 Mod. 86.

If an idiot ſue or defend, he cannot appear by guardian, *prochein amy*, or attorney, but muſt appear in proper perſon; but otherwiſe of him who becomes *non compos mentis*, for he ſhall appear by guardian if within age, or by attorney if of full age. Co. Lit. 135. b. 2 Inſt. 390. 4 Co. 124. Palm. 520. 2 Sand. 335. *Vide* title *Idiots and Lunaticks*.

In an attachment of privilege by the marſhal, he ſhall have no attorney becauſe preſent in court. 6 Mod. 16.

(C) Of retaining an Attorney, what ſhall be an Appearance; and herein of the Warrant of Attorney.

AN attorney is not compellable to appear for any one, unleſs he take his fee, or back the warrant; after which the court will compel him to appear. Salk. 87. pl. 4. [Where an attorney of either bench has accepted a warrant, or ſubſcribed a proceſs, declaration, or warrant to appear, the rule is, "that he ſhall be compelled to cauſe an appearance, or be liable to an attachment, or put out of the "roll, as the caſe requires; and the party is not to be received to countermand ſuch appearance after "his retainer." Tidd's Pr. 124. The uſual mode of proceeding upon this rule is by attachment, 6 Mod. 42. 86; and if an attorney expreſsly undertake to appear, the court will oblige him to do it in a proper manner; as, if for an *infant*, he muſt appear by *guardian*, Goodwright v. Wright, 1 Str. 25. Stratton v. Burgiſs, *ibid.* 114. Power v. Jones, *ibid.* 445. And though he may have been impoſed upon by a ſheriff's officer, yet the court will oblige him to fulfil his undertaking. Lorymer v. Holliſter, 1 Str. 696.]

If before a writ be taken out an attorney promiſe to appear to it, and after it is taken out, it is ſhewed to him, he ought to appear, but that is no actual appearance; but if ſuch undertaking be after the writ is actually taken out, it is an appearance. 6 Mod. 42. *per* Holt, Ch. Juſt. *Vide* Comb. 299.

Salk. 86. pl. 3. *per* Holt ſaid to be the practice of the court.

Where an attorney takes upon him to appear, the court looks no farther, but proceeds as if the attorney had ſufficient authority, and leaves the party his action againſt him (*a*).

1 Keb. 89. [(*a*) But *Qu.* Whether an appearance under a forged warrant of attorney be good? and ſee the caſe of Robſon v. Eaton, 1 Term Rep. 62. where it was adjudged, that if *A.* pay a debt which he owes to *B.* to the attorney of a perſon ſuing him in *B.*'s name, but without his authority, he ſhall be obliged to pay it over again.]

1 Sid. 31. (*b*) Mordecai v. Solomon, Say. Rep. 173.

[For where he once appears, or undertakes to be attorney for another, he ſhall not be permitted to withdraw himſelf; and it is ſaid (*b*) to be his duty to proceed in the ſuit, though his client neglect to bring him money.]

Salk. 88. pl. 7. 6 Mod. 16. S. P. That an action will lie againſt an attorney for appearing without a warrant. 5 Mod. 205.

If an attorney appears, and judgment is entered againſt his client, the court will not ſet aſide the judgment, though the attorney had no warrant, if the attorney be able and reſponſible; for the judgment is regular, and the plaintiff is not to ſuffer when in no default; but if the attorney be not reſponſible or ſuſpicious, the judgment will be ſet aſide, for otherwiſe the defendant has no remedy, and any one may be undone by that means.

And for that reaſon an attachment denied. Comb. 2. *vide infra* Letter (H. 192.)

1 Wilſ. 39. 2 Keb. 199. 1 Lill. Pr. Reg. 134. 137.

[Attornies were anciently appointed in court, when actually preſent: but they are now uſually appointed out of court by warrant, which ſhould regularly be in writing; but an authority by parol is ſaid to be ſufficient to ſupport a judgment.]

Roll. Abr. 290. For this *vide* 13 Eliz. c. 14.

A warrant of attorney may be entered at any time (*c*) before judgment, or before a writ of error brought.

That after verdict in any court of record judgment ſhall not be ſtayed or reverſed for want of a warrant of attorney; and *vide* 32 H. 8. 30. and 4 An. c. 16. ſ. 3. that the plaintiff's attorney ſhall file his warrant the ſame term he declares, and the defendant's attorney the ſame term he appears, on pain of forfeiting ten pounds; and alſo ſuffering ſuch impriſonment, as by the diſcretion of the juſtices of the court, where any ſuch default ſhall happen to be, ſhall be thought convenient. *Vide* Roll. Rep. 186. March, 122. Goldſ. 91. Brownl. 46. Hetley, 59. Bulſt. 21. Cro. Jac. 277. *Vide* title *Error*. [(*c*) At any time *pendente lite*. 1 Str. 526. Noke v. Caldecot, 2 Str. 807. Henriques v. The Dutch Eaſt India Company, 2 Ld. Raym. 1532. S. C. Brooke v. Manning, Fitzg. 191.]

1 Salk. 88. R. E. 4 J. 2.

[It was formerly the courſe of the court of K. B. to enter the warrants of attorney on a particular roll kept for that purpoſe: but this courſe was altered by *Wright*, Ch. J. who cauſed them to be entered on the top of the plea-roll, as the practice is at this day.

It is to be obſerved with reſpect to the warrant of attorney, that by 25 *G.* 3. *c.* 80. above-mentioned, § 13, 14, 15. "No "attorney ſhall ſue out any writ or proceſs, or commence, proſecute, or defend any action, unleſs he ſhall have delivered to "the officer or his deputy, appointed to ſign or iſſue the firſt "proceſs for the plaintiff, or to enter, file, or record the bail or "appearance for the defendant, a *memorandum* or minute of his "warrant duly ſtamped, containing the names of the parties, "the court, and the attorney; and where a *præcipe* is required "(except for an original), the nature and denomination of the "proceſs, and the return of it; which *memorandum* or minute "the

But by § 17. No action ſhall be ſtayed, or judgment ſet aſide on account of the omitting to enter a *memorandum*.

" the ſaid officer or his deputy ſhall receive, and forthwith enter " or file on record, and ſhall ſign thereon the day of delivering " it." A ſimilar memorandum is required by § 19. previous to entering up judgment on a *cognovit actionem*, or warrant of attorney.]

No man, though by conſent of parties, can be attorney on both ſides, for the conſent of parties cannot change the law. Fareſl. 47. *per curiam.*

If the attorney in the original action, acts as attorney in the proceedings againſt the bail without any (*a*) new warrant, this is error; for though any perſon may take out a *ſcire facias*, yet upon the return a plea commences, and a new warrant of attorney ought to have been entered, becauſe this is a new cauſe and different record. Salk. 89. pl. 11. 402. pl. 10. 2 Salk. 603. 2 Salk. 369. 2 Ld. Raym. 821. 1252. 7 Mod. 3. 5 Mod. 397. Carth. 447. Burr. and Atwood.

(*a*) If the tenant makes an attorney *in banco*, and after, conuzance of this plea is demanded by a franchiſe, and granted, the attorney ſhall continue attorney for him in the franchiſe alſo, without other making, and he is his attorney there *in facto*, without other removal; for the conuzance is granted to hold plea as the juſtices ought, if this had not been granted. 21 E. 3. 45. b. 61. 21 Aſſ. pl. 17. Fitz. tit. *Receit*, 133. Roll. Abr. 290. S. C. So if after conuzance granted, a re-ſummons be ſued for the failure of right there in the court where this was granted, he continues attorney for him there alſo upon the firſt retainer. Roll. Abr. 290. If judgment be given *in banco* againſt the demandant, and this be reverſed in B. R. for error in the proceſs, the attorney whom the tenant had in the firſt plea, ſhall continue his attorney now in B. R. to anſwer to the original. Roll. Abr. 290.

In debt on a bail-bond, the principal gave a warrant of attorney to appear for himſelf, and likewiſe ordered the ſame attorney to appear for the bail, who were his neighbours; the attorney appeared accordingly, and for want of a plea, judgment was had againſt the principal and bail; but upon motion ſet aſide as to the bail, the principal's order not being a warrant to appear for more than himſelf, and it being by ignorance of the law, and not a wilful act, the judges diſcharged the attorney as to any contempt *. 2 Show. Rep. 161. pl. 147. Keb. 593. * *Qu.* If the courts would now ſet aſide the judgments againſt the bail, if they were regularly ſerved with proceſs, unleſs they had a good defence?

If there be a miſtake in the attorney's name, it may be amended by the warrant of attorney, for the warrant of attorney being precedent, will amend the roll, and the court will take notice that it is the ſame that appeared. Moor, 711. [*Vide* ſupra, tit. *Amendment*, (D 3.) the caſe of Richards v. Brown, Dougl. 114. where the very reverſe to this was done; the name in the warrant of attorney altered to that in the declaration.] But if the right name be no where entered, the court cannot amend. 3 Bulſt. 202. [In Phillips v. Smith, which was a penal action, a miſtake in the addition of the defendant in the warrant of attorney, was amended after error brought. 1 Str. 136.] *Vide* Salk. 88.

[The want of a warrant of attorney is aided after verdict (*b*), or judgment by *nil dicit* (*c*), &c. by the ſtatutes of jeofails.] (*b*) 18 El. c. 14. (*c*) 4 & 5 Ann. c. 16.

(D) Of the Power of an Attorney, when appointed; and the Regularity of his Proceedings.

THE authority of an attorney, when appointed, continues until judgment, and for a year and a day afterwards to ſue out execution, and for a longer time if they continue execution; Comb. 40. Roll. Rep. 366. Stile, 426.

but

but if not, the judgment is ſuppoſed to be ſatisfied and to make it appear otherwiſe, the plaintiff muſt (*a*) again come into court, which he either does by *ſcire facias*, or an action of debt on the judgment.

(*a*) And then a new authority is neceſſary. Salk. 86.

By the 2 *Geo.* 2. *cap.* 23. *ſect.* 22. it is enacted, "That every "writ and proceſs for arreſting the body, and every writ of "execution, or ſome label annexed to ſuch writ or proceſs, and "every warrant that ſhall be made out upon any ſuch writ, "proceſs, or execution, ſhall, before the ſervice or execution "thereof, be ſubſcribed or indorſed with the name of the attorney, "clerk in court, or ſolicitor, written in a common legible hand, "by whom ſuch writ, proceſs, execution, or warrant reſpec- "tively ſhall be ſued forth; and where ſuch attorney, clerk in "court, or ſolicitor, ſhall not be the perſon immediately retained "or employed by the plaintiff in the action or ſuit, then alſo "with the name of the attorney or ſolicitor ſo immediately re- "tained or employed, to be ſubſcribed or indorſed, and written "in like manner; and that every copy of any writ or proceſs "that ſhall be ſerved upon any defendant, ſhall before the "ſervice thereof be in like manner ſubſcribed or indorſed "with the name of the attorney or ſolicitor who ſhall be im- "mediately retained or employed by the plaintiff in ſuch writ or "proceſs."

[Where the attorney ſues for himſelf, his name need not be indorſed on the writ. 4 Term Rep. Fields one, *&c.* v. Lewen.]

All warrants for confeſſing judgments taken by any ſheriff or bailiff from any perſon in his or their cuſtody by arreſt, if not executed in the preſence of ſome ſworn attorney of either court, and his name ſet or ſubſcribed thereto as a witneſs, ſhall not be good or of any force, and upon oath made that the ſame was not done, the ſame ſhall be ſet aſide, and the ſheriff or officer may be puniſhed for ſo doing; and if judgment be entered thereon, the ſame on motion will be vacated and ſet aſide; and if execution thereon be executed, the party will have reſtitution awarded him.

Paſch. 15 Car. 2. B.R. Salk. 402. 6 Mod. 85. Str. 530. Barnes, 44. Wilmot v. Barry, Eſq.

[By a ſubſequent rule, Paſch. 4 Geo. 2. the attorney required to be preſent, muſt be an attorney on the behalf of the defendant. 2 Str. 902. He muſt be an actual attorney at the time; therefore one who had ſerved a clerkſhip, though he was ſworn an attorney ſoon after the execution of the warrant, and before any motion was made to ſet aſide the ſubſequent proceedings, was not thought ſufficient. Barnes v. Ward, Barnes, 42. Theſe rules are univerſal; they extend to warrants of attorney executed abroad. Firzgerald v. Plunket, 2 Str. 1247. But they are limited to the caſe of arreſts upon meſne proceſs; for one in execution may give a warrant of attorney to confeſs a new judgment, though an attorney on his part be not preſent. Watkins v. Hanbury, 2 Str. 1245. Fell v. Riley, Cowp. 281. Birch v. Sharland, 1 Term Rep. 715. But even in execution, if the party had been prevailed upon to acknowledge a judgment for more than was really due, the court would give relief. Cowp. 281. They are limited too to the particular cauſe, and the particular perſon at whoſe ſuit the defendant is in cuſtody; to warrants to confeſs judgments in other actions, to other perſons they do not extend. 5 Mod. 144. Churchy v. Roſſe, 2 Ld. Raym. 797. Finn v. Hutchinſon, 3 Burr. 1792. Holcombe v. Wright, Cowp. 141. Of courſe they do not apply to the caſe of a perſon in cuſtody on criminal proceſs. Charlton v. Fletcher, 4 Term Rep. 433. Though in ſtrictneſs they are confined to the caſe of perſons in cuſtody of ſheriffs' officers, yet where a *cognovit actionem* was taken from a priſoner in cuſtody of the marſhal, no attorney on his part being preſent, the court thought that the plaintiff's attorney had acted improperly, and relieved the priſoner. Parkinſon v. Caines, 3 Term Rep. 616. But theſe rules, intended for the protection of defendants, are not to be converted by them into inſtruments of fraud: therefore, where it appeared that a warrant of attorney given by one in cuſtody without an attorney on his part being preſent, was ſo given *purpoſely with a view to cheat the plaintiff*, the court refuſed to ſet it aſide. Gilman v. Hill, Cowp. 141. Where the defendant is himſelf an attorney, the preſence of another attorney on his part is not neceſſary. Walton v. Stanton, Barnes, 37.

In

In *assumpsit* the defendant pleaded *non assumpsit infra sex annos*; the plaintiff replied, and for want of the defendant's joining issue in due time, the plaintiff's attorney signed judgment, but afterwards consented to accept the joinder in issue; but upon motion to the court to compel him to accept it, it was opposed, because the plea was a hard plea, and the client had notice of the advantage, and ordered the attorney to insist upon it. The court said, that since it was a hard plea, they would not have compelled him if he had not consented to wave the advantage; but now they would hold him to his consent; and for the client, he was (*a*) bound by the consent of his attorney, and they could take no notice of him. Salk. 86. pl. 2. (*a*) That the attorney's consent to stand to an arbitration will bind the client, *vide* Carth. 412. Salk. 70. pl. 3. Skin. 679. 2 Salk. 787. 12 Mod. 129. Comb. 439. [See tit. *Arbitrament*, (C). Payment of a debt to the attorney, is payment to the party; but payment to an agent employed by the plaintiff's attorney, merely to sue the defendant, is not so. Yates v. Freckleton, Dougl. 623. But if an agent in town take money out of court, which the defendant has irregularly paid in under a judge's order, that shall bind the plaintiff, and be a waver of the irregularity. Griffiths v. Williams, 1 Term Rep. 710.]

In debt the plaintiff by attorney cannot enter a *retraxit*, because that is a perpetual bar, and in nature of a release. 8 Co. 58. Cro. Jac. 211. Jenk. 283. In trespass in *C. B.* there was a verdict for the plaintiff, and his attorney entered a *remittit damna* as to part, and judgment for the rest: and it was held, that the attorney, by his being constituted attorney, may remit damages, and that a *remittitur* need not be by the plaintiff *in propriâ personâ*, as a *retraxit* must. Salk. 89. pl. 9. Lamb and Williams. Ld. Raym. 589. Coux v. Lowther.

If a client desires his attorney to put in a plea, which the attorney knows to be false, in such case he may plead *quod non fuit veraciter informatus*, and thereby he discharges his duty Jenk. 52. Where two brought a writ of error, and the attorney for one of the parties assigned errors, to which the defendant took issue, and the other would plead in abatement. *Vide* 6 Mod. 40. 2 Stra. 783. Barnard. K. B. 4. Fitzgib. 1. and tit. *Error*.

[A *remittit damna* may be entered by attorney. Earl of Yarmouth v. Russel. 2 Ld. Raym. 1142.

The warrant of attorney continues in force until the judgment, and for a year and a day afterwards, in order to have execution.] 2 Inst. 378. Gilb. Exec. 92.

(E) Of the Determination of his Power; and herein of dismissing or changing him.

BY an order of the courts it is provided, that no person without rule of court, order of the judge or secondary, and notice to the adverse party or his attorney, shall change or shift his attorney (*b*); or if done by such order as aforesaid, the attorney newly coming in, is to take notice, at his peril, of the rules in the cause, whereof the former attorney was liable to take notice, and shall also pay such first attorney, upon demand, all such fees as the secondary shall tax to be due to him. *Vide* Fares. 50. 12 Mod. 440. [(*b*) Kaye v. De Mattos, 2 Bl. Rep. 1323. Macpherson v. Rorison, Dougl. 217. Walmesley v. Booth, 2 Atk. 27. Ld. Hardwicke said, that he did not know that a 60 clerk could not be changed merely at the pleasure of the party. Taylor v. Lewis, 2 Vez. 112. Payment to the plaintiff's late attorney, changed without leave of the court, is good. Powell v. Little, 1 Bl. Rep. 8.]

Vide Jenk. 179. Style's Prac. Reg. 137. 241.

That where the attorney for the plaintiff or defendant dies pending the ſuit, and the party whoſe attorney is dead, will not retain another attorney to manage his cauſe, the attorney againſt him may proceed, and is not bound to hinder his client's cauſe.

Raym. 18. Andrews v. Showell.

If *A.* gives a warrant of attorney to one to confeſs judgment in debt to *B.* by *non ſum informatus* at eight in the morning, and at ten the ſame day *A.* dies before the judgment is ſigned by the ſecondary, yet the judgment is regular.

[(*a*) Where the plaintiff after judgment received the money, and gave a warrant to an attorney to acknowledge ſatisfaction, and afterwards and before ſatisfaction acknowledged, revoked his warrant, the court would not ſuffer any proceeding upon the judgment without their leave. Manſer v. Shelley, Raym. 69.] Salk. 87. pl. 6. *Vide* Raym. 69. Latch. 8. Far. 2. 93. 2 Ld. Raym. 766. 849, 850. 2 Stra. 718. 882. 1081. Andr. 54. 309. Barnard. K. B. 357, 358. 404. Caſ. Temp. Hardw. 158. Barnes, 270. [(*b*) A judgment entered up by an attorney, on a warrant of attorney given to him after the death of his teſtator, as of a term when his teſtator was alive, will be ſet aſide. Gainſborough v. Follyard, Str. 1121. If it be made appear to the court that the party is dead at the time of moving to enter up judgment, they will not allow it to be done. 2 Str. 1081. But this relation does not operate in adverſary ſuits. Sibbet v. Ruſſel, Ca. Tem. Hardw. 183.

A warrant of attorney to confeſs a judgment is not revocable, (*a*) and the court will give leave to enter up the judgment though the party does revoke it, but it is determinable by the party's death; but if the party dies in the vacation, the attorney may enter up the judgment that vacation, as of the precedent term, and it is a judgment at the common law, as of the precedent term, (*b*) though it be not ſo upon the ſtatute of *frauds* in reſpect of purchaſers, but from the ſigning; alſo the attorney muſt bring in the roll before the eſſoin of the ſubſequent term, otherwiſe the court will not admit it to be filed.

(F) Of his Fees and Diſburſements, and the Remedy for the Recovery of them.

Vide Cro. Car. 159. and title *Maintenance.*

(*c*) If an attorney alleges a ſpecial promiſe to pay, the ſtatute cannot be pleaded. Salk. 86. pl. 1. Comb. 126. Al. 4. So if there be three counts in the declaration; the firſt for work done in proſecuting, &c. 2d. Upon an executory conſideration to proſecute and defend ſuits, and alleging a performance. 3d. Upon a general *inſimul computaſſet.* Carth. 57. Show. 48. S. C. 2 Barnard. K. B. 164. (*d*) Therefore does not extend to matters tranſacted in, or where part of the buſineſs was done in an inferior court, and part in *Weſtminſter.* Carth. 147. [But the law is otherwiſe now, for if *any part* of the demand ariſe from the conduct of buſineſs in the ſuperior

BY the 3 *Jac.* 1. *cap.* 7. it is enacted, "That no attorney, ſolicitor, or ſervant to any, ſhall be allowed from his client "or maſter, of or for any fee given to any ſerjeant or counſellor "at law; or of or for any ſum or ſums of money given for copies, to (*c*) any clerk or clerks, or officers in any court or courts "of record at (*d*) *Weſtminſter*, unleſs he have a ticket ſubſcribed "with the hand and name of the ſame ſerjeant or counſellor, "clerk or clerks, or officers aforeſaid, teſtifying how much he "hath received for his fee, or given or paid for copies, and at "what time, and how often; and that all attornies and ſolicitors ſhall (*e*) give a true bill unto their maſters or clients, or "their aſſigns, of all other charges concerning the ſuits which "they have for them, ſubſcribed with their own hand and name, "before ſuch time as they or any of them ſhall charge their "clients with any the ſame fee or charges."

perior court, the whole bill will be referred. Doug. 199. 4 Term Rep. 124. So if the whole be for buſineſs done at the ſeſſions, *ex parte* Williams, 4 Term Rep. 494. Clarke v. Donovan, 5 Term Rep. 694. And therefore in ſuch caſe the bill muſt be ſigned and delivered, *ibid.* A ſimilar rule prevails in equity, and it makes no difference if part of the buſineſs be done for ſeveral other perſons, as well as the party who applies. Marzennor v. Sandiford. 3 Br. Ch. Rep. 233. But if the *whole* demand be for conveyancing, the courts at *Weſtminſter* will not interfere. *Id.* Hillier v. James, Barnes, 41.] (*e*) *Vide* Raym. 245. and 3 Keb. 118, 514. Where this clauſe of the ſtatute was pleaded, and held a good plea. But where the executor of an attorney ſued for fees, the court held that it was not neceſſary to have the bill ſigned. Comb. 348. Rep. and Caſ. of Pract. *C. P.* 58. [But, on the defendant's undertaking to pay, the court will, in the caſe of an executor, refer it to be taxed, Imp. K. B. 482. Weſton v. Pool, 2 Str. 1056. though the practice ſeems to have been different formerly. Andr. 276. Wellis v. Nicholſon, Barnes, 119. Lee v. Knight, *id.* 122. Chapple v. Chapman.] This act may be given in evidence upon *non aſſumpſit* pleaded to an action brought for fees. Show. Rep. 338. 12 Vin. Abr. 76. pl. 71.

The executor of an attorney brought an action for fees and law buſineſs done by his teſtator; defendant moved to refer the plaintiff's demand to the maſter, but denied, becauſe all the buſineſs was done in another court; otherwiſe, had the buſineſs been done in this court, or partly in this; and beſides, the plaintiff was an executor. Salk. 89. pl. 1.

By the 2 *Geo.* 2. *cap.* 23. *ſect.* (*a*) 23. made perpetual by 30 *Geo.* 2. *cap.* 19. *ſect.* 75. it is enacted, "That no attorney or "ſolicitor ſhall commence or maintain any action or ſuit for the "recovery of any fees, charges, or diſburſements at law or in "equity, until the expiration of one month or more (*b*) after "ſuch attorney or ſolicitor reſpectively ſhall have delivered unto "the party or parties to be charged therewith, or left for him, "her, or them, at his, her, or their dwelling-houſe, or laſt "place of abode, a bill of ſuch fees, charges, and diſburſements, "written in a common legible hand, and in the *Engliſh* tongue, "(except law-terms and names of writs) and in words at length, "(except times and (*c*) ſums) which bill ſhall be ſubſcribed with "the proper hand of ſuch attorney or ſolicitor reſpectively (*d*), "and upon application of the party or parties chargeable by ſuch "bill, or of any other perſon in that behalf authorized, unto the "lord high chancellor, or the maſter of the rolls, or unto any of "the courts, or unto a judge or baron of any of the ſaid courts "reſpectively, in which the buſineſs contained in ſuch bill, or "the greateſt part thereof in account or value, ſhall have been "tranſacted; and upon the ſubmiſſion (*e*) of the ſaid party or "parties, or ſuch other perſon authorized as aforeſaid to pay the "whole ſum, that upon taxation of the ſaid bill ſhall appear to "be due to the ſaid attorney or ſolicitor reſpectively, it ſhall and "may be lawful for the ſaid lord high chancellor, the ſaid maſ-"ter of the rolls, or for any of the courts, or for any judge or "baron of any of the ſaid courts reſpectively, and they are "hereby required to refer the ſaid bill, and the ſaid attorney or "ſolicitor's demand thereupon, (although no (*f*) action or ſuit "ſhall then be depending in ſuch court touching the ſame,) to "be taxed and ſettled by the proper officer of ſuch court, with-"out any money being (*g*) brought into the ſaid court for that "purpoſe; and if the ſaid attorney or ſolicitor, or the party or "parties chargeable by ſuch bill reſpectively, having due notice, "ſhall refuſe or neglect to attend ſuch taxation, the ſaid officer "may

(*a*) This act does not extend to any bill of fees and diſburſements due from one attorney and ſolicitor to another. Stat. 12 G. 2. c. 13. ſ. 6. [But under the general juriſdiction of the courts, an agent's bill may be referred to be taxed; and it hath accordingly been done, the employer bringing into court the ſum remaining due on the amount of the plaintiff's claim, the ſum that ſhould be deducted, if any, to be afterwards repaid. *Ex parte* Bearcroft, E. 7 G. 3. Dougl. 200. Dixon v. Plant, M. 19 G. 3. *Ibid.*

"may proceed to tax the ſaid bill *ex parte*, (pending which reference and taxation no action ſhall be commenced or proſecuted touching the ſaid demand;) and upon the taxation and ſettlement of ſuch bill and demand, the ſaid party or parties ſhall forthwith pay to the ſaid attorney or ſolicitor reſpectively, or to any perſon by him authorized to receive the ſame, that ſhall be preſent at the ſaid taxation, or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner as the reſpective court aforeſaid ſhall direct, the whole ſum that ſhall be found to be or remain due thereon; which payment ſhall be a full diſcharge of the ſaid bill and demand; and in default thereof, the ſaid party or parties ſhall be liable to an attachment (*h*) or proceſs of contempt, or to ſuch other proceedings at the election of the ſaid attorney or ſolicitor, as ſuch party or parties was or were before liable unto: and if upon the ſaid taxation and ſettlement it ſhall be found that ſuch attorney or ſolicitor ſhall happen to have been overpaid, then in ſuch caſe the ſaid attorney or ſolicitor reſpectively ſhall forthwith refund and pay unto the party or parties entitled thereunto, or to any perſon by him, her, or them authorized to receive the ſame, if preſent at the ſettling thereof, or otherwiſe unto ſuch other perſon or perſons, or in ſuch manner as the reſpective court aforeſaid ſhall direct, all ſuch money as the ſaid officer ſhall certify to have been ſo over-paid; and in default thereof, the ſaid attorney or ſolicitor reſpectively ſhall in like manner be liable to an attachment or proceſs of contempt, or to ſuch other proceedings at the election of the ſaid party or parties, as he would have been ſubject unto if this act had not been made: and the ſaid reſpective courts are hereby authorized to award the coſts of ſuch taxations to be paid by the parties, according to the event of the taxation of the bill, (that is to ſay) if the bill taxed be leſs by a ſixth part (*i*) than the bill delivered, then the attorney or ſolicitor is to pay the coſts of the taxation; but if it ſhall not be leſs, the court in their diſcretion ſhall charge the attorney or client, in regard to the reaſonableneſs or unreaſonableneſs of ſuch bills."

(*h*) If action be brought before the expiration of a month after the delivery of the bill, it is a ground of nonſuit, but not of motion to ſtay proceedings. Harper v. Leech, Barnes, 123. But in order to enable an attorney to *ſet off* his bill, it is not neceſſary that he ſhould deliver it a month before; he muſt not indeed produce it at the trial by ſurpriſe; Murphy v. Cunningham, Exchequer, 1793. But if he deliver it time enough for the plaintiff to have it taxed before the trial, that is ſufficient. Martin v. Winder, E. 23 G. 3. Dougl. 190.

The object of the legiſlature in making this requiſition was, that the client may have due time to examine the charges, and take advice upon them if neceſſary; and therefore the attorney muſt not only deliver the bill, but *leave* it with the client; if he take it back again, the ſtatute is not complied with. Brooks v. Maſon, 1 H. Bl. Rep. 290. 1 Str. 633. It ſeemeth to have been formerly a common practice with attornies to deliver in their bills at any time pending the ſuit. Barnard. K. B. 316. But the client having this time given him to examine the bill, and a ſummary way of trying the reaſonableneſs of the items by reference to the maſter, ſhall not be allowed if he put the attorney to his action to diſcuſs the items at the trial; for if the buſineſs were really done, the delay of the defendant for more than a month in objecting to the *quantum*, is an admiſſion that he thinks *that* reaſonable. Dougl. 198, 199. Williams v. Frith, Harper v. Till. But a bill may be taxed after action brought, and at any time before verdict, or judgment, if the money be not paid. Shaw v. Pickering, B. R. M. 30 G. 3. Dougl. 198. notes. (*c*) By 12 G. 2. c. 13. ſ. 5. the bill may be written with ſuch abbreviations as are commonly uſed in the Engliſh language. (*d*) Taxation cannot regularly be applied for before bill delivered. Cowper v. Milburn, Barnes, 126. but the delivery of the bill may be compelled. Imp. K. B. 479. (*e*) Where a perſon who has obtained an order of taxation dies, his repreſentative ſhall not revive it, but on an undertaking to pay. 2 Atk. 114. (*f*) Heretofore, it ſeemeth, that no rule could properly be made for taxation, unleſs there was an action pending upon the bill. Springate v. Springate, Salk. 332. (*g*) The year before this ſtatute paſſed, Lord Chancellor King declared, that *he* firſt introduced the practice of bringing in the money into the courts of law when he was Lord Chief Juſtice C. P.; and that the ſame rule was afterwards adopted by

by the court of K. B.; for the party being ſtopped from ſuing at law, he thought it reaſonable that the attorney ſhould have ſecurity for his money; but his Lordſhip refuſed to do it in chancery. Moſ. 68. p. 40. And this was thought, ſaith Lord Hardwicke, a great hardſhip on clients at the time of making the act, becauſe an attorney might make a very unreaſonble bill, and put a burthen on his client to raiſe it: the act therefore varied the rule both of courts of common law and equity; ſo that the client ſubmitting to pay what ſhould become due, the bill ſhould be taxed, and that without bringing the money into court. 2 Vez. 451. In general, accounts cannot be taken on taxation of a bill, much leſs can the client after taxation allege an antecedent demand, and deſire to have that deducted; this would be to open a judgment, (for this is a judgment of the court upon the client's own ſubmiſſion to pay what may be due,) and would make theſe things ſo uncertain that there would be no end of them. *Ibid.* (*b*) In equity, after taxation, the ſolicitor may take out an attachment for the bill without firſt of all taking out a *ſubpœna*. But he muſt previouſly leave a copy of the order of taxation, and the maſter's report of the ſum at which the bill is taxed, at the client's houſe. 2 Atk. 114, Barnard. Ch. 266. (*i*) But the executor of an attorney pays no coſts, although above a ſixth part be taken off. Weſton v. Pool, 2 Str. 1056. Where an attorney accepted a leſs ſum than he demanded in diſcharge of his bill, and the bill was afterwards taxed, and a ſixth part of the ſum originally demanded taken off; the court conſidered the ſum accepted in full of his bill, as his demand; and therefore that he was not abſolutely liable to pay the coſts of taxation. Ecollier v. Dutour, Barnes, 128.]

[A ſolicitor cannot bring a bill in equity for his bill: nor can he go there for an account after his bill has been taxed, upon the ground that the officer has not made proper allowances.

Parry v. Owen, Ambl. 109. Oſbaldiſton v. Croſs, Com. Rep. 611.

Where a client, unaſſiſted by an attorney, has paid a law-bill, and accepted of a receipt for it, a court of equity has allowed him to open the whole account notwithſtanding, and to take exceptions to any improper or extravagant charges. And where a client has given an attorney a bond or mortgage to ſecure the payment of what was charged to be due to him on account of a law-ſuit, the courts of equity have relieved the client and ordered the bill to be taxed: and the ground on which this relief is given, is, the great power and influence which the attorney has over his client. *Per* Lord *Hardwicke*.

Walmeſley v. Booth, 2 Atk. 27. See too Sir William Sanderſon v. Glaſs, 2 Atk. 296. Proof v. Hines, Caſ. Temp. Talbot, 115. Newman v. Payne, 4 Br. Ch. Rep. acc.

A ſolicitor having taken a judgment of his client for 400*l.* whilſt the cauſe was depending, and ſeveral extraordinary charges appearing in the bill, Lord *Hardwicke* referred it to be taxed, though it had been adjuſted and allowed ſeventeen years before, and ordered the judgment and ſecurities to be given up.

Draper's Company v. Davis, 2 Atk. 295. 4 Br. Ch. Rep. S. P.

An attorney cannot be compelled to deliver up any deeds, or writings belonging to his client, which may come into his hands in the courſe of the buſineſs in which he hath been engaged, until his bill, taxed by the proper officer, hath been paid. But whether he have ſuch a lien upon deeds and writings the property of third perſons, which he hath ſo become poſſeſſed of, is a matter of doubt.

Comb. 43. 337. 4 Term Rep. 123. Moſ. 319.

Where an attorney had been employed by one who afterwards became bankrupt, and the aſſignees petitioned to have the papers delivered up, and that the attorney might come in for his demands *pari paſſu* with the other creditors; the Lord Chancellor ſaid, that the attorney had a lien upon the papers in the ſame manner againſt the aſſignees, as againſt the bankrupt; and though it doth not ariſe by any expreſs contract or agreement, yet it is as effectual, being an implied contract by law. But, he ſaid, that papers received after the bankruptcy could not be retained.

Park v. Carter, C. P. Tr. 1788. *Ex parte* Buſh, Mich. 1734. 7 Vin. Abr. 74. 1 Co. Bankrupt Laws, 514.

An

Dougl. 238. 3 Atk. 720. An attorney hath, in conſideration of his trouble, and the money he is in diſburſe for his client, a right to be paid out of the duty decreed, or money recovered by him. If ſuch money come to the attorney's hands, he may retain to the amount of his bill. He may ſtop it *in tranſitu*, if he can lay hold of it. If he apply to the court, they will prevent it from being paid over till his demand is ſatisfied; and it ſeemeth, that a payment by a defendant after notice from an attorney not to pay it till his bill is diſcharged, would be a payment in his own wrong, and like paying a debt, which hath been aſſigned, after notice. He is entitled to be paid out of money levied by a ſheriff upon an execution under a judgment recovered by his client; notwithſtanding the ſheriff may have had notice from the party againſt whom the execution iſſued, to retain the money, as the court would be moved to ſet aſide the judgment for irregularity; and notwithſtanding a docket may have been ſtruck againſt the client becoming a bankrupt.

1 H. Bl. Rep. 122.

Owſton v. O'Bryan, Barnes, 115. The aſſignees of a bankrupt cannot take out of court money paid in by a defendant in an action at the bankrupt's ſuit, till they have paid his bill.

Barnſley v. Powell, Ambl. 102. *Ex parte* Price, 2 Vez. 407. It hath been determined in equity, that he hath a lien on a lunatick's eſtate for money expended by him in ſuits at law and in equity. But the reporter queſtions this doctrine. However, in a caſe in the following year, on a petition by a ſolicitor to be paid his bill of coſts for taking out a commiſſion of lunacy, out of the lunatick's eſtate, and not to be obliged to come under a commiſſion of bankrupt which had iſſued againſt the perſon who took out the commiſſion of lunacy; Lord *Hardwicke* ſaid, that ſolicitors have this equity allowed them to be entitled to a ſatisfaction out of the fund for their expences, whether in the way of ſuit, or proſecution in lunacy, or bankruptcy.

3 Atk. 720. His lien upon a duty decreed his client gives him a preference to ſpecialty creditors.

Sharſton v. Hipſley, 4 Vin. Abr. 103. If employed in a ſuit by huſband and wife for a term of years in right of the wife, and the huſband die leaving no aſſets, equity will decree him ſatisfaction out of the profits of the term.

2 Vez. 25. The courts will not permit an attorney to be defeated of this remedy for his coſts by colluſion between his client and the defendant; as where a client, at whoſe ſuit a defendant was in cuſtody for non-payment of coſts taxed for ſcandal and impertinence, executed a mere voluntary releaſe to the defendant without the knowledge of the clerk in court, the chancellor would not diſcharge the defendant till he had paid the clerk his fees.

Dougl. 238. 2 Vez. 25. This however is to be confined to caſes of fraud and colluſion; for if the client has fairly and honeſtly terminated the affair with his adverſary, and the *whole* debt and coſts have been paid, this equity cannot be ſet up againſt the defendant.

1 H. Bl. Rep. 23. 2 Bl. Rep. 827. The attorney's lien upon the coſts is ſubject to the equitable claims of the parties in the cauſe.

But

But where a party againſt whom a judgment hath been obtained applies to get rid of the judgment, the court will take care that the attorney's bill is ſatisfied. 4 Term Rep. 123.

As where *A.* recovered againſt *B.*, and *B.* recovered againſt *A.* and *C.*, and *B.* moved to ſet off the damages which he had recovered againſt thoſe obtained by *A*; the court inſiſted upon his undertaking to ſatisfy the bill of *A.*'s attorney in the firſt action, he having a lien on the judgment for his coſts.

If a ſolicitor recover an eſtate for his client in equity, and the client die, he loſes his lien upon the eſtate in the hands of the heir at law; but if the ſuit be revived, the lien will revive too. *Per* Lord *Hardwicke.*] Ambl. 102.

(G) Of the Privileges which an Attorney has.

ATTORNIES have (*a*) privilege not to be ſued in any other courts except thoſe in which they are ſworn and admitted, becauſe of the prejudice that may accrue to the buſineſs of thoſe courts in which their attendance is required; neither are they to be held to ſpecial bail, becauſe they are obliged to attend, and therefore are preſumed to be always ameſnable; alſo as officers of the court they are entitled to the proceſs of attachment, and may ſue by attachment of privilege. 2 Leo. 256. *Vide* head of *Privilege*, and title *Abatement.*

(*a*) But this privilege an attorney ſhall not have at the king's ſuit. 2 Roll. Abr. 274. Bro. *Superſedeas* 1. 9 H. 6. 44. [But actions *qui tam* are not conſidered as the king's ſuits. T. Raym. 275. 1 Bl. Rep. 373. Cowp. 367.] Nor unleſs there be the ſame remedy in his own court; therefore ſhall not have it when money is attached in his hands by foreign attachment in the ſheriff's court in *London*. Sand. 67. *Vide* Comb. 427. Nor in an action real againſt an attorney of the King's Bench. Sand. 67. Nor appeal againſt an attorney of the Common Pleas. Sand. 67. Nor when he ſues, or is ſued in *auter droit*, as executor or adminiſtrator. 12 Mod. 316. Ld. Raym. 533. Hob. 177. Salk. 2. pl. 4. Nor when one attorney ſues another, if both of the ſame court. 2 Mod. 298. 2 Roll. Abr. 274. Barnes, 35.; [for if of different courts, the plaintiff is entitled to his privilege. 2 Str. 1141. 1 Bl. Rep. 19.] Nor when he joins, or is joined in the ſame action with others. Vent. 298. Dyer, 277. Godb. 10. 2 Roll. Abr. 275.

Alſo if an attorney of any of the courts of *Weſtminſter*-hall be choſen conſtable, he may have a writ of privilege for his diſcharge, for his attendance being neceſſary in thoſe courts, it is apparent that he cannot execute any inferior office in perſon; and this privilege he ſhall have, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom in reſpect of their eſtates, or otherwiſe, for that no ſuch cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. Cro. Car. 389. Noy, 112. March, 30. Vent. 16. 29. 2 Keb. 477. 508. Lev. 265. Raym. 179.

Vide tit. *Privilege*, (B).

(H) Of Offences and Miſbehaviour for which he is puniſhable; and herein of the Form of the Proceedings againſt him.

2 Hawk. P. C. 217, 18, 19. St. W. 1. 21. c. 29. 2 Atk. 173. Stile, 426. Cro. Car. 74. 6 Mod. 16. 187. 8 Mod. 109. 12 Mod. 251. 318. 440. 583. 657. 666. Freeman, 74. 4 Mod. 367. 2 Bl. Rep. 991. 4 Burr. 2060. Pitt v. Yalden. [An attorney, convicted of felony and puniſhed for it, was ſtruck off the roll as a perſon unfit for the profeſſion, though no particular miſconduct was imputed to him. *Ex parte* Brownfall, Cowp. 829.]

ATTORNIES are officers of the court, and liable to be puniſhed in a ſummary way, either by attachment, or having their names ſtruck out of the roll of attornies, for any ill practice attended with fraud and corruption, and committed againſt the obvious rules of juſtice and common honeſty: but the court will not eaſily be prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident, than deſign; or if the party injured has other remedy provided by act of parliament, or action at law.

38 E. 3. 8. b. Raſtal, 93. [2 Str. 1197. 1 Wilſ. 30. Oppenheim v. Harriſon, 1 Burr. 20.]

But if an (*a*) attorney take upon him to proſecute or defend a ſuit for another, without any manner of directions from him, the court will grant an attachment againſt him. [So if he put another attorney's name to proceſs without his authoriry.]

(*a*) Alſo a perſon taking upon himſelf to proſecute or defend any action, who is no attorney, is liable to be puniſhed in this manner, whether he had any directions or not. 2 Hawk. P. C. 217. In ſtrictneſs, he is liable to be puniſhed unleſs he record his authority or warrant of attorney in time. 2 Hawk. P. C. 217. See too 25 G. 3. c. 80. ſ. 13., &c.

2 Hawk. P. C. 218. [R. v. Tew, Say. Rep. 50.

(*b*) Where they are guilty of groſs negligence, the courts will, upon motion, compel them to indemnify their clients from the conſequences. Fawkes v. Pratt, 1 P. Wms. 593. But for a mere miſtake, the clients will be left to their ordinary remedy. Barker v Butler, 2 Bl. Rep. 780.]

Attornies are alſo puniſhable for baſe and unfair dealings towards their clients in the way of (*b*) buſineſs, as for protracting ſuits by little ſhifts and devices, and putting the parties to unneceſſary expences in order to raiſe their bills; or demanding fees for buſineſs that never was done; or for (*c*) refuſing to deliver up to their clients writings with which they had been entruſted in the way of buſineſs, or (*d*) money which has been recovered and received by them to their client's uſe; and for other ſuch like groſs and palpable abuſes.

(*c*) But the court will ſeldom grant an attachment for the detainer of ſuch writings or money, without firſt making a rule on the attorney to deliver them to the party; alſo it will juſtify an attorney's detaining ſuch writings or money for his ſecurity, till he be paid all his juſt fees; nor will it ever interpoſe in this manner, as to any writings or money received by an attorney on any other account, except only in his way of buſineſs as an attorney, but will leave the party to his ordinary remedy by action. Salk. 87. pl. 5. [But in the caſe of Strong v. How, though it appeared that the deeds did not come into the hands of the attorney in the way of his profeſſion, yet the court ordered him to deliver them up, otherwiſe attachment. Str. 621. 8 Mod. 339. S. C. And a like order was made in 3 Term Rep. 276. where they came into his poſſeſſion as ſteward of a court and receiver of rents. Where an attorney accidentally loſt a deed entruſted to his care, an attachment was granted, but ordered to lie in the office till farther directions. The mode of proceeding in this caſe ſeems to be, for the plaintiff to file a bill in equity againſt the attorney for a diſcovery of the deed; the expence of doing ſo to be paid by the attorney. Court v. Gilbert, 2 Barnard. K. B. 263. Where an attorney delivered back to his client a deed which he had received from him, the court would not, upon the motion of a third perſon by whom the deed had been lent to the client, grant a rule againſt the attorney to deliver it up. Dottin's caſe, Str. 547. Where it appears that a third perſon is intereſted in the deeds, the court will take a ſecurity from the perſon to whom they are delivered

delivered to produce them on demand for the inſpection of ſuch third perſon. Hughes v. Mayre, 3 Term Rep. 275. An attorney of one court practiſing in another court, thereby becomes ameſnable in this inſtance to the juriſdiction of ſuch other court. 8 Mod. 340.] (*d*) Attorneys embezzling their clients' money excepted out of the inſolvent debtors act.

Attornies are puniſhable for diſobeying the rules of court, of which they have notice, either expreſsly or impliedly; alſo for forging a writ, or any other matter of record, or but attempting to do it; or for taking out a *capias* which has no original to warrant it; or for receiving money of a client for ſuing out an original; and alſo for the fine due thereon to the king, where in truth no original was ſued out, nor any fine paid to the king; or for endeavouring to impoſe upon the court; as by cauſing an action to be brought againſt one in it, by colluſion, without any juſt ground, in order thereby to entitle the party to the privilege of the court, and afterwards, upon the examination of the matter in court, giving a falſe account of it; or for giving directions to a ſheriff concerning what perſon he ſhould return on a pannel *.

Cro. Car. 74. Dyer, 241. pl. 50. 244. pl. 58. Fitz. *Attachment*, 3. 7. 16 E. 4. c. Bro. *Privilege*, 43. Moor, 882. 2 Hawk. Pl. Cr. 145. c. 22. ſ. 11. 1 Com. Dig. 475. 20 H. 6. 37. a. 2 Inſt. 215. Lit. Rep. 46.

4 Inſt. 101. Hetl. 29. [See too ſeveral other inſtances where attornies are puniſhable. Str 420. 576. 899. 1024. C. T. H. 131. 237. Andr. 275. 2 Barnard. K. B. 219. Bl. Rep. 2. The ſtriking off the roll is not to be underſtood as a perpetual diſability, but may be conſidered in the light of a ſuſpenſion only, and the party may, if the court ſees cauſe, be re-admitted. Rex v. Greenwood, Bl. Rep. 222.]

* An attorney ordered to pay coſts, (as well as his client) having joined in an affidavit, to ſupport a frivolous complaint, and made reſentful declarations, which ſhewed him to be perſonally active in it. 2 Burr. 654.

[If attornies do any thing wrong *quà* attornies in inferior courts, the ſuperior courts will puniſh them for it, for they cannot act in the former, unleſs they are admitted of the latter.] Evans v. P——, 2 Wilſ. 382.

Audita Querela.

AN *audita querela* is a writ to be delivered againſt an unjuſt judgment or execution, by ſetting them aſide for ſome injuſtice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded it was the party's own fault, and therefore he ſhall not be relieved, that proceedings may not be endleſs.

(A) Who may be relieved by *Audita Querela*, and againſt whom.

(B) In what Caſes an *Audita Querela* will lie.

(A) Who may be relieved by *Audita Querela*, and againſt whom.

2 Inſt. 673. Dyer, 232. S. P. Moor, 75. S. P. adjudged.

IF an infant acknowledges a recognizance, ſtatute-merchant or ſtaple, or recognizance in nature of a ſtatute-ſtaple, he cannot avoid this without an *audita querela* brought before his full age, becauſe his nonage ought to be tried by inſpection.

10 Co. 43. S. P. Noy, 16. Yelv. 88. Cro. Jac. 59. 2 Roll. Abr. 57. 2 Bulſt. 320. *Vide* Reg. 149. F. N. B. 105. That an Infant may bring an *audita querela* to avoid a ſtatute for his nonage, although it be not certified or returned in any court. Ander. 228. And there ſaid, that the common practice was ſo, elſe the conuzor might be of age before the conuzee would procure it to be certified. *Vide* 3 Bulſt. 307. *Vide* title *Infant*.

Yelv. 155. Cro. Jac. 646. S. P. *Vide* Co. Ent. 87, 88.

If *A.* being within age becomes bail for *B.*, and after two *ſcire fa.* and *nihil* returned, judgment is given againſt *A.*, *&c.* he may have an *audita querela* and avoid the recognizance, and ſo the judgment thereupon of conſequence ſhall be avoided.

Where an infant was bail and taken in execution, and he brought an *audita querela*, and moved to be inſpected; the court, as a matter diſcretionary, refuſed to admit him to bail till he corroborated his allegation by the oaths of witneſſes, and a copy of the regiſter where he was born, was produced; but if he had brought his *audita querela* before he was taken in execution, he muſt have had a *ſuperſedeas* of courſe. Carth. 278, 279.

Cro. Jac. 694. *Vide infra*, letter B. * *Sed. qu.* If the court would not, on motion, have ſet aſide the judgment?

But if *A.* being within age enters into a bond to *B.*, who procures *C.*, without any warrant, to appear for *A.* and confeſſes a judgment thereupon, yet *A.* ſhall not have an *audita querela*, but he muſt take his remedy by action of diſceit againſt the attorney *.

Roll. Abr. 305. Cro. Jac. 85. *Vide* Sid. 55.

If tenant in tail acknowledges a ſtatute, and dies, and the conuzee ſues execution againſt the heir, he may avoid it by aſſiſe, without being put to his *audita querela*.

But the iſſue at his election may have an *audita querela*, if he will. Roll. Abr. 305. Cro. Jac. 85. That this is only an equitable action, and may be brought by a reverſioner, or him that has but *interiſſe termini*, or might have been by *ceſtui que uſe* before the ſtatute. March, 71.

Roll. Abr. 304. Cro. Jac. 424. 477.

So if a diſſeiſor acknowledges a ſtatute, and the diſſeiſee enters, the conuzee extends the land, the diſſeiſee is not put to his *audita querela* to avoid the extent, becauſe there is not the appearance of juſtice in this extent, the conuzor having only a tortious and unlawful ſeiſin of the land, and conſequently no power to charge it.

Raym. 19. Sid. 54. Keb. 112. 141. Lev. 41, 42. S. C. between Day and Guilford.

But if *A.* be tenant for life, remainder to *B.* his ſon in tail, *A.* enters into a recognizance and dies, *C.* brings a *ſcire facias*, and *B.* is returned heir and tertenant, and warned, but makes default; he can have no *audita querela* to avoid this execution, becauſe he had a day given him in court to ſet aſide the recognizance, and it was his folly not to appear when warned.

[So in a *ſcire facias* on a judgment, if defendant has a releaſe, but omits to plead it, he ſhall not have an *audita querela*. 1 Wilſ. 98.]

If

If a ſtatute be acknowledged to two, of which one is an infant, and they make a defeazance, and after ſue execution contrary to it, an *audita querela* ſhall be brought againſt both, for it does not appear within the deed that he is an infant; alſo the deed of an infant is only voidable, and peradventure he will affirm it. 48 E. 3. 12. b. Roll. Abr. 312.

If a ſtatute be made to baron and feme, and they make a defeazance, and ſue execution contrary to it, the *audita querela* ſhall be brought againſt both, although the defeazance be void as to the wife; for this action is in lieu of an anſwer of the execution, which is ſued by both; and this is all one as if the baron alone had made the defeazance, which would have been a ſufficient diſcharge. Roll. Abr. 312. [*Contr.* 48 E. 3. 12. Br. *Brief*, pl. 81. *Audita Querela*, pl. 12. *Baron and Feme*, pl. 24.]

If a ſtatute be acknowledged to a feme ſole and *J. S.*, and after the feme take huſband, and *J. S.* releaſe, and after execution be ſued, the *audita querela* may be brought againſt the baron and feme and *J. S.* 11 E. 4. 8. b. Roll, Abr. 312.

If two executors ſue execution for damages recovered by the teſtator, where one hath releaſed, an *audita querela* lies againſt both. 21 E. 3. 13. b. Co. Ent. 89. Roll. Abr. 312.

That no *audita querela* lies againſt the king. Noy, 26. 2 Bulſt. 325. Jenk. 129.

(B) In what Caſes an *Audita Querela* will lie.

IF a conuzee of a ſtatute releaſes to the tertenant all right, intereſt and demands, together with all ſuits and executions, and afterwards ſues execution, the tertenant ſhall have an *audita querela* to ſet aſide this execution. Cro. Eliz. 40. And. 133. Roll. Abr. 313. Co. Lit. 265.

291. 10 Co. 47. But it may be demanded, how a ſtatute, which has the force and ſolemnity of a judgment, can be avoided by an act of leſs notoriety than itſelf; as a releaſe, which is an act *in pais*, muſt be confeſſed to be; which overthrows the eſtabliſhed rule *unumquodque ſolvitur eo ligamine quo ligatur*. The anſwer to this is, that notwithſtanding the releaſe, *&c.* from the conuzee, the ſtatute ſtill continues in force; but the law, with reaſon, conſtruing all men's deeds moſt ſtrongly againſt themſelves, by this act precludes the conuzee from execution; but this muſt be by bringing an *audita querela*; for without this, nothing appears to the court deſtructive of the ſtatute: the words of the releaſe muſt be comprehenſive enough. *Vide* Cro. Eliz. 552. and the authorities *ſupra* *.

* See farther, Com. Dig. 1 V. 485, *&c.*

So in treſpaſs or other action, if it be found for the plaintiff at *niſi prius*, and after, before the day in Bank, the plaintiff releaſe to the defendant, and after judgment be given for the plaintiff, the defendant ſhall have an *audita querela* upon this matter, becauſe he could not plead the releaſe at the day in Bank. Roll. Abr. 307. Noy, 26. Cro. Jac. 646. Hob. 162. Yelv. 125. [Bro. Contin. p. 27. *Infra*, tit. *Pleas and Pleading*, P. See the caſe of Lovell v. Eaſtaff, 3 Term Rep. 554. where the bankruptcy of the plaintiff, between the trial and the day in bank, was pleaded as a plea *puis darrein* continuance.] But if it had been in the caſe of the king, the defendant at the day in Bank might have pleaded it, becauſe no *audita querela* lies againſt the king. Noy, 26. If there be judgment againſt the defendant for debt and damages, and before execution the money is paid to the plaintiff, who thereupon releaſes the defendant, and afterwards takes him in execution within the year, yet he ſhall not have an action for this vexation, but muſt bring an *audita querela*. 4 Mod. 14. †

† *Sed qu.* Would not a ſpecial action on the caſe lie?

Roll. Abr. 307. F. N. B. 105. If a conuzee of a ſtatute gives a deed of defeaſance to the conuzor, and afterwards ſues execution, contrary to the form of the defeaſance, the conuzor may have an *audita querela*, becauſe the defeaſance precludes the execution, if the terms or condition of it be performed by the conuzor; and the conuzor may have an *audita querela*, though the condition be not performed according to the defeaſance, if execution was ſued before the condition broken, becauſe the conuzee extended before his time; and therefore the execution, being unjuſtly ſued, muſt conſequently be an injury to the conuzor.

Moor, pl. 1097. In *audita querela* the caſe was this: The conuzee gave a defeaſance, that if he ſued execution of the lands the conuzor had in *Kent*, the ſtatute ſhould be void; the conuzee, contrary to his defeaſance, extended the land in that county; and it was adjudged this writ well lay to avoid the execution and vacate the ſtatute; for the defeaſance was no way repugnant to the ſtatute, becauſe the conuzee might ſtill extend the lands of the conuzor in any other county, and take his body and goods.

F. N. B. 104. If *A.* enters into a ſtatute to *B.*, and pays the money at the day aſſigned, upon which the ſtatute is cancelled, and after *B.* forges a new ſtatute in the name of *A.*, in this caſe *A.* may relieve himſelf by *audita querela*, for the forged ſtatute having all the eſſentials of a true one, the court was obliged to look on it as ſuch till the contrary appeared, which the conuzor could not ſet forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injuſtice of the pretended conuzee.

Roll. Abr. 313. If the conuzee of a ſtatute, upon agreement with the conuzor, delivers up the ſtatute in lieu of an acquittance, and after ſues execution, and the conuzor prays a re-extent, becauſe that the land was extended too low, and has it granted him, he ſhall never avoid the extent by *audita querela*, becauſe, by his praying the re-extent, he admits the ſtatute good and executory.

Roll. Abr. 305. 12 Mod. 365. If upon an *elegit* the ſheriff takes an inquiſition, and there are ſeveral lands found ſubject to the extent, and ſeveral values found, and the ſheriff returns, that he has delivered ſome of the lands in particular for the moiety, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a diſſeiſin by the entry, but only voidable by *audita querela*.

Roll. Abr. 307. So if the plaintiff conſents that one defendant only ſhall be delivered out of execution, Price v. Goodrick, Stile, 387. So if one of the bail be delivered out of execution, he ſhall not take the other. 3 Leon. 260. Stile, 117. If a man in execution upon a judgment for debt or damages, be delivered out of execution by the ſheriff or gaoler who hath him in execution, with the aſſent of him at whoſe ſuit he is in execution, and after, by colour of this judgment, he takes him again and puts him in priſon, an *audita querela* lies upon this matter, and thereupon he ſhall be delivered.

[It muſt be obſerved that the only point determined in the caſe of Price v. Goodrick was, that where the plaintiff conſents to the diſcharge of one defendant in execution, the court will not relieve the other upon motion, but put him to his *audita querela*.

querela. Whether entitled to relief or not upon the *audita querela*, was left open by that caſe. So conſidered by the court of Common Pleas, who acted accordingly in a like caſe of Williams v. Jaques and Griffin, Mich. 28 Geo. 3.]

But if *A.* be in execution at the ſuit of *B.*, and after *A.* eſcape with the conſent of the ſheriff, and after *A.* return to the priſon, and the ſheriff keep him in priſon upon the ſaid execution, *A.* ſhall not be diſcharged by *audita querela*, for *B.* has it ſtill in his election to have him in execution at his ſuit, and ſhall not be compelled to take his remedy againſt the ſheriff, who perhaps may be worth nothing, for this voluntary eſcape.

Vide title *Execution*, and Roll. Abr. 307. Hob. 60. Cro. El. 555. Moor, 57. 2 Leon. 118.

If the principal be taken in execution upon a judgment, and after a *ſcire facias* returned according to the courſe of the court, judgment be given againſt the bail, and thereupon he be taken in execution, and after the principal be delivered upon an *audita querela*, becauſe the recoveror had acknowledged ſatisfaction, *&c.* in this caſe, though the recognizance was forfeited by the bail, by not bringing in the principal at the time appointed by law; yet in as much as the judgment and execution againſt the bail depends upon the judgment againſt the principal, and he was but a ſecurity for the payment of the money, of which the recoveror is ſatisfied, the bail ſhall be diſcharged *.

Vide head of *Bail in Civil Caſes*, and Roll. Abr. 308.

* If the principal is taken in execution, the bail may plead it in diſcharge of themſelves, and if by accident they omit to plead it, and execution iſſues againſt them, I conceive on motion the court would ſet the execution aſide, the plaintiff being ſatisfied, by having the body of the principal in execution.

If *A.* and *B.* are bound in an obligation jointly and ſeverally, and judgment given againſt each on ſeveral actions brought, and both taken in execution, and after *A.* eſcapes, yet *B.* ſhall not be delivered upon an *audita querela*; for though the obligee may have an action againſt the ſheriff for the eſcape, yet till he is actually ſatisfied, the other ſhall not have an *audita querela*, for perhaps the ſheriff is worth nothing.

5 Co. 86. Bloomfield's caſe. Roll. Abr. 308. S. C. Q. If there be a diverſity where the plaintiff recovers againſt the ſheriff in debt, and where in caſe. *Vide* Mod. 170. 12 Mod. 105. 598. Danv. Abr. 635. †

† I ſhould conceive there is not any diverſity, but that plaintiff being *ſatisfied* by the ſheriff (and not till then) the court would diſcharge *B.* out of cuſtody, on motion.

If *A.* leaſes *Black-acre* for years to *B.*, and then acknowledges a ſtatute to *C.*, and afterwards another to *D.*, then *C.* takes a leaſe of the reverſion, and the rent from *A.*, by which he has ſuſpended the execution of the ſtatute during the term, and conſequently laid the land open to the extent of *D.* the ſecond conuzee, who ſues execution; if therefore *C.* ſhould extend the reverſion and rent during his own leaſe, *B.* the leſſee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, becauſe *C.* hath ſuſpended the execution of his ſtatute, the firſt in date, by the acceptance of the leaſe from the conuzor.

Roll. Abr. 304. Cro. Jac. 424. 477. S. C. between Harrington and Garraway.

If a ſtatute is erroneouſly acknowledged, as before one that has no authority; or if a ſtatute-merchant hath but one ſeal, an *audita querela* (*a*) lies, and not a writ of error, for this is no record; but if a ſtatute is well acknowledged, and the execution erroneous, a writ of error lies.

Cro. El. 233. 319. 810. Leon. 229. Owen, 142. Dyer, 35. pl. 27.

(*a*) That it lies where a man ought not to be charged, and yet without any default in himſelf hath no other way of avoiding

avoiding it. Kelw. 25. That it muſt be founded upon a ſuggeſtion not contrary to, but admitting the verdict. Sav. 69, 70. Where a judgment in a copyhold court reverſed upon petition to the lord, and the party reſtored to his damages by *audita querela*. Hob. 54. Where after judgment the treſpaſs was diſcharged by an act of indemnity. 2 Mod. 37. Fitzgib. 88. 130. Raym. 89. Keb. 634. Where the party muſt bring a *ſcire facias*, and cannot be relieved by *audita querela*, *vide* title *Scire Facias*. And where a writ of error, *vide* title *Error*, and Carth. 282. 4 Mod. 314. Ld. Raym. 27. Salk. 262. pl. 3. And where the party may be relieved on motion. Salk. 93. pl. 4. [Where a *feme ſole* married between interlocutory judgment and the final judgment, and after the final judgment, the huſband and wife brought a *ſcire facias* thereupon for the defendant to ſhew cauſe *quare executionem non*, &c. the court of Exchequer would not ſet aſide the judgment upon motion, but put the defendant to his *audita querela*. Lord Sutherland & Ux. v. ——, Bunb. 282. So where a *feme* married after the interlocutory judgment, and before executing the writ of inquiry, the court refuſed to interpoſe upon motion, and left the defendant to his *audita querela*. Chubbs v. Billington, Bunb. 283. The court will not relieve upon motion if the law is doubtful, though the facts are admitted, but will oblige the party to reſort to an *audita querela*. Lord Portcheſter v. Petrie, K. B. Tr. 23 G. 3. Williams v. Jaques and Griffin, C. P. M. 28 G. 3.]

F. N. B. 104. Roll. Abr. 308. Q. * Or perhaps a ſpecial action upon the caſe.

If a ſtatute be delivered to *B.* to be kept in an indifferent hand, upon certain conditions between the conuzor and conuzee; if *B.*, before the conditions performed, deliver it to the conuzee, and he ſue execution, the conuzor at his election may either have an *audita querela* upon this matter, or a writ of *diſceit* againſt *B.* *

Cro. Jac. 218. So upon a promiſe to diſcharge, &c. an action upon the caſe only lies. Bulſt. 152.

If the conuzor is taken in execution upon a ſtatute, and the conuzee covenants to diſcharge him from the ſtatute, the conuzor ſhall not thereupon have an *audita querela*, but muſt take his remedy by action of covenant.

Roll. Abr. 310.

If a man makes a feoffment upon condition to re-infeoff him, and after the feoffee, to the intent to deceive him, falſely and by covin between him and *B.* acknowledges a recognizance to *B.*, and after re-infeoffs him, the feoffee may have an *audita querela* upon this matter; for this is grounded upon the matter of record, as well as upon the matter of diſceit, which is matter *in pais*.

Roll. Abr. 310. An *audita querela* lies upon a ſuggeſtion that a ſtatute was made by *dureſs* of impriſonment. Roll. Abr. 310. Owen, 142. Vidian Ent. 107. So upon a ſuggeſtion that it is forged. F. N. B. 104.

If a man acknowledges a ſtatute, which is uſuriouſly entered into, and the conuzee ſues execution, the conuzor ſhall have an *audita querela* upon this matter.

2 And. 170. Yelv. 12. Noy, 47.

If *A.* hath lands in ſeveral counties, and enters into a recognizance to *B.*, and after acknowledges a ſtatute to *C.*, upon which *C.* extends the lands in one county, and after *B.* ſues execution upon the recognizance, and hath the moiety of the ſame lands delivered to him, but ſued no execution of the moiety of the lands in the other county; *A.* hath no reaſon to complain, becauſe *B.* hath taken in execution only a moiety of his lands, but *C.* may have an *audita querela* againſt *B.* becauſe it is prejudicial to him.

1 Roll. Abr. 311. (*a*) But whether thereupon the execution ſhall be avoided, or the party only have contribution, *vide* 3 Co. 14. b. 2 Inſt. 396. Mo. 537. Dyer, 331. Bulſt. 15. 17. But now *vide* 16 & 17 Car. 2. cap. 5. made perpetual by 22 &

If the conuzor infeoffs ſeveral men of ſeveral parts of the land, and after the conuzee ſues execution of the ſtatute againſt one, he ſhall have an *audita querela* (*a*) upon this matter.

22 & 23 Car. 2. cap. 2. by which no extent upon any ſtatute, judgment, or recognizance, ſhall be avoided or delayed, becauſe part of the lands extendable are omitted, ſaving to the party, whoſe lands are extended, his remedy for contribution. But note; no ſtatutes, unleſs conditioned for payment of money only, nor extents, unleſs within twenty years after judgment, &c. had, are within this act *.

* Nor is extent or contribution given by the act, againſt any heir within age.

If *A.* brings an *audita querela* againſt *B.*, and declares, that whereas *B.* had recovered againſt *A.* 200*l.* debt, &c. and thereupon the ſaid *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the ſuit of the ſaid *B.*, and after from the ſaid execution was delivered and ſuffered to go at large, &c. and yet *B.* hath taken out execution upon the ſaid judgment, and endeavours, &c. the defendant may plead and ſhew, how that after the ſaid enlargement, and before the purchaſe of the *audita querela*, the outlawry was ſet aſide and made void, and ſo conclude *quod non habetur tale recordum.* 8 Co. 141. Dr. Drury's caſe, *vide* Mod. 111. 3 Keb. 291. Rob. Ent. 157. 12 Mod. 105. 240. Ld. Raym. 439. Vent. 34. Salk. 93. pl. 4. 264. pl. 6. 2 Str. 1075. [After two *nihils* returned the court will relieve upon motion, but not after the *ſcire facias* hath been ſerved. But they will not do ſo in the former caſe if the fact on which the motion is grounded be controverted. 2 Str. 1198. Mitford v. Cordwell.]

If *A.* hath judgment againſt *B.* for coſts and damages, and releaſes to *B.* all executions, and after *B.* brings a writ of *error*, and thereupon the judgment is affirmed, and further coſts given for the delay of execution, and *A.* takes *B.* in execution for the whole, upon an *audita querela B.* ſhall be diſcharged *quoad* the damages and firſt coſts, but not *quoad* the ſecond coſts. Cro. Jac. 337. Roll. Rep. 11. S. C. *quod vide.*

If *A.* as adminiſtrator recovers damages in trover againſt *B.*, and after his adminiſtration is repealed, and granted to another, upon a ſurmiſe that *A.* intends and endeavours to ſue execution, *B.* may have an *audita querela*; for by the repeal of the adminiſtration the power of *A.* is abſolutely determined. 2 Sand. 148. Turner and Davis. Mod. 62. 2 Keb. 668. Lutw. 343. For this *vide* Brownl. 29. 91. Yelv. 125. Noy, 15. Stile, 417. Dyer, 203. Cro. Jac. 394. 6 Mod. 92. Fitzgib. 202. 257, 258. 10 Mod. 21, 22. 389. Comyns, 150. pl. 102. 2 Will. Rep. 576. pl. 188. 3 Will. Rep. 88, 89. and *vide* tit. *Executors and Adminiſtrators*, and 17 Car. 2. cap. 8. revived and made perpetual, by 1 Jac. 2. cap. 17. ſect. 5. whereby the adminiſtrator *de bonis non* is enabled to take out execution upon a judgment obtained by the executor or former adminiſtrator; and note this *audita querela* was brought only againſt the firſt adminiſtrator, and does not diſcharge the judgment, but the execution at his ſuit only. *Vide* Co. Ent. 91. a. An executor *durante minori ætate* obtains judgment, and the infant comes of age, &c. *Quære*, if an *audita querela* lies? *Vide* 3 Leon. 278. Godb. 104.

Authority.

(A) Where an Authority ſhall be ſaid to be given; and herein of the Conſtruction of the Words that create it.

(B) Who are capable of executing an Authority.

(C) Where an Authority is well purſued and executed.

(D) Where an Authority cannot be transferred.

(E) When it ſhall be ſaid to be determined and revoked.

(A) Where an Authority ſhall be ſaid to be given; and therein of the Conſtruction of the Words that create it.

11 H. 4. 71. 2 Roll. Abr. 8. Co. Lit. 52. *Vide infra* tit. *Feoffment*, E. tit. *Leaſes and Terms for Years.*

THAT power of acting which one man has, being tranſferred to another, is called an authority, and this the law allows of; for as a contract is no more than the conſent of a man's mind to a thing, if ſuch conſent or concurrence appears, it would be very unreaſonable to oblige him to be preſent at the execution of every contract, ſince it may be as well performed by any other perſon delegated for that purpoſe.

Co. Lit. 48. b. 2 Roll. Abr. 8. Salk. 96. *Vide infra* Letter (C). Brownl. 94.

But ſuch delegation or authority muſt be by deed, that it may appear that the attorney or ſubſtitute had a commiſſion or power to repreſent the party; alſo that it may appear that the authority was well purſued.

If *A.* by letter of attorney conſtitutes and appoints, and in his ſtead and place puts *B.* to ſurrender a certain copyhold, this authority is ſufficient, and as full as if ſaid for him and in his name, *&c.*

Roll. Abr. 328. Emery and Cook.

If a man ſigns and ſeals a leaſe of *ejectment* indented, but does not deliver it, and at the ſame time ſeals and delivers a letter of attorney, in which he recites, *whereas by indenture of leaſe, bearing ſuch a date*, &c. *hath demiſed to* B. *ſuch land* habendum: *now theſe preſents witneſs, that he makes* J. S. *his lawful attorney to deliver the ſaid*

ſaid indenture upon the land as his deed; though according to the proper ſignification of the words the leaſe ought to be taken to be delivered by him, and ſo this letter of attorney void, to deliver it again; for this cannot be an indenture if it was not delivered; yet all parts of the letter of attorney being laid together, and the intent of the parties, and proof being made that the leaſe was not delivered, but only ſigned and ſealed, it appears that this was only an improper expreſſion of his intent, by calling it an indenture and a demiſe; for if he had intended that this was an indenture ſealed and delivered, this letter of attorney to deliver it upon the land need not have been made.

If the authority in a letter of attorney be *ad petend', recipiend' & recuperand'* a certain debt, it is ſufficient to arreſt, *&c.* becauſe neceſſary in order to recover. Roll. Rep. 390. Palm. 394. Godb. 359.

If a ſteward makes a deputy *hâc vice* to take a ſurrender of a copyhold, *& ulterius ad faciend' quantum in ſe eſt;* by virtue of theſe laſt words the deputy may take a conditional ſurrender. Cro. Eliz. 48. See 12 Mod. 468.

An authority may be delegated by deed indented, though the attorney be not party to the deed, becauſe the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore ſince a man may take an eſtate in remainder, though he is no party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it. 2 Roll. Abr. 8, 9. Shep. Touchſtone 217.

(B) Who are capable of executing an Authority.

THERE are few if any perſons excluded from exerciſing a naked authority to which they are delegated; and therefore monks, infants, feme coverts, perſons attainted, outlawed, excommunicated, villains, aliens, *&c.* may be attornies; for the execution of a naked authority can be attended with no manner of prejudice to the perſons under ſuch incapacities or diſabilities, or to any other perſon, who by law may claim any intereſt of ſuch diſabled perſons after their death. Co. Lit. 52. a. Perk. ſ. 187.

A feme covert may be an attorney to deliver ſeiſin to her huſband; and ſo may he in remainder be an attorney to make livery to the tenant for life. Co. Lit. 52. a. Perk. ſ. 148. 199.

So if *ceſtui que uſe* had deviſed that his wife ſhould ſell his land, ſhe might ſell it to a ſecond huſband; for ſhe did it *in auter droit*, and the vendee was in by the deviſor. Co. Litt. 112. *Vide* Latch. 9, 10. 39. 134.

Jones, 137. S. C. Noy, 80. S. C. Co. Lit. 13th edit. 112. b. n. 6. 1 P. Wms. 149. Salk. 239.

(C) Where an Authority is well purſued and executed.

HERE it is neceſſary to take notice of a difference in the (*a*) old books, between a naked authority and an authority coupled with an intereſt; for if a man deviſe that his executors ſhall ſell his lands, this gives but a naked authority, and the lands, Co. Lit. 112, 113. 181. (*a*) But it has been holden in

equity, that if a man devises that his lands shall

lands, till the sale is made, descend to the heir at law; and in this case all must join in the sale; and if one die, it being a bare authority, (*a*) cannot survive to the rest.

be sold for the payment of his debts and legacies, though one of the parties who was empowered die, the survivor and heir at law must join in a sale. Hard. 204. So if lands are devised to be sold, and no person is named for that purpose, the heir must do it. [Locton v. Locton, 2 Freem. 136. and 3 Ch. Ca. 179. Garfoot v. Garfoot, 1 Ch. Cas. 35. Pitt v. Pelham, 2 Freem. 134. 1 Ch. Rep. 283. and 1 Ch. Cas. 176. T. Jon. 25. 1 Lev. 304. Yates v. Compton, 2 P. Wms. 308. (*a*) One devises the residue of his personal estate to *J. S.*, provided she marries with the consent of his two executors: upon the death of one, the condition is gone, for this is a bare authority, not coupled with an interest, and therefore cannot survive without express words for that purpose. Peyton v. Bury, 2 P. Wms. 626.]

Co. Lit. 113. b. 181. b. S. P.

But if a man by will give land to executors to be sold, and one of them die, the survivors may sell; for the trust being coupled with an interest shall survive together with it.

[This distinction between a devise *of lands to be sold by executors*, and a devise that *executors shall sell lands*, seems rather to consist in the arrangement of the words, than in any thing substantial; and the learned editor of the 13th edition of the 1st Inst. hath a very full note upon this passage of Lord Coke, in which he contends, that the power to sell being given to the executors *by reason of an office or interest*, which go to the survivor, may well survive with them in either case.] *Vide* Cro. El. 856.

Co. Lit. 112. b. (*b*) So if there had been but one executor living. Cro. Car. 382. Jones, 352.

Also if lands be devised to *A.* for life, and that after his decease his lands shall be sold by his executors, and he makes three or four executors, and during the life of *A.* one of the executors dies, and then *A.* dies, the surviving executors may sell, because the land could not be sold before, and (*b*) the plural number of executors remains.

Vide And. 145. Moor, 61.

Co. Lit. 113. * *Sed qu.* and *vide* Cro. Car. 382. *cont.* 3 Leon. 106.

But it is said, that if a will had given such power to certain persons, naming them by their names; as to *J. S.*, *J. N.*, *J. D.*, and one of them died, the survivors could not sell, for the words of the will in that case could not be satisfied *.

c. 156. Moor, 147. c. 291.

2 And. 59. Townsend and Wales. Owen, 155. Moor, 341. Cro. El. 524. S. C.

If *A.* being seised in fee of a reversion of twenty acres expectant upon an estate for life, and of other twenty acres in possession, for the performance of his own and his father's will, devises all his lands and tenements to his executors, and wills that they should take the profits thereof for ten years, and that after the expiration thereof the same should be sold by his executors, or by one of them, and dies, and after the tenant for life dies, and then one of the executors dies, the other two may sell the twenty acres; for as they may perform his will, so they may sell in order thereto.

Co. Lit. 113. 181.

At common law, if one of the executors who was empowered to sell lands refused, the others could not sell; but now, by 21 *H.* 8. *cap.* 4. notwithstanding part of those to whom power is devised refuse, the rest may sell; and so may such of those to whom land is devised to be sold, as are willing, though the others refuse, by a favourable construction of that statute; but they cannot in either case sell it to the executor that refused, for he is privy to the will, and executor still.

Co. Lit. 113.

My Lord *Coke* observes, that it is safest, in giving such power by devise, to limit it to the survivors or survivor, or those that prove the

the will, &c. and when an eſtate is deviſed to executors to be ſold, it is adviſable to appoint that the profits taken by them before the ſale ſhall be aſſets, for otherwiſe they ſhall (*a*) not.

(*a*) But *vide* head of *Truſt*; that they are now conſidered only as truſtees, and ſhall have no more than their coſts and charges.

If a man deviſes lands to his executors to ſell, and dies, the executors may ſell part of the land at one time, and part at another time, as they can find purchaſers. Co. Lit. 113.

A. by indenture demiſed to *B. habend' a die datus* (which was the tenth of *June*) *indenturæ prædict'* for his life, with a letter of attorney to make livery; the attorney makes livery the twenty-third of *July* following; and the livery was holden to be void, becauſe the eſtate for life being by the indenture to commence the tenth of *June*, the attorney had no authority to change the commencement of the eſtate, and therefore having not purſued his authority, by not giving livery, to let the freehold commence according to the deed, what he did afterwards was without any authority, and conſequently void; but in this caſe, if the deed had not been delivered till after the day of the date, and the attorney had given livery at the time of the delivery of the deed, this had been a good delivery, becauſe the deed of feoffment was to govern the livery, but the deed itſelf had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment began to operate, which was to govern it, ſeems to have well enough executed his authority. Cro. Jac. 153. Cro. El. 873. Lit. Rep. 144.

If a letter of attorney be to make livery upon condition, ſo as to make a conditional feoffment, and the attorney deliver ſeiſin abſolutely, the livery is not good, becauſe the attorney had no authority to create an abſolute fee-ſimple; and therefore ſuch abſolute feoffment ſhall not bind the feoffor, becauſe he gave no ſuch authority. 11 H. 4. 3. 2. 2 Roll. Abr. 9. And hence the attorney, in ſome books, is called a diſſeiſor. Co. Lit. 258. Perk. ſect. 188.

But if the letter of attorney had been to make livery abſolutely, and the attorney had made it upon condition, this ſeems a good execution of his power, and the feoffment good, becauſe when the attorney has once delivered ſeiſin, he has fully executed his power; and the condition annexed to it being without authority is void; and therefore ſhall not deſtroy the operation of the livery. 26 Aſſ. 39. 2 Roll. Abr. 9. Co. Lit. 258. Shep. Touchſtone, 218. Perk. ſ. 188.

If a warrant of attorney be given to make livery to one, and the attorney make livery to two; or if the attorney had authority to make livery of *Black-acre*, and he make livery of *Black-acre* and *White-acre*, though the attorney has in theſe caſes done more, yet there is no reaſon that ſhould vitiate what he has done purſuant to his power, ſince what he did beyond it is a perfect nullity and void. Perk. ſ. 189. [Alexander v. Alexander, 2 Vez. 640. Adams v. Adams, Cowp. 651.] But if the attorney was to deliver ſeiſin to two, and he had made livery only to one, that had been void, becauſe he had no authority to deliver the whole poſſeſſion to one excluſive of the other; and therefore it is void for the whole. Perk. ſ. 189. *Vide infra.*

If a letter of attorney be given to two jointly to take livery, and the feoffor make livery to one in the abſence of the other, in Co. Lit. 49. b. 2 Roll. Abr. 8.

in the name of both, this is void, becauſe they being appointed jointly to receive livery, are to be conſidered but as one.

Co. Lit. 49. 2 Roll. Abr. 8. But if a feoffment be made to *A.* and *B.*, and the feoffor give a letter of attorney to deliver ſeiſin, and *J. S.* give livery to *A.* in the abſence of *B.* in the name of both; this is a good livery, for though the entire poſſeſſion be delivered to one only, yet they being joint-tenants by the deed of feoffment, ſuch livery to one makes no alteration or change in the poſſeſſion, becauſe if the livery had been made to both, each had been placed in the whole poſſeſſion; beſides that, every man being preſumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the poſſeſſion for him; and therefore the livery of *A.* enures to the benefit of *B.* till he diſagrees to it.

Dyer, 62. Roll. Abr. 329. Co. Lit. 181. Roll. Rep. 299. Yelv. 26. But if a letter of attorney be made to three *conjunctim & diviſim*, and two only make livery, this is not good, becauſe not purſuant to their authority; for the delegation was to them all three, or to each of them ſeparately; yet if the third was preſent at the time of the livery made by two, though he did not actually join with them in the act of livery, the livery is good, becauſe when they all three are upon the land for that purpoſe, and two make livery in the preſence of the third, there is his concurrence to the act, though he did not join in it actually, ſince he did not diſſent from it.

Co. Lit. 52. 2 Roll. Abr. 9. If *A.* be diſſeiſed of *Black-acre* and *White-acre*, and give a letter of attorney to enter into both, and make livery, if the attorney enter into one acre only, and make livery *ſecundum formam chartæ*, this is not good, becauſe the attorney has not purſued his authority; for the eſtate of the diſſeiſor cannot be defeated without an entry into both acres; and till the eſtate be defeated the attorney cannot execute his power in the manner it was delegated, and therefore what he did in this caſe was void.

Co. Lit. 52. Pop. 103. Dyer, 131. a. 340. a. But *per* Rolle, it is the ſafer way for the feoffor to inſert a clauſe in the letter of attorney for the attorney to enter *& omnes alios inde expellend'*. 2 Roll. Abr. 8. that an attorney cannot make livery within view. *Vide* Co. Lit. 52. 2 Roll. Abr. 9. If a letter of attorney be given to *A.* to make livery of lands already in leaſe, the attorney may enter upon the leſſee in order to make livery, becauſe whilſt the leſſee continues in poſſeſſion, the attorney cannot deliver ſeiſin of it; and therefore to execute the power given him by the letter of attorney, it is neceſſary he ſhould have a power to enter upon the leſſee.

11 Co. 92. Roll. Abr. 328, 329. If the king grants a warrant to four officers of the Exchequer, by which he authorizes them, or any one of them, to pay out of the king's treaſure the coſts and expences of any man who ſhall be employed in the ſervice of the king; and two of the four give a warrant for the payment of a certain ſum to *J. S.*; this is a good warrant, though neither all four nor one only did it. [But Rolle adds, "*dubitatur*;" and Lord Coke ſaith, that "it was touched (but not reſolved) that they had *not* purſued their authority."]

5 Co. 91. Roll. Abr. 328. So if a judgment be aſſigned to the king in ſatisfaction of a debt due to the king, with a proviſo, that if the barons of the Exchequer,

Exchequer, or any two of them, revoke it, that it ſhall be void; and after three of the barons revoke it, (there being four in all,) this is a good revocation.

But if the words had been, that if the barons, or any twoof them, jointly or ſeverally revoke it, *&c.* there three of them could not revoke it, for this is neither jointly nor ſeverally *. 5 Co. 91. Roll. Abr. 328. * *Sed. qu.*

If an act done by three ſhall not be conſidered in this caſe as a proper execution of the power?

But if a ſheriff makes a warrant to four or three, on a *capias* jointly or ſeverally, to arreſt one, two of them may arreſt the party, for the greater expedition of juſtice. Co. Lit. 181. Palm. 52. 2 Roll. Rep. 137. Poph. 202. Cro. Eliz. 913. Noy, 47. Yelv. 26. 3 Bulſt. 209. Roll. Rep. 406. Roll. Abr. 329. 3 Vin. Abr. 418. [Where the king directed the deputy and council of *Ireland* to cauſe a biſhop to be inſtalled, and the deputy was changed, it was holden, that the ſucceſſor and council might do it. Palm. 27.] But a commiſſion directed to fix, four, or two, cannot be executed by three, becauſe that is a judicial act. Yelv. 26. Noy, 47. 2 Inſt. 380.

Where a perſon is authorized to do a thing, it is moſt (*a*) regular to do it in the name of him who gave the authority. *Vide* 9 Co. 76. b. Ld. Raym. 1418. Stra. 705. Godb. 389. Roll. Abr. 331. Moor, 70. pl. 191. 818. pl. 110. b. Salk. 96.

(*a*) But if executors have power to ſell lands, they may do it in their own names. Roll. Abr. 331. So if a deputy ſteward makes an attorney, or appoints an under-deputy to take a ſurrender of a copyhold eſtate, and he does it accordingly, without reciting his power, this is good; for where a man does ſuch an act as he cannot do, ſo as to be effectual any other way than by virtue of his authority, that ſhall be taken to be in execution of his authority. Salk. 95, 96. But where a man has an intereſt and authority, and does an act without reciting his authority, it ſhall be taken to be done by virtue of his intereſt. Salk. 96. For this *vide* 6 Co. 18. a. Sir Edward Cleer's caſe. Cro. Eliz. 878. Cro. Jac. 31. Co. Lit. 111. b. Jenk. 201. 215. Cro. Car. 335. [Hob. 160. 1 Atk. 559. Hardr. 395. 1 Ch. Caſ. 103. 1 Lev. 150.]

If the lord gives licence to a copyholder for life to leaſe the copyhold for five years, the copyholder may leaſe it for three years; for this is comprehended within the leaſe, inaſmuch as he hath given him licence to leaſe for more years. Roll. Abr. 330. For authorities that are to be ſtrictly purſued, ſee Moor, 43. Godb. 39. 2 Roll. Rep. 6. Owen, 73. Bulſt. 104. 2 Mod. 318. Kelw. 43. Lit. Rep. 141. Cowp. 26. One who hath power to make a leaſe for ten years, makes a leaſe for twenty; decreed good in Chancery for ten years. Chan. Ca. 23. *vide* head of *Leaſes and Terms for Years.*

So if the lord gives licence to a copyholder for life to leaſe the copyhold for five years, if the copyholder *tamdiu vixerit*, and he leaſes it for five years generally, without limitation; this is a good execution, and purſuant to the licence, for the leaſe is determinable by his death, by a limitation in law, and therefore as much is implied by law as if he had made an actual limitation. Roll. Abr. 330, 331. Cro. Ja. 436. S. C. Poph. 105. S. C. Cro. Eliz. 461. Owen, 73. S. C.

Where the *mayor* and *commonalty* of *London* had conſtituted J. S. their bailiff to receive their rents, and to make demand of them, and to make entry, ſuch general authority is not ſufficient to authorize a bailiff to take advantage and demand a rent accrued due after the authority given; for it is a new right attached, and there ought to be a ſpecial authority for this purpoſe. Skin. 413. pl. 10. Ruled by Holt, in evidence in *ejectment*, at *Guildhall.*

(D) Where an Authority cannot be transferred.

9 Co. 77. b. Roll. Abr. 330. (a) *Quære*, and *vide* head of *Executors and Adminiſtrators.*

ONE who has an authority to do an act for another muſt execute it himſelf, and cannot transfer it to another; for this being a truſt and confidence repoſed in the party, cannot be aſſigned to a ſtranger, whoſe ability and integrity were not ſo well thought of by him for whom the act was to be done; therefore an (a) executor having authority to ſell, cannot ſell by attorney.

9 Co. 76. 2 Roll. Rep. 393. Roll. Abr. 330.

So if leſſee for life hath power to make leaſes, rendering the ancient rent, he cannot make them by letter of attorney.

Mod. 210. Bringlo and Morris. But it is otherwiſe where a certain time is limited for the loan of the horſe;

If *A.* lends *B.* a horſe to ride to *York*, *B.* cannot let his man ride him; for the licence is a matter of pleaſure annexed to the perſon of *B.*, and cannot be transferred; adjudged upon a demurrer, in an action of treſpaſs, for immoderately riding the plaintiff's mare; where the defendant pleaded that the plaintiff *licentiam eidem dedit equitare*; and that the defendant and his ſervant *alternatim* had rid upon the ſaid mare.

for in that caſe he hath an intereſt in the horſe, and may let his ſervant ride him. So if *B.* for money lets a horſe to *A.* to ride to *York*. Mod. 210. 2 Ld. Raym. 913. 915, 916.

(E) When it ſhall be ſaid to be determined and revoked.

Vide 2 Roll. Abr. 9. Co. Lit. 52. b. and note 17. 14th ed. Perk. 188. Dy. 92. 277. 270.

THE authority given by letter of attorney muſt be executed during the life of the perſon that gives it; becauſe the letter of attorney is to conſtitute the attorney my repreſentative for ſuch a purpoſe, and therefore can continue in force only during the life of me that am to be repreſented; and hence it is, that if *J. S.* make a letter of attorney to deliver ſeiſin after my death, it is void, becauſe he cannot deliver ſeiſin during my life, for that were plainly without any authority from me; nor can he do it after my death, for the former reaſon.

14 H. 8. 3. 11 H. 7. 19. Co. Lit. 52. 2 Roll. Abr. 22.

But if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver ſeiſin, this authority does not determine by the death of the mayor or dean; but the attorney may well execute the power after their death, becauſe the letter of attorney is an authority from the body aggregate, which ſubſiſts after the death of the mayor or dean, and therefore may be repreſented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after ſeems not good.

Co. Lit. 52. b. (b) So if the leſſor grants over

If the leſſor by deed licenſes his leſſee for years or life to alien, who is reſtrained by condition not to alien without licence, and the leſſor (b) dies before the leſſee aliens; yet this is no counter-

mand

mand of the licence, for the licence exempts the leſſee out of the penalty of the condition, and it was executed on the part of the leſſor as much as could be. his eſtate, yet the leſſee may alien. Cro. Ja. 103.

If the king gives licence to alien in mortmain, and dies, yet it may be executed after. Co. Lit. 52. b.

So if the king licenſes *J. S.* to ſell wines, and dies. Sid. 6, 7. [In both

theſe caſes an intereſt paſſeth with the authority, and therefore it is that it doth not determine by the death of the king. But where a bare authority paſſeth, and no more, it ſeemeth to be otherwiſe. Pl. Com. 457. Hardr. 444. 1 Freem. 85. 115. 137.]

Bail in Civil Cauſes.

BAIL and mainprize, words often uſed in our law-books as ſynonymous (*a*), agree in this, that they ſave a man from impriſonment in the commom gaol, his friends undertaking for him before certain perſons, for that purpoſe authorized, that he ſhall appear at a certain day, and anſwer whatever ſhall be objected to him in a legal way. 2 Hawk. P. C. 140. (*a*) But in what they differ. *Vide* 4 Inſt. 180. Godb. 339. and 2 Hawk.

P. C. 140. That the chief difference is, that a man's mainpernors are barely his ſureties, and cannot impriſon him themſelves to ſecure his appearance, as his bail may, who are looked upon as his gaolers, to whoſe cuſtody he is committed, and therefore may take him up upon a *Sunday*, and confine him till the next day, and then render him. 6 Mod. 231. *per Cur.* 7 Mod. 77. 85. 98. Ld. Raym. 706. 12 Mod. 275. 348. 606, 607. 667. [So they may juſtify the breaking and entering the houſe, (the outer door being open,) in which the principal reſides, (whether he is ſolely poſſeſſed of ſuch houſe, or reſide in it by the conſent of another,) in order to ſeek for him, for the purpoſe of rendering him. Sheers v. Brooks, 2 H. Bl. Rep. 120.] Againſt him that is mainprized *de die in diem*, no bill can be filed; otherwiſe againſt him that is bailed. 4 Inſt. 180.—Alſo it ſeems that before the 23 H. 6. c. 10. the ſheriff was not upon an arreſt obliged to take bail, unleſs the party ſued out a writ of *mainprize*; but for this *vide* 2 Roll. Abr. 112. Title *Mainprize*.

The putting in bail in perſonal actions ſeems to be in imitation of the civil law, which requires that cautions ſhould be put in either by *pignora* or *fidejuſſores*, and the *idoneus fidejuſſor* was *ex arbitrio judicis approbatus, vel litigantium conſenſu acceptus*; for formerly in theſe actions, if the defendant did not appear on the ſummons, the proceſs was an *attachment*, and the ſheriff might attach him either by his goods or by pledges; and if he attached him by his goods, by his non-appearance his goods were forfeited; if by pledges, and the party did not appear, they were amerced. Vin. 839. *Digeſt*, lib. 2. tit. 8. Booth, 9, 10.

Under this head I ſhall conſider,

(A) What Perſons are authorized to take Bail.

(B) In what Caſes Special or Common Bail is required. And herein,

1. What the Debt muſt amount to for which there muſt be Special Bail.
2. Where the Demand is uncertain, and ſounds only in Damages.
[3. Whether a Defendant can be holden to Bail twice for the ſame Cauſe of Action?]
4. Whether Bail be required in Actions on Penal Statutes?
5. Of Perſons that are not required to put in Special Bail.
6. Where Special Bail is required on removing a Cauſe out of an inferior Juriſdiction before Judgment.
7. Of putting in Bail on bringing a Writ of *Error*.
8. Common Bail in what Caſes neceſſary.

(C) Where Bail ſhall be ſaid to be put in regularly. And herein,

1. Of the Manner of putting in, excepting to, and juſtifying Bail.
2. To what Time it ſhall have Relation.
3. Where a different Action is proſecuted from that to which Bail was given.
4. What Defect or Irregularity may be amended.

(D) Of the Proceedings againſt the Bail, and what they may plead in their Diſcharge.

[(D 2.) Of the Proceedings on the Bail-Bond.]

(A) What Perſons are authorized to take Bail.

2 Sand. 59. Vent. 55. 85. Mod. 33. Salk. 99. pl. 6. Ld. Raym. 425. 6 Mod. 122. [This, it is now ſettled, is a publick act, of courſe, need not be pleaded. Samuel v. Evans, 2 Term Rep. 569.]

WHEN the ſheriff arreſts any one, he is not only authorized, but obliged to take bail, otherwiſe an action on the caſe lies againſt him.

This the ſheriff is obliged to do by the 23 *H.* 6. *cap.* 9. which enacts, "That ſheriffs, coroners, *&c.* ſhall let to bail perſons by "them arreſted, or in their cuſtody, by force of any writ, bill, "or warrant, in any perſonal action, or becauſe of any indict-"ment of treſpaſs, upon reaſonable ſureties (having ſufficient "within the county) to keep their days in ſuch place, *&c.* as the "writ, *&c.* require, (ſuch as are in ward by condemnation, exe-"cution, *capias utlagatum*, or excommunication, ſurety of peace, or "committed by command of the juſtices; and vagabonds refuſing "to ſerve according to the ſtatute of labourers only excepted.)

But

But though the ſheriff is obliged to take bail, yet if the plaintiff diſlike the ſecurity, and does not take an aſſignment of the bail-bond, he may have the defendant brought up; for the ſheriff having arreſted him, (*a*) muſt return a *cepi corpus*, on which return it is a breach of duty in him not to bring him up, for which the court amerces him as one of their officers.

(*a*) 1 Vent. 85. Mod. 33. 57. 244.

But if the writ be not returned, and the court make an order that the ſheriff ſhall return his writ in four days, as is uſual, there the diſobedience is to the pronounced order of the court, and conſequently a contempt of the court, for which an attachment lies.

Vide tit. *Sheriff.*

If the ſheriff returns *cepi* on a meſne proceſs, & *paratum habeo*, he ſhall be only (*b*) amerced if he does not bring in the body, though he ſhall be attached if he does not return his writ; and the reaſon is, becauſe the ſheriff is bound to bail the party; and therefore if the ſheriff is miſtaken in his ſureties, he is not to ſuffer in his liberty; and the returning his writ is in his own power; but it may not be in his power to bring in the body which he was obliged to bail.

Roll. Abr. 807, 808. Cro. Eliz. 852. Noy, 39.

(*b*) That it is uſual at this day to ſerve the ſheriff with a rule to bring in the body before you move to amerce him. Salk. 99——If the ſheriff returns a *cepi corpus* and *paratum habeo*, or *languidus*, where the defendant is at large, without any bail taken, he is not aided by the ſtatute, but an action for a falſe return lies againſt him. Noy, 39. Roll. Abr. 807.*

* After the ſheriff has returned a *cepi corpus*, plaintiff may ſue out a rule to bring in the body: The intent of this rule is, to compel the ſheriff to put in good bail above, which if not done in due time, the court, on motion, will grant an attachment againſt the ſheriff, the conſequence of which is, generally, payment, by the ſheriff, of the debt and coſts, who ſeeks his remedy over againſt the officer, by whom the defendant was arreſted, or his ſureties; or, in *London*, againſt that ſecondary, or officer who took the bail-bond, if any, or his ſureties. 1 Wilſ. 262. Wolfe v. Collingwood.

And if the plaintiff takes (*c*) an aſſignment of the bail-bond, the ſheriff is not amerciable; for by accepting the bond, the plaintiff has waved the benefit of the amercement, and he may now ſue it in his own name, though formerly he could only ſue in the ſheriff's name; and if the ſheriff releaſed the action, his remedy was in a court of equity. 99. pl. 6. 6 Mod. 122. Gilb. H. C.P. 21.

[(*c*) For he is not obliged to do ſo. Rex v. Dawes, 1 Ld. Raym. 722.] Salk.

But now by 4 *Ann. cap.* 16. *ſect.* 20. for amendment of the law, it is enacted, " That if any perſon ſhall be arreſted by any writ, " bill, or proceſs, out of any of her majeſty's courts of record " at *Weſtminſter*, at the ſuit of any common perſon, and the " ſheriff or other officer takes bail from ſuch perſon againſt whom " ſuch proceſs is, the ſheriff or officer, at the requeſt and coſts " of the plaintiff in ſuch action or ſuit, or his lawful attorney, " ſhall aſſign to the plaintiff in ſuch action the bail-bond or other " ſecurity taken from ſuch bail, by indorſing the ſame, and at- " teſting it under his hand and ſeal, in the preſence of two or " more credible witneſſes, which may be done without any ſtamp, " provided the aſſignment ſo indorſed be duly ſtamped before " any action be brought thereon; and if the ſaid bail-bond, or other " ſecurity taken for bail, be forfeited, the plaintiff in ſuch action, " after ſuch aſſignment made, may bring an action and ſuit there- " upon, in his own name; and the court where the action is brought " may, by rule or rules of the ſame court, give ſuch relief to the

" plaintiff and defendant in the original action, and to the bail " upon the ſaid bond or other ſecurity taken from ſuch bail, as " is agreeable to juſtice and reaſon; and that ſuch rule or rules " of the ſaid court ſhall have the nature and effect of a de- " feaſance to ſuch bail-bond or other ſecurity for bail."

By the 4 *W. & M. cap.* 4. " The judges in each court, or " any two of them, whereof the chief to be one, may, by com- " miſſions under the ſeals of their reſpective courts, appoint " commiſſioners to take recognizances of bail in ſuits depending " before them, and upon affidavit of the true taking of them, " ſuch recognizances ſhall be as effectual as if they were taken " *de bene eſſe* before themſelves: §. 2. The cognizors, unleſs they " live in *London* or *Weſtminſter*, or within ten miles, may juſtify " before the commiſſioners in the country."

[And by the laſt ſection, " any judge of aſſiſe, in his circuit, " ſhall and may take and receive all and every ſuch recogni- " zance and recognizances of bail or bails, as any perſon ſhall " be willing and deſirous to make and acknowledge before " them, *&c.*"]

[But in *C. B.* a copy of the writ whereon bail is required muſt be written on parchment, and upon that the recognizance of bail engroſſed. Rules and Orders of *C. B.* 108.]

Before this ſtatute, bail was always taken *de bene eſſe* before a judge, as it may, and muſt be ſtill, if the cognizors live within ten miles of *London* or *Weſtminſter;* the commiſſioners are obliged by rule of court to keep a book wherein are the names of the plaintiff and defendant, and bail, and the perſon who tranſmits the ſame, and who makes affidavit that the recognizance was duly acknowledged in his preſence; on ſuch affidavit the judges make a conditional *allocatur*, and the bail are to ſtand abſolute, unleſs the plaintiff except againſt them within twenty days; and if he except, the bail may juſtify by affidavit taken before the commiſſioners in the country.

Cro. Car. 196. Roll. Abr. 561. S. C. Jones, 226. S. C.

If one is arreſted in *London* by a ſerjeant of the mace, upon a plaint of debt entered in any of the counters, the ſerjeant cannot take bail, (*a*) but the judge in court muſt *.

(*a*) Cro. Eliz. 77. S. P. agreed, and like point agreed, where an arreſt was upon a plaint in the court of *Nottingham*, and the defendant in gaol under cuſtody of the mayor, and not of the ſerjeant; and Cro. Eliz. 168. it is ſaid, that in all corporation courts the mayor, who is judge, is gaoler alſo.——Bail being a matter of record cannot be taken before any but the judge of the court, and not before the ſerjeant, though alleged *ſecundum conſuetudinem villæ*; but bail for appearance only may be taken by the ſerjeant. Cro. Jac. 94.

* *Qu.* If the ſecondaries, in *London*, and their deputies are not the proper officers for this purpoſe.

Anon. 1 Str. 479.

[The ſheriff cannot bail on an attachment, though a judge at his chambers may.]

(B) In what Caſes Special or Common Bail is required.

Vide head of *Sheriff*, *vide poſt*, where upon bringing a writ of

HERE it muſt be firſt obſerved that regularly, after judgment, no bail is to be taken; for the plaintiff having aſcertained his right, and proved his demand, the defendant muſt pay the condemnation

demnation money; for which purpoſe a writ of execution iſſues, to which the ſheriff can take no bail.

error, and where upon reverſing an outlawry, title *Outlawry*, and Carth. 459.

But if one in execution brings an attaint, (*a*) he may have (*b*) a writ to the (*c*) juſtices, commanding them to let him to mainprize.

F. N. B. 106. 2 Roll. Abr. 112.

(*a*) Cro. Eliz. 5. *per Wray*, the court doth not uſually bail, for the verdict is intended true till reverſed; but in ſome caſes upon good conſideration they will bail. (*b*) Reg. 123. a. (*c*) Dyer, 193. pl. 29. though at firſt it was doubted whether it lay to the juſtices *de B.*, and a caſe cited *cont.* where it was commanded to the warden of the *Fleet* to have the body in court *quolibet die*, &c. [See the form of this writ, and that *C. P.* may ſend to the marſhal of *B. R.* for ſuch a priſoner, and in what form it ſhall be. Dyer, 364. b.]

If an *audita querela* is founded upon a releaſe or record, the plaintiff may be bailed.

Dyer, 365. pl. 31. Roll. Rep. 132. ſaid *per Coke*, S. C. but ſuch bail muſt be taken in open court. Bulſt. 140. Latch. 113.

But if upon (*d*) a ſurmiſe of a matter of fact only, it is otherwiſe.

Roll. Rep. 132. *per Coke*, Chief Juſt. Roll. Rep. 384. S. P. *per Coke*, who ſaid that in the time of *Dyer* and *Wray*, and all his time, the practice had been never to bail, where grounded on a matter of fact only; but where upon a matter of writing in diſcharge the plaintiff had uſed to be bailed, the defendant being called to know whether he could deny it. *Vide Sid.* 286. Dyer, 285. pl. 41. 339. pl. 46. and *vide* 11 H. 6. c. 10. 2 Roll. Abr. 113. (*d*) Yet *vide* in ſuch caſes where the plaintiff was bailed. Cro. Jac. 29. 67.

If in an *homine replegiando* an *elongatus* is returned, and the defendant taken upon a *withernam*; though this is no execution, yet the defendant ſhall not be bailed unleſs he will confeſs the taking and having the party in cuſtody (*e*).

Raym. 475. Sid. 210. [(*e*) The doctrine here laid down is objected to in the caſe of Moor v. Watts, 2 Salk. 582. where it is ruled that a defendant taken upon a *withernam* may, if he plead *non cepit*, be admitted to bail. Wiſe v. Lawrence, Barnes, 59. S. P.]

But, if in an action for a falſe return of an *elongatus* againſt the ſheriff it is found for the plaintiff, he may be bailed.

Raym. 475.

As to the caſes in which ſpecial or common bail are required, I ſhall conſider,

1. What the Debt muſt amount to for which there muſt be Special Bail.

The old rule in the *Compleat Attorney* is, that if the defendant be arreſted by meſne proceſs, as *capias*, *alias*, or *pluries*, and the plaintiff hold him not ſufficient to anſwer to debt or damages contained in the writ, the ſame amounting to 20*l.* or upwards, that in this caſe the plaintiff, upon the return of the writ, by entering a (*f*) *ne recipiatur* with the filazer, out of whoſe office the *capias* did iſſue, may have ſpecial bail to be put in to this action, which the defendant muſt put in before ſome judge of the court where the cauſe depends, who will accept of ſuch bail as the validity or weight of the cauſe doth require, or in his diſcretion ſhall be thought fit.

Comp. Attor. printed 1667. fol. 45. (*f*) The *ne recipiatur* is entered by the attornies as officers of the court, after which no appearance is to be received till bail is filed with the judge.

This was the rule that both the courts of *King's Bench* and *Common Pleas* went by, but it was afterwards ſunk to 10*l.*, which has been long the ſtanding rule of the courts.

Vide the ſtatute, and 21 Geo. 2. c. 3. whereby it is made perpetual, and 5 Geo. 2. c. 27. whereby it is explained and amended, and 6 Geo. 2. c. 14. whereby it is extended to *Wales*, [and 19 Geo. 3. by which the cauſe of action in inferior courts is raiſed from 40*s.* to 10*l.* But a debt of 20*l.* muſt be ſworn to, to hold to bail in the counties palatine, or in *Wales*, on proceſs from Weſtminſter-Hall; for this ſtatute being in the affirmative, without negative words, is not a repeal of the 11 & 12 W. 3. c. 9. which requires a debt to that amount in order to hold to bail in thoſe places. Smith v. Dudley, 2 Str. 1102. Rayner v. Brough, Barnes, 89. *Vide* tit. *Soldiers* (B).]

And now by the 12 *Geo.* 1. *cap.* 29. it is enacted, "That where "the cauſe of action ſhall not amount to the ſum of 10*l.* in a "ſuperior court, or 40*s.* in an inferior court, the plaintiff ſhall "only ſerve the defendant with a copy of the proceſs, and ſhall "not arreſt his perſon; and that in all caſes where the plaintiff's "cauſe of action ſhall amount to the above ſums or upwards, "affidavit ſhall be made and filed of ſuch cauſe of action, and "the ſum or ſums ſpecified in ſuch affidavit ſhall be indorſed on "the back of ſuch writ or proceſs; for which ſum or ſums ſo "indorſed the ſheriff or other officer ſhall take bail, and for no "more."

Jacks v. Pemberton, 5 Term Rep. 552.

[The affidavit to hold to bail under this ſtatute muſt ſhew how the debt aroſe; and that plainly and diſtinctly, neither in general terms, nor in terms of art.

Cooke v. Dobree, 1 H. Bl. Rep. 10. Hubbard v. Pacheco, *Id.* 218. Cope and another v. Cooke, Dougl. 467.

Heathcote v. Goſlin, 2 Str. 1157. Jennings v. Martin, 3 Burr. 1437.

It muſt be a *poſitive* oath of the debt, made at the time of ſuing out the proceſs. It muſt not be argumentative, point to any further evidence, refer to any thing *dehors*, or leave any thing to be collected by inference, or reſt only on *belief*; but muſt be expreſſed in terms of direct abſolute aſſertion.

Bright v. Purrier, *Id.* 1687. Anon. 1 Wilſ. 121. Champion v. Gilbert, 4 Burr. 2126. Wheeler v. Copeland, 5 Term Rep. 364. Mackenzie v. Mackenzie, 1 Term Rep. 716. Powell v. Portherch, 2 Term Rep. 55. Williams v. Jackſon, 3 Term Rep. 575. Collier v. Hague, 2 Str. 1270. See the caſe of Moultby v. Richardſon, 2 Burr. 1032., where the words "as he computes it," added to a poſitive oath of the debt were holden by Foſter and Wilmot, (the only judges then in court,) not to invalidate the affidavit: and the caſe of Charter v. Jaques, Cowp. 529., where in trover againſt ſeveral, an affidavit that *all* the defendants had poſſeſſed themſelves of the goods, and had refuſed to deliver them up, and that *ſome or one of them* had converted them," was allowed to be ſufficient, the cauſe of action being expreſſed with preciſion in the preceding parts of the ſentence, and thoſe parts being independent on the ſubſequent words, "*ſome or one of them*," which are merely ſurpluſage. In the caſe of Loveland v. Baſſet, Tr. 16 G. 2. cited in 1 Wilſ. 232.; an affidavit by the aſſignee of a bond that went only to *belief* of the exiſtence of the debt was admitted, the bond itſelf being conſidered as ſome evidence of the debt; a preſumption that it was not paid, ariſing from its neither being cancelled, nor given up to the obligor.

Claphamſon v. Bowman, 2 Str. 1226. Rollin v. Mills, 1 Wilſ. 279. Van Morſell v. Julian, *Id.* 231.

Nor is this ſtrictneſs required only where it is made by the plaintiff himſelf: for it muſt be equally direct and ſubſtantive when it comes from a third perſon. And a defective affidavit by ſuch perſon cannot be helped by one made by the plaintiff himſelf in another country; for the oath *abroad* is no ground for proceſs *here*.

Rios v. Beliſante, 2 Str. 1209. Pomp v. Ludvidgſon, 2 Burr. 655.

Walrond v. Franſham, 2 Str. 1219. Barclay v.

But it is ſufficient if aſſignees of bankrupt, executors, &c. ſwear that they *believe* the debt to be due, becauſe from their ſituation *belief* is the higheſt degree of certainty which they can be

be expected to attain. But it muſt not be forgotten, that, in theſe caſes, the inſertion of the *belief* of the deponent is eſſential, and can on no account be diſpenſed with. And this exception, it ſeemeth, is not confined to perſons ſuing in this repreſentative character, but wherever from the nature of the queſtion the party can have but a ground of belief, an affidavit to that extent only will be admitted.

Hunt, 4 Burr. 1992. Tonna v. Edwards, *Id.* 2283. Sheldon v. Baker, 1 Term Rep. 83. *Id.* 717.

Hobſon v. Campbell, 1 H. Bl. Rep. 245.

A ſtill looſer form of affidavit is allowed in actions upon penal ſtatutes. It is enough in thoſe if the plaintiff ſtate in general terms the nature of the offence, and ſhew the amount of the penalty: he need not ſpecify the particular acts which conſtitute the offence, or charge in words directly that the defendant hath committed it; nor need he ſwear that the defendant is *indebted to him* in the ſum forfeited, or that the debt is ſtill due; becauſe it is poſſible that the right of action may have previouſly attached in another perſon; and beſides, as no one is entitled to the penalty until proceſs is actually ſued out, it is not a debt due to him at the time of making the affidavit.

Davis v. Mazzinghi, 1 Term Rep. 705. Rex v. Baptiſt Rebord, 3 Burr. 1569. Watſon v. Shaw, 2 Term Rep. 654. A miſ-recital of the year in which the ſtatute paſſed, is fatal; though the inſertion of it be unneceſſary. *Ibid.*

It is to be obſerved that there is a difference between the practice of the court of *King's Bench*, and that of the court of *Common Pleas*, with reſpect to the affidavits to hold to bail. In the latter, the defendant is ſuffered to file a croſs affidavit, and the plaintiff may afterwards file an additional one in order to ſupply the defects of the firſt. In the former court, the plaintiff can file only one affidavit, which nothing can be received from the defendant to explain or contradict, or from the plaintiff to ſtrengthen, or even impeach. In this court therefore it is abſolutely neceſſary that the affidavit ſhould have all that poſitiveneſs and preciſion above ſtated. In the other the ſame neceſſity doth not exiſt, as that court will reſort to other media of proof, and allow the plaintiff to explain himſelf more fully in a ſubſequent affidavit. Not that that court, though leſs ſtrict in the firſt affidavit, is wholly inattentive to it, or will in all events permit a ſupplemental one to be filed: for if the firſt be not a ſufficient one to found the proceſs, as, if it be made by a perſon infamous; if it be ſo drawn, though by a mere ſlip of the pen, as that perjury cannot be aſſigned upon it; if it wholly omit to ſtate the conſideration of the debt, a ſupplemental one cannot be received.

1 Term Rep. 717. 1 Bl. Rep. 249. Emerſon v. Hawkins, 1 Wilſ. 335. Roche v. Carey, 2 Bl. Rep. 850. Cope v. Cooke, Dougl. 467. Jacks v. Pemberton, 5 Term Rep. 552.

Nichols v. Dalyhanty, Barnes, 79. Reeks vs Groneman, 2 Wilſ. 224. Cooke v. Dobtee, 1 H. Bl. Rep. 10.

It is no objection to the affidavit that it was ſworn before a commiſſioner, who is concerned as attorney for the plaintiff.

R. E. 15 G. 2. B. R.

Howard v. Nolder, Barn. 60.

It is inadmiſſible, if made by a perſon convicted of felony, or other infamous crime.

2 Str. 1148. 2 Wilſ. 225. Barnes, 79.

In every action there muſt be a ſeparate affidavit; as one will not ſerve for different actions againſt one, or ſeveral defendants. And if there be only one in ſuch caſe, it is a fatal irregularity, and cannot be waved by any act of the defendant.

5 Burr. 2690. Dougl. 217. 5 Term Rep. 254.

Huſſey v. Baſkerville, cited in 2 Wilſ. 225. 1 Burr. 332.

If there be *no* affidavit, or if it be defective or not duly filed, or if the ſum ſworn to be not indorſed on the writ, the court will diſcharge the defendant on common bail.]

However the above ſtat. 12 Geo. 1. c. 29. hath ſuperſeded this doctrine, and that at this day an attorney cannot, any more than any other perſon, hold defendant to bail, unleſs the demand be 10 *l.* or upwards.

In an attachment of privilege, which is a *capias* in the firſt proceſs, the defendant is held to bail for any ſum though never ſo ſmall; for this being a *capias* in the firſt proceſs without ſummons, does not ariſe from a ſuppoſition of a *nihil* returned, but ariſes from a debt due to the officers of the court, by the acts of the court; and therefore another officer ought not to appear without ſeeing a ſecurity given for ſuch debt.

2. Where the Demand is uncertain, and ſounds only in Damages.

Vide 13 Car. 2. ſt. 2. c. 2.

Where the action is only for damages, there regularly the party is not to be holden to ſpecial bail; for there is no certain ſum for which bail can be aſcertained.

Sid. 307. Roll. Abr. 335. Lev. 39. Brownl. 90. Sid. 183. Raym. 74.

But in actions of *aſſault* and *battery*, *ſcandalum magnatum*, and for other perſonal wrongs, in which it is apparent the damages will exceed the ſum of 10 *l.*, the court, or any judge of the court, may and do, on good cauſe ſhewn, give leave to the plaintiff to ſue out a writ with the clauſe of *ac etiam billæ*, to hold the defendant to ſpecial bail *.

* But this muſt be on an affidavit of the facts.

Sid. 276. Special bail ordered *per cur'*, in caſe of a notorious battery.

So upon an affidavit of a great *maihem*, and that he intended to declare in *treſpaſs*, the court ordered a ſpecial *latitat*, with an *ac etiam*, and that ſo there ſhould be ſpecial bail.

Sid. 307.—So in caſe of a foul battery againſt a man and his ſervants. Comb. 57. See too 1 Bl. Rep. 192.—But this ſeems to be diſcretionary in the court; therefore *vide* Mod. 2.; ſpecial bail denied for putting an arm out of joint; and *vide* Roll. Abr. 335. pl. 14.

Sid. 63. (*a*) So ſpecial bail in *account*, *ſecus* in debt upon an account. 2 Roll. Rep. 53. Lev. 300. (*b*) And the meaſure of that ſhall be taken from the plaintiff's oath. Salk. 100. pl. 11. Barnes, 109. Say. Rep. 109. Dougl. 449. [(*c*) But a defendant may be arreſted for the penalty of a bond conditioned for the performance of a promiſe of marriage, &c., where the penalty is the real debt, or rather in nature of ſtated damages. 1 Wilſ. 59. 3 Burr. 1351. Dougl. 449.]

In debt upon a (*a*) bond for performance of covenants, the court will order bail according to the (*b*) breaches aſſigned (*c*) *.

* This muſt mean according to breaches ſtated in plaintiff's affidavit.

Tidd's Prac. 35.

[So in debt upon bond, conditioned for *the payment of money*, though the penalty is, ſtrictly ſpeaking, the legal debt; yet, as it is now conſidered upon the ſtatute of 3 & 4 *Ann. c.* 16. § 13. to be merely a ſecurity for principal, intereſt, and coſts, the defendant cannot be holden to bail for more than the ſum really due by the condition.

6 Mod. 14. 2 Str. 1192. 1 Wilſ. 23. S. C.

In *trover*, the defendant may be arreſted of courſe, though the action be brought for uncertain damages; for this is more an action of property than a *tort*.

1 Wilſ. 335. Say. Rep. 253. S. C. Cowp. 529. But it is ſaid, that where the defendant, being a cuſtom-houſe officer, was arreſted in an action of trover, brought againſt him for ſeizing goods, and if

it appeared by affidavit that there was a reaſonable foundation for the ſeizure, that the goods were depoſited in the king's warehouſe, and that the defendant had uſed due diligence in proceeding towards a condemnation in the Exchequer, the court ordered common bail to be accepted. 2 Bl. Rep. 1018. 1 Wilſ. 335. Say. 53. *ſemb. contr.*

Where there have been mutual dealings between the parties, the *balance* is conſidered as the debt at law as well as in equity.] Tidd's Prac. 35. 4 Burr. 1996.

In an action of debt on a bond, though the defendant ſays it was by *dureſs*, or on an uſurious contract, yet there ſhall be ſpecial bail, for the merits of the cauſe ſhall not be determined on motion; neither will the court put a ſlur upon the plaintiff's cauſe, which ought to come down fairly to trial, without prejudice. Salk. 100. *Vide* Dougl. 449.

So in an action for money won at play, if the contract be lawful, as being under 100*l.*, the defendant muſt put in ſpecial bail*. Salk. 100. pl. 10. 12 Mod. 295. *Vide* head of *Gaming*.

* There are few caſes now where ſuch an action will lie; and query, if for any ſum amounting to 10*l.* on games mentioned in the ſtat. 9 Ann. c. 14? See that ſtat. and the ſeveral acts of 2 Geo. 2. c. 28. 12 Geo. 2. c. 28. 13 Geo. 2. c. 19. and 18 G. 2. c. 34. See too Young v. Moore, 2 Wilſ. 67.

[3. Whether a Defendant can be holden to Bail twice for the ſame Cauſe of Action?

Regularly, a man cannot be twice arreſted for the ſame cauſe: and this rule was formerly ſo rigidly adhered to, that, where the plaintiff was non-pros'd for want of a declaration, he could not afterwards arreſt the defendant in a ſecond action (*a*). But a different doctrine now prevails; for the plaintiff is ſaid to ſuffer enough by paying coſts in the firſt action, and therefore ought not to be in a worſe condition than before (*b*).

(*a*) Almanzor v. Davilack, 1 Ld. Raym. 679. Com. Rep. 94. S. C.

(*b*) Turton v. Hayes, Str. 439.

Where the bail in the firſt action are forſworn and inſufficient, the court will permit the plaintiff to arreſt the defendant again in a ſecond action, even without diſcontinuing. Olmius v. Delany, 2 Str. 1216.

Where the plaintiff, having miſconceived his action, moves to diſcontinue upon payment of coſts, he may after the coſts are taxed and paid (*d*) take out a new writ for the ſame cauſe, and arreſt the defendant *de novo*.

(*c*) Belifante v. Levy, 2 Str. 1209.

(*d*) Bates v. Barry, 2 Wilſ. 381.

But where the plaintiff, not liking the bail in the former action, obtained a ſide-bar rule for leave to diſcontinue, upon payment of coſts, and afterwards proceeded to charge the defendant in cuſtody; the court, conceiving this to be a trick, diſcharged the ſide-bar rule; ſo that the bail ſtill continued liable. Belchier v. Ganſell, 4 Burr. 2502.

And wherever the ſecond action appears to be *vexatious* (*e*), or the defendant is arreſted or detained in cuſtody therein, after being *ſuperſeded* or *ſuperſedable* in a former action by the *laches* (*f*) of the plaintiff, the court will diſcharge the defendant on common bail. Nor will a promiſe to pay the debt (*g*) *ſubſequent* to the *ſuperſedeas* entitle the plaintiff to require ſpecial bail.

(*e*) Cox v. Chubb, 2 Bl. Rep. 809.

(*f*) Chambers v. Robinſon, 2 Str. 782.

Maud v. Branthwaite, *Id.* 943. Hall v. Howes, *Id.* 1039. Ca. Temp. Hard. 244. S. C. Cratchfield v. Seward, 2 Wilſ. 93. Blandford v. Foot, Cowp. 72. (*g*) Taylor v. Waſteneyes, 2 Str. 1218.]

In an action of debt on a judgment, whether after verdict or by default, the defendant cannot be arreſted, if he was previouſly 2 Str. 782. Newton v. Swynmer,

viouſly arreſted in the original action: even though the bail in that action have ſince become inſolvent (*a*), or the plaintiff has releaſed them by declaring in a different county (*b*), or the defendant has ſurrendered in their diſcharge, or obtained a *ſuperſedeas* (*c*).

Say. Rep. 43.
(*a*) Bowen v. Barnett, *Id.* 160.
(*b*) 2 Wilſ. 93.; but ſee *contr.* De la Cour v. Read, 2 H. Bl. Rep. 278. (*c*) 2 Str. 1039. R. H. 8 G. 2. C. B.; but ſee Caſ. Pr. C. B. 34.

It is now the ſettled practice as well of the court of K. B. as of that of C. P., to hold to bail in an action on a judgment, where the damages and coſts amount to 10*l.* or upwards, though the original debt or demand were under that ſum.

Nightingale v. Nightingale, 2 Bl. Rep. 1274.
Lewis v. Pottle, 4 Term Rep. 570.

So it is now ſaid to be the practice of both courts to hold to bail in an action of debt upon a judgment, notwithſtanding error brought, provided no bail was given in the original action.

Sellon's Pr. 49.

In an action on a recovery in a foreign court, there ſhall be only common bail.

De Balf v. Mackenſie, 2 Str. 1243.

In an action on a judgment of an inferior court, though bail were given in the original action below, yet defendant may be holden to ſpecial bail, becauſe no bail has been given in the ſuperior court before.

Davies v. Leckie, 1 Barnard. K. B. 94.

Where a cauſe in which the defendant has been arreſted is referred to *arbitration*, and the arbitrator awards to the plaintiff a ſum exceeding 10*l.*, the defendant may be arreſted again in an action upon the award.]

Collins v. Powell, 2 Term Rep. 756.

4. Whether Bail be required in Actions on Penal Statutes?

On a penal ſtatute the defendant is not holden to bail, becauſe the penalty on a ſtatute is in the nature of a *fine* or *amercement* ſet on the party for an offence committed; and therefore no perſon ought to ſuffer any inconvenience by reaſon of ſuch law, till he is convicted of the offence.

Yelv. 53. 2 Brownl. 293. Comyns, 75. Caſ. 48. 12 Mod. 231. Gilb. Hiſt. C. P. 37. [Several modern ſtatutes expreſsly require bail. 3 Burr. 1569. 1 Term Rep. 705. And where an action is brought on a *remedial* ſtatute, as on the ſtatute of 9 Ann. c. 14., by the loſer for money won at play, the defendant may be holden to bail. Turner v. Warren, 2 Str. 1079. Andr. 70. S. C.]

5. Of Perſons who are not required to put in Special Bail.

An heir, executor, or adminiſtrator, (*d*) ſhall not be holden to ſpecial bail; for the demand is not on the perſons, but on the aſſets of the deceaſed; and it would be unreaſonable to ſubject their perſons to an execution for the debt of another.

2 Brownl. 293. 3 Bulſt. 316.
(*d*) So though an attorney was plaintiff, and it was pretended he was entitled to have ſpecial bail by his privilege. Sid. 62. S. P. *per cur'*.

So if there be a judgment againſt an executor for the debt *de bonis teſtatoris*, and for the damages only *de bonis propriis*, he may bring *error*, and have a *ſuperſedeas*, without giving ſureties according to 3 *Jac.* 1. *cap.* 8. For though the words of the ſtatute are

Cro. Jac. 352. Cro. Car. 59. Lit. Rep. 2, 3.

are general, yet it muſt be intended where judgment is againſt the defendant himſelf, upon his own bond, or where the judgment is general againſt the executors; for it would be unreaſonable they ſhould find ſureties to pay the whole out of their own eſtate.

Neither is an executor, adminiſtrator, or heir, upon the removal of a cauſe out of an inferior court, obliged to put in bail. 268. 2 Jones, 82. Salk. 98. pl. 4. S. P. *cont.* Lit. Rep. 81. — 2 Lev. 204. Sid. 418. Lev. 245.

[If an heir, executor, or adminiſtrator perſonally promiſe and undertake, in writing, to pay any debt or legacy, he is liable to be arreſted upon it.] — Mackenzie v. Mackenzie, 1 Term Rep. 716.

So if there be a *devaſtavit* ſuggeſted (*a*), which can only be on an action of debt on a judgment, executors and adminiſtrators muſt find ſpecial bail. — Lev. 145. Sid. 63. Salk. 98. pl. 4.

[(*a*) But it ſhould be an actual *devaſtavit*, returned by the ſheriff, or at leaſt grounded on an affidavit. Duprett v. Teſtard, Carth. 264. A mere ſuggeſtion of a *devaſtavit* is not ſufficient. *Ibid.*] *Vide* head of *Executors* and *Adminiſtrators*.

An atttorney or other officer, whoſe attendance is required in the court to which he belongs, ſhall not be holden to ſpecial bail. — Mod. 10.

If baron and feme are ſued, the huſband muſt put in bail for both; but if the huſband does not appear upon the arreſt, the wife muſt file common bail before ſhe can be diſcharged; for otherwiſe the plaintiff could not proceed to obtain judgment. — *Vide* title *Baron* and *Feme*, and Goldſ. 127. Cro. Eliz. 370. Cro. Jac. 445.

Stile, 475. Mod. 8. 6 Mod. 17. Ld. Raym. 73. Salk. 115. pl. 4. 2 Stra. 1272. [Barnes, 96. 1 Term Rep. 486. 1 H. Bl. Rep. 235. 1 Wilſ. 264. If the coverture be doubtful, or the defendant have committed any fraud in order to procure credit, ſhe ſhall not be diſcharged upon motion; but ſhe muſt plead her coverture, which plea * muſt be in abatement, not in bar. Pearſon v. Mary Meadon, 2 Bl. Rep. 903. Partridge v. Clarke, 5 Term Rep. 194. Holland v. Ereſkine, Barn. 100. 6 Mod. 105. 7 Mod. 10. * Milner v. Milner, 3 Term Rep. 631.]——And where one partner muſt put in bail for another. Mod. 45.

[If a bankrupt, having obtained his certificate, conſcientiouſly promiſe to pay a debt, contracted previouſly to his bankruptcy, he cannot be arreſted thereon; for that would be taking advantage of his conſcientiouſneſs to uſe it againſt conſcience. — Bailey v. Dillon, 2 Burr. 736. But where the commiſſion, 2 Bl. Rep. 725. Cowp. 824., or certificate, Dougl. 228. appear to be fraudulent, he may be arreſted.

Inſolvent debtors, and fugitives, diſcharged under inſolvent acts, cannot be holden to bail upon *ſubſequent* promiſes to pay debts contracted *before* the time preſcribed by the acts: but they may (*b*), for debts contracted afterwards, and before they were actually diſcharged.] — Turner v. Schomberg, 2 Str. 1233. (*b*) Cowp. 527. The ſheriff, however, is not bound to take notice of their privilege, Dougl. 671. Nor do the clauſes reſpecting fugitives extend to perſons who have conſtantly reſided abroad; 1 Wilſ. 85.; or who have been abroad, merely in the courſe of their trade, and not for the purpoſe of avoiding their creditors. Say. Rep. 308.

6. Where

6. Where Special Bail is required on removing a Cauſe out of an inferior Juriſdiction before Judgment.

Salk. 98. pl. 4. *Vide* title *Courts, and their juriſdiction in general.*

Upon the removal of a cauſe by *habeas corpus* out of any inferior court into the courts above, though the ſum be under 10*l.* (*a*) the party (*b*) muſt file ſpecial bail, ſo that the plaintiff may not be in a worſe condition than he was in the court below; and the reaſon hereof is, that thoſe inferior juriſdictions being confined, they cannot follow the debt out of their own juriſdiction; and therefore it is requiſite that they ſhould be bail who live within their precincts *.

(*a*) *Vide* 19 G. 3. c. 70.

(*b*) But if the cauſe appears to be vexatious, the court above will conſider the *quantum* of the ſum in which bail ought to be taken. Salk. 101. pl. 15. 102. 2 Ld. Raym. 767. 7 Mod. 9. 6 Mod. 242. S. P.

* If bail is not in within due time, a *procedendo* iſſues, and carries the cauſe back to the inferior court.

Salk. 97. pl. 1. *per Holt*, Ch. Juſt.

If a cauſe be removed by *habeas corpus* out of the *Marſhalſea*, or any other inferior court, and the bail there offer to be bail to the action in the court above, the plaintiff is compellable to take them, becauſe he might, but did not except to them below.

Comb. 1. Skin. 244. pl. 9. Salk. 97. pl. 1. *per Holt*, Ch. Juſtice.

But it is otherwiſe where the cauſe comes out of *London*, for the ſufficiency of the bail there is at the peril of the clerk, and he is reſponſible to the plaintiff; ſo that the plaintiff had not the liberty of excepting againſt them, and the clerk is not reſponſible for their deficiency in the court above, though he was in *London*.

Cro. Jac. 363. *Beſton* and *Buller* adjudged, and there ſaid, that *Brook*, *Mainprize*, 96. and *Procedendo* 16. is ſo to be underſtood. Moor, 836. S. C. adjudged. 2 Bulſt. 286, 287. S. C. adjudged. Roll. Rep. 64. S. C. adjudged, notwithſtanding the old bail was diſcharged, and new put in; the new bail being taken off the file and made void the ſame term, while the record was in the breaſt and power of the court. *Vide* Cro. Jac. 203. and Yelv. 120. adjudged *cont.* But *per curiam* it is there ſaid, if the *procedendo* were delivered, *&c.* before bail given to the ſuperior court, it ſhould be a *ſuperſedeas* to the *habeas corpus*, and the old bail ſhould ſtand.

If a cauſe is removed out of an inferior court by *habeas corpus*, and new bail found, and after in the ſame term it is remanded by *procedendo*, the old bail ſhall ſtand; for when a cauſe is remanded the ſame term in which it was removed, no record is made thereof.

Otherwiſe where it is remanded in another term.

Cro. Jac. 363. Moor, 836. pl. 1128. Roll. Rep. 64. 2 Bulſt. 286. S. C. and S. P. *per Cur'*. and Skin. 244. pl. 9. S. P. Where it ſeems agreed generally, that upon ſuch removal the bail below are diſcharged, for they declare *de novo*.

Skin. 244. pl. 9. *Dorrington* and *Edwin* adjudged. 2 Show. 421. 485. S. C. adjudged. Mulſo v. Shere. Forteſc. 330. S. P.

But where a replevin by plaint was ſued in the ſheriffs' court of *London*, and pledges were found *de retorno habend' ſi, &c.* and this plaint was removed according to their cuſtom into the mayor's court, and after into the *King's Bench* by *certiorari;* and there *oyer* of the *certiorari* being demanded, the party declared in *B. R.*, and upon this a return awarded; and upon an *elongat'* returned a *ſcire facias* went againſt the pledges in the ſheriffs' court of *London:* the queſtion was, Whether this cauſe being removed by *certiorari*, the pledges in the inferior court were diſcharged? and it was held that they were not.

[By ſtat. 19 *Geo.* 3. c. 70. § 6. no cauſe under 10*l.* ſhall be removed into any ſuperior court, unleſs the defendant who ſhall be deſirous

deſirous of removing it, ſhall enter into a recognizance with two ſufficient ſureties, for payment of debt and coſts, in caſe judgment ſhall paſs againſt him.]

7. Of putting in Bail on bringing a Writ of Error.

By the (*a*) 3 *Jac.* 1. *cap.* 8. it is enacted, "That no execution "ſhall be ſtayed or delayed, upon or by any writ of error, or "*ſuperſedeas* thereupon, to be ſued for the reverſal of any judg- "ment given, or to be given, in any action or bill of debt, upon "any ſingle bond for debt, or upon any obligation with condi- "tion for the payment of money only, (*b*) or upon any action or "bill of debt for rent, or upon any (*c*) contract ſued in any of "the courts of *Weſtminſter*, counties palatine, or great ſeſſions in "*Wales;* unleſs ſuch perſon or perſons in whoſe name or names "ſuch writ ſhall be brought, with two ſufficient ſureties, ſuch "as the court (wherein ſuch judgment is or ſhall be given) ſhall "allow of, ſhall firſt, before ſuch ſtay made, or *ſuperſedeas* "awarded, be bound unto the party for whom any ſuch judgment "is or ſhall be given, by recognizance, to be acknowledged in "the ſame court, in double (*d*) the ſum adjudged to be recovered "by the ſaid former judgment, to proſecute the ſaid writ of error "with effect; and alſo to ſatisfy and pay (if the ſaid judgment "be affirmed) all and ſingular the debts, damages, and coſts ad- "judged, or to be adjudged upon the former judgment; and all "coſts and damages to be alſo awarded for the ſame delaying of "execution."

(*a*) Made perpetual by 3 Car. 1. c. 4. ſ. 4. and the 13 Car. 2. ſt. 2. c. 2. par. 9. enacts in like manner, That no execution ſhall be ſtaid after verdict and judgment in actions for not ſetting out tithes, actions on the caſe on any promiſe for payment of money, trover, covenant, detinue, and treſpaſs*. The 16 & 17 Car. 2. c. 8. par. 3. extends to writs of error on judgments after verdict in dower and ejectment. Carth. 121. 3 Lev. 275. [(*b*) The 19 Geo. 3. c. 70. ſ. 5. enacts, That no writ of error ſhall be brought on any judgment in any inferior court of record where the damages are under 10 *l.*, unleſs the party bringing it ſhall be firſt bound with two ſufficient ſureties (ſuch as the court wherein ſuch judgment is given ſhall allow of) unto the party for whom ſuch judgment is given in double the ſum adjudged by the former judgment, to proſecute the ſaid writ of error with effect; and alſo to ſatisfy and pay, if the ſaid judgment be affirmed, or writ of error be *non-proſ'd*, all and ſingular the debt, damages, and coſts adjudged, and all the coſts and charges awarded for the delay of execution. (*b*) A bond given by a third perſon as a ſecurity for the payment of a ſum of money by inſtalments, is a bond conditioned for the payment of money only within this act. Chauvet v. Alfray, 2 Burr. 746. So a bond conditioned for the payment of money according to the true intent and meaning of an indenture, or for the payment of money at ſuch a day, being the ſame ſum mentioned in a certain indenture, is a bond within this act, Littleton v. Hanſon, Barnes 98. Deſbordes v. Horſey, 2 Str. 959. But a bond conditioned for the performance of covenants in an indenture, in which there are other covenants beſides that for the payment of money, is not within the act. Gerrard v. Danby, Carth. 28. Show. 14. S. C. Comb. 105. S. C. A bottomry bond, after the contingency hath happened, is in every reſpect a bond for the payment of money only. Pitt v. Coney, Str. 476. A bond to pay ſo much money as *J. S.* ſhall declare to be due on account, is within the act; for though the ſum be uncertain at the time when the bond was entered into, it is aſcertained at the time of bringing the action. Dean and Chapter of St. Paul v. Capell, 1 Lev. 117. 1 Keb. 613. 690. S. C. But a bond to pay for ſo much beer as ſhall be delivered to *J. S.*, not exceeding 100l. is not ſo, for here the ſum is uncertain, and reſts upon a *quantum meruit*. Thrale v. Vaughan, 2 Str. 1190. Where a defendant had confeſſed judgment in an action upon a bond conditioned for payment of money only, and afterwards debt was brought upon that judgment, and judgment obtained thereon, it was ruled that, in a writ of error upon this ſecond judgment, bail was not requiſite; that this was *caſus omiſſus* out of the act, which was to be taken literally, and not extended by conſtruction. Bidleſon v. Whytel, 3 Burr. 1545. 1 Bl. Rep. 506. S. C. So it ſeemeth that bail is not requiſite on a writ of error in parliament upon a judgment in B. R. in an action of debt on a recognizance in error. Tiinder v. Watſon, 3 Burr. 1566. See the caſe of Chriſty v. Manucaptors of Anſtruther, 8 Mod. 237.] (*c*) On this ſtatute it hath been adjudged, that judgment on an *infimul computaſſet* was not an action founded on ſuch a contract as comes within it. 2 Bulſt. 53. Yelv. 227. So of a debt due by arbitration. *Ibid. per Cur'.* [(*d*) In error on a judgment upon debt on *bond*, the bail need be bound only in the ſum recovered, for that is double the ſum due. Moor v. Lynch, 1 Wilſ. 213.

It

It is obvious from the nature of this recognizance, that the bail in error have not the alternative of ſurrendering the principal; and therefore though the principal become a bankrupt, and be diſcharged by his bankruptcy, yet the plaintiff may have recourſe to them. Southcote v. Braithwaite, 1 Term Rep. 624.]

* This ſtatute does not extend to judgment by *default*, in any of the actions ſpecified, nor doth either of the others.

Cro. Jac. 94. *per Cur'*. (*a*) *A.* became bail for *B.* in the *Portmote* court of the city of *Cheſter*, and judgment

If *A.* becomes bail for *B.* in an (*a*) inferior court, and there judgment is given for *B.*, and thereupon the plaintiff brings a writ of error, and that judgment is reverſed, and judgment given for the plaintiff againſt *B.*, the bail is liable; for when the firſt judgment is reverſed, it is as if that judgment had never been, and as if at the firſt the principal had been condemned in the inferior court.

was there given for *B.*, and upon a writ of error before the juſtices of the great ſeſſions of the county of *Cheſter*, that judgment was reverſed; and after, upon a writ of error in *B. R.* both judgments were reverſed; and it was adjudged, that the plaintiff ſhould recover 50*l.* damages, *&c.* and it was urged, that *A.* was not liable; for by the reverſal there is no judgment in the inferior court againſt *B.*, and took a difference where the judgment of the inferior court is affirmed, and where reverſed. 2 Jones, 96. *adjornatur.*

Cro. Jac. 402. *Auſten* and *Monk*, adjudged without argument. Moor, 853. pl. 1165. S. C. and S. P. adjudged *per totam Curiam.*

If *A.* brings a writ of error upon a judgment obtained againſt him, and according to the 3 *Jac.* 1. *c.* 8., *B.* enters into a recognizance, conditioned that *A.* ſhall proſecute his writ of error with effect, and if judgment ſhall be affirmed, that he ſhall pay the condemnation, *&c.* after the judgment is affirmed, *B.* cannot render *A.* the principal, for this manucaption is not to render the body, but to pay the debt.

It is now the known and eſtabliſhed doctrine.

Roll. Abr. 335. Cro. Jac. 636. S. P. adjudged. Noy, 18. Cro. El. 587.

If judgment be affirmed upon a writ of error in the Exchequer-chamber (*b*), no execution ſhall go againſt the bail in the original action for the coſts *occaſione dilationis executionis*, and the party might have compelled the defendant in error to put in bail, purſuant to the ſtatute 3 *Jac.* 1. *c.* 8.

(*b*) In a *ſcire facias* upon a recognizance againſt bail, the defendant pleaded a writ of error brought by the principal; and *per Cur.*' This is no plea, for the writ of error upon the principal judgment doth not affect the recognizance: But *per Holt*, Ch. Juſt. I have known an attachment againſt a town-clerk for proceeding in an inferior court after a writ of error here; but I never took it to be right. Comb. 295. *

* Where error is brought, the court, on motion, will ſtay proceedings againſt the bail, on terms, according to the nature of the caſe; *i. e.* if they are in time to ſurrender the principal, on engaging to pay debt and coſts, or ſurrender, within a ſpecific time, after affirmance. If too late to ſurrender, then on engaging to pay debt and coſts, within a limited time, after affirmance, if the judgment ſhall be affirmed.

Salk. 97. pl. 2. Tully and Richardſon. 2 Ld. Raym. 840. 7 Mod. 120. 8 Mod. 79. (*c*) *Vide* 2 Bulſt. 162. That one in execution is not to be bailed on

In debt on a bond in *C. B.* and judgment for the plaintiff, error was brought in *B. R.*, and bail put in according to the ſtatute, and judgment affirmed thereupon, error was brought in (*c*) parliament, and the clerk of the errors refuſed to allow the writ, unleſs the party would give a new recognizance. It was objected, that it was not required by 3 *Jac.* 1. *c.* 8. But *per Cur'*, The firſt recognizance does not include payment of coſts to be aſſeſſed in the Houſe of Lords, and theſe coſts ought to be paid, and therefore a new recognizance ought to be given within the intent of the ſtatute; and it is not the buſineſs of this court to

to examine whether bail was put in upon the firſt writ, for the want of that does not hinder the proceſs of the writ of error, but only makes it no *ſuperſedeas*.

bringing a writ of error in parliament, because of the uncertainty how long the parliament may continue.

If there is a judgment in *B. R.*, and the defendant is taken in execution, and after brings error in the Exchequer-chamber, and the record is removed, he (*a*) cannot be bailed in *B. R.*, becauſe there is no record there, nor can he be bailed in the Exchequer-chamber, for they have authority only to affirm or reverſe the judgment.

Cro. Jac. 108. Cro. Eliz. 731.

(*a*) By a rule of *B. R.* every attorney who ſhall ſue out any writ of error on any judgment of this court, returnable in the Exchequer-chamber, ſhall forthwith allow ſuch writ of error with the clerk of the errors of this court for the time being; and in caſe where ſpecial bail ſhall be required, if the plaintiff upon ſuch writ of error do not within four days after allowance thereof put in ſpecial bail thereon, the plaintiff in the action may proceed to take out execution notwithſtanding ſuch writ of error; and where ſpecial bail is put in, the plaintiff or his attorney muſt forthwith give notice thereof to the defendant in error, or his attorney; and if the defendant in error do not except againſt ſuch bail within twenty days after ſuch notice given, ſuch bail ſhall be allowed. By a rule in *C. B. Mich.* 6 *Geo.* 2. in all caſes where bail ſhall be filed on writs of error, ſuch bail ſhall be perfected within four days after exception taken thereto; or in default thereof, the clerk of the errors of this court ſhall *non-pros* ſuch writ of error *.

* The allowance of a writ of error, before execution, is, of itſelf, a *ſuperſedeas* to execution; and I conceive the court would ſet aſide the execution, if executed after allowance of a writ of error, though there was not any notice given: The intent of notice is, to ſubject the attorney for the defendant in error to an attachment, if he ſhould dare, after notice, to levy an execution.

Upon a writ of error of a judgment in *Ireland*, the record being removed in *B. R.*, the court took bail here, and ſent directions to have the defendant ſet at liberty there. Palm. 286.

8. Common Bail, in what Caſes neceſſary.

The filing of common bail is neceſſary, that it may appear that the court had conuzance of the cauſe.

But where the want of it is error, *vide* title *Error*, and Hob. 264.

[Common bail in K. B. is entered on a piece of parchment, called a bail-piece, with a triple ſixpenny ſtamp, and filed with the clerk of the common bails; who, by a rule of *Eaſter* 30 *Geo.* 3. 3 *Term Rep.* 660., is to mark the bail-pieces numerically as they are received.]

If a priſoner be diſcharged for want of being declared againſt within (*b*) two terms, or upon non-proſſing the plaintiff, or if he ſurrender himſelf in diſcharge of his bail, and is not charged within two terms; in all theſe caſes he muſt file common bail, that it may appear by the acts of the court that he was actually in court when diſcharged.

Vide Salk. 98. pl. 5. and the ſtat. 4 & 5 W. and M. c. 21.

(*b*) Formerly three terms. Cro. Jac. 620.

By the rules of *B. R.* no attorney ſhall be compelled to appear or file common bail for any defendant, unleſs ſuch attorney hath by a note in writing under his hand † undertaken ſo to do, and ſuch note produced by the plaintiff's attorney; but if any attorney hath accepted a warrant to appear for the defendant, (which warrant be in no wiſe revoked,) or hath ſubſcribed the ſame, and do not cauſe bail to be filed accordingly, ſuch attorney ſhall be compelled to file common bail of the (*d*) proper term, and take a declaration and plead to the ſame, or, in default of pleading, judgment

R. M. 1654. § 10.

† *Sed qu.* If the court, on motion, will not compel an appearance on a parol undertaking, unleſs in particular caſes?

judgment may be entered by default, if rules for pleading have been given; for that the default of the defendant or his attorney ſhall not tend to the plaintiff's prejudice.

And ſee 1 Str. 114. acc. (*d*) By the 5 W. and M. c. 21. § 3. the defendant ſhall cauſe an appearance or common bail to be entered or filed within eight days after the return of the proceſs, on penalty of 5 *l.* to be paid to the plaintiff, for which the court ſhall immediately award judgment, and the plaintiff may take out execution. 5 Mod. 392. 2 Str. 737.

[Before the ſtatute of 12 *G.* 1. *c.* 29. common bail could only have been filed, or a common appearance entered by the defendant, or his attorney. But now, by that ſtatute, as altered by 5 *G.* 2. *c.* 27., "if the defendant, having been ſerved with proceſs, ſhall not appear at the return thereof, or within eight days after ſuch return, the plaintiff, upon affidavit of the ſervice of ſuch proceſs, made before a judge, or commiſſioner of the court for taking affidavits, or before the proper officer for entering common appearances, or his deputy, (which affidavit ſhall be filed *gratis*,) may enter a common appearance, or file common bail for the defendant; and proceed thereon, as if ſuch defendant had entered his appearance, or filed common bail."]

[But common bail thus filed is not ſuch a general bringing the defendant into court as to warrant delivering a declaration by the bye; and therefore to prevent miſtakes, theſe words are written on the bail-piece: "Filed according to the ſtatute." 2 Str. 1027. Caſ. Tem. Hardw. 207. Bail filed under this act muſt be filed *of the term* in which the writ is returnable; if of a *ſubſequent term*, the cauſe is out of court. Edgar v. Farmer, Ca. Tem. Hardw. 138. Smith v. Painter, 2 Term Rep. 719. Common bail may be filed, or a common appearance entered, by the plaintiff's attorney, without his entering or filing of record a memorandum, or minute of his warrant, purſuant to the 25 Geo. 3. cap. 80. § 22. But the defendant's attorney muſt not plead or carry on any further proceedings in the action, until ſuch *memorandum* or *minute* ſhall have been delivered to the proper officer, to be entered or filed of record, according to the directions of the 23d § of that act.

Salk. 99. pl. 8. Carth. 519. Holt, 127. pl. 1. 12 Mod. 320. 380. R. M. 8 Ann.

In an action upon a recognizance of bail, or upon a bail or replevin bond, common bail only ſhall be filed.

2 Show. 249. pl. 253. and ſuch a judgment actually ſet aſide.

A judgment in ejectment againſt the caſual ejector is erroneous, unleſs a *latitat* was ſued out, and common bail filed for him *.

* This is not, now, law. If judgment goes againſt the caſual ejector, there is not any defendant in court, to bring error. If the tenant, or landlord appears, he enters into the common rule to confeſs leaſe, entry, and ouſter, and inſtantly pleads the general iſſue. The declaration in ejectments is in the nature of proceſs only.

R. H. 1 W. & M. R. T. 4 W. & M.

[It is neceſſary to authorize judgments by warrant of attorney, default, or *non ſum informatus*.]

(C) Where Bail ſhall be ſaid to be put in regularly: And herein,

1. Of the Manner of putting in, excepting to, and juſtifying Bail.

Salk. 98. 6 Mod. 24. 25.

BY the printed rules of the courts, every attorney who ſhall appear for any defendant in any action in which ſpecial bail is not required, ſhall duly file common bail for ſuch defendant, of the

the term of which he appears (*a*), and give notice thereof to the plaintiff or his attorney; and where ſpecial is required and put in (*b*) *de bene eſſe*, before any judge or commiſſioner on a *cepi corpus*, the defendant's attorney ſhall forthwith give notice (*c*) thereof in writing to the plaintiff or his attorney, and of the names of ſuch bail, with their additions and places of habitation; and if no exception be taken to ſuch bail, and entered in the judge's book within (*d*) twenty days after ſuch notice, then upon oath thereof made, for which no fee is to be taken, ſuch bail ſhall be filed; and if ſpecial bail ſhall be put in before any judge *de bene eſſe*, on any writ of *habeas corpus* or *certiorari*, and no rule for better bail, or exception taken, or entered in the judge's book, againſt the bail ſo put in, within twenty-eight days after putting in ſuch bail, then ſuch bail ſhall be filed by the defendant's attorney after the end of the ſaid twenty-eight days.

[(*a*) *Vide ſupra.* (*b*) The origin of bail *de bene eſſe* is thus related by Glynn, C. J. "A biſhop," ſays he, "having arreſted a man for a large debt, he tendered bail to Juſtice Richardſon, who took it in his chamber, and the bail being inſufficient, the biſhop repreſented the matter to parliament, and prayed their remedy for it; upon which it was enacted, that no bail, taken before a judge in his chamber, ſhould bind the plaintiff without his aſſent thereto, or the confirmation of ſuch bail, taken by all the court." 2 Sid. 91. R. M. 1654. f. 7, 8. (*c*) The notice of bail is, either that they are put in, or, if taken before a commiſſioner, that the bail-piece is *filed*, with an affidavit of the due taking thereof, at a judge's chambers. Imp. 124. The notice in either caſe ſhould be properly entitled. Lofft. 237. The *pariſh*, or *town* wherein they live, without the *ſtreet*, or other certain place of their reſidence, is too vague a deſcription. *Id.* 72. 194. *Per Cur.* M. 25 G. 3. If the bail above are the ſame perſons who were bail to the ſheriff, it is uſually ſo expreſſed in the notice. Imp. 118.] (*d*) At the expiration of twenty days without any exception, the bail is filed in court; but if the defendant except and give notice thereof, the defendant's attorney muſt bring up the bail-piece, and the bail muſt juſtify in court; and *note*, That in the Common Pleas the bail-piece remains with the filacer till the twenty days are expired; but in the King's Bench it is left with the judge, becauſe judges of that court determine all matters relating to their priſoners. And for the difference of the manner of taking bail, and the form of the recognizance in each court, *vide* Cro. Jac. 449. 645. Cro. Car. 481. 2 Bulſt. 232. Roll. Rep. 387. 2 Show. 335. 2 Salk. 564. The like time to except where the plaintiff puts in bail upon bringing a writ of error. Salk. 98. [No notice neceſſary in C. P. if bail put in, *in due time*; otherwiſe it is ſo, Dawkins v. Reid, 1 H. Bl. Rep. 529.]

[When the bail already put in do not mean to juſtify, others ſhould be *added*, before a judge, on the bail-piece by bill, or in the filacer's book by *original*, within the time allowed for their juſtification: and if there be not time enough, the defendant's attorney may take out a ſummons, and obtain an order for further time; and they muſt actually become bail before the notice of juſtification is given. When other bail are added, the court will order the names of thoſe who were excepted to, and did not juſtify, to be ſtruck out of the bail-piece. But until this be done, they are liable to be proceeded againſt, and may alſo ſurrender the principal. And if it be not done till after proceedings have been had againſt them, they muſt pay the coſts of ſuch proceedings.

Tidd's Pr. 136. Imp. 119. 1 H. Bl. Rep. 291. Say. Rep. 58. 1 Wilſ. 337. S. C. Say. Rep. 338. 5 Term Rep. 633. 1 Bl. Rep. 462. 4 Burr. 2107.

The bail juſtify either in *perſon*, or by *affidavit*. If they live in *London*, or *Weſtminſter*, they muſt juſtify in *perſon*, and in *open* court, unleſs the plaintiff conſent to their juſtifying before a judge at his chambers. If they live at a greater diſtance, they may be juſtified, without their perſonal attendance, by affidavit duly taken before a commiſſioner. In both caſes, they muſt ſwear that they are houſekeepers, and reſpectively worth double the ſum ſworn to, after all their debts are paid.

6 Mod. 24. 2 Bl. Rep. 1064. R. T. 8 W. 3. Reg. 3. 5. R. E. 5 G. 2. Reg. 1.

Imp. 124. The notice of juſtification ſhould ſet forth, that the bail already put in will, on a certain day, juſtify themſelves in open court, or that others will be added, and juſtify themſelves, as good bail for the defendant. And if the bail were put in before a commiſſioner, the notice ſhould expreſs that they will juſtify themſelves by *affidavit*.

Id. 119.

Imp. Lofft. 26. Notice of juſtification by *three* bail has been holden good: but notice that *A.*, *B.*, and *C.*, or *two* of them, will juſtify, is irregular.

Imp. 119. Where the bail already put in intend to juſtify, *one* day's previous notice of juſtification, or notice for the next day, is deemed ſufficient; unleſs *Sunday* intervene, and then notice muſt be given on *Saturday* for *Monday*. But where other bail are added to thoſe already put in, there muſt be *two* days previous notice of juſtification; one *incluſive*, and the other *excluſive*, as *Monday* for *Wedneſday*, *&c.* And *Sunday* is not reckoned as a day for this purpoſe; therefore notice of added bail on *Saturday* for *Monday* is not ſufficient.

Ibid. per Cur. M. 21 G. 3.

Imp. 125. Caſe of Overton's bail, M. 26 G. 3.

Baddeley v. Adams, 5 Term Rep. 170. Bail may be put in on a *dies non juridicus*.

Vide ſupra. One ground of oppoſing bail is, ſome defect in the *form*, or irregularity in the *ſervice* of the notice of juſtification.

1 Str. 384. And by ſt. 21 J. 1. c. 26. § 2. Another ground is, that they have aſſumed names that are either feigned, or belong to other perſons. If they aſſume feigned names, the court will order them, and the attorney, to be ſet on the pillory.

"If any perſon ſhall acknowledge, or procure to be acknowledged, any recognizance of bail, in the name of another perſon, not privy or conſenting to the ſame;" or (by ſt. 4 & 5 W. & M. c. 4. § 4.) before a commiſſioner ſhall repreſent or perſonate another perſon, whereby he may be liable to the payment of any debt or damages; he ſhall, on conviction, ſuffer death as a felon, without benefit of clergy." But the court will not vacate the proceedings againſt the party perſonated, until the offender be convicted. 1 Ld. Raym. 475. Nor can a conviction take place, until the bail-piece be filed. 2 Sid. 90.

Lofft. 148. *Id.* 328. A third ground is, that they are not houſekeepers: but if they are, the rent of their houſes is immaterial, though under ten pounds: nor is it neceſſary that they ſhould have been aſſeſſed to the poor's rate.

Tidd's Pr. 140. Mountain v. Wilkins, M. 21 G. 3. M. 26 G. 3. Lofft. 72. 194. 3 Bl. Com. 296. Cro. Car. 146. A fourth ground is, that they are not worth double the ſum ſworn to, after payment of all their debts. Under this head may be ranked bankrupts, who have not obtained their certificates; or ſuch as have been twice bankrupts, and not paid fifteen ſhillings in the pound. And bail have been rejected, who did not know the defendant; or had been bail before, but did not know in how many actions, or for what ſums. But it ſeems, that the circumſtance of not knowing the defendant, being only a mark of ſuſpicion, may be explained away. Their living within the verge of the court is an objection, but not ſufficient without other ſuſpicious circumſtances. If they forſwear themſelves, they are liable to the puniſhment of wilful and corrupt perjury.

Fifthly, Foreigners are not admitted to be bail, merely in reſpect of property *abroad*, which is not liable to the proceſs of our courts. Though it has been ſaid, that merely having no property in *England*, is not of itſelf a ſufficient objection, without other auxiliary circumſtances. 4 Burr. 2526. Lofft. 34. 147. 1 Bl. Rep. 444.; and ſee 2 Bl. Rep. 1323.

Sixthly, No attorney, or his clerk, can be bail: neither can any ſheriff's officer, or perſon concerned in the execution of proceſs, keeper of the *Poultry-Compter*, or *Marſhalſea*-court officers. K. B. R. M. 1654. J. 1. C B. M. 6 G. 2. Dougl 466. 1 H. Bl.

Rep. 76. Tidd's Pr. 140, 1. But if a perſon who, by the rules of the court, is not permitted to become bail, be put into the bail-piece, and not excepted to, the plaintiff cannot take an aſſignment of the bail-bond, and proceed upon it, as if no bail had been put in. Thomſon v. Roubell, B. R., E. 22 G. 3. cited in Dougl. 466.]

Seventhly, Perſons outlawed after judgment, or convicted of perjury, cannot be bail. 4 Term Rep. 440.

Laſtly, The court will not permit a juſtification of bail, after the expiration of the rule to bring in the body. Tidd's Pr. 142, and the caſes there referred to.]

If ſpecial bail put in by defendant be excepted to, the defendant ſhall perfect his bail within four days after ſuch exception taken, in default whereof the plaintiff may proceed upon the bail-bond. In *B. R.*, if notice of exception is in term, bail muſt juſtify in four days, or add others that will juſtify. If exception and notice be in vacation, juſtification to be the firſt day of next term. *E.* 5 *Geo.* 2. If notice of exception in vacation, juſtification to be on firſt day of term, as in *B. R.* [Of the four days allowed to perfect bail after exception, the firſt is reckoned excluſively, and the laſt incluſively. So that where the exception was on a *Wedneſday*, an attachment againſt the ſheriff could not regularly iſſue till the *Tueſday* following (*Sunday* being no day). But though the attachment did iſſue on the *Monday*, the court would not ſet it aſide, becauſe the bail were not perfected. R. 3 & 4 G. 2. C. B. Barnes 74. 82. 2 H. Bl. Rep. 35.

Where the bail do not attend, or are not permitted to juſtify on account of a defect in the notice of bail, or juſtification, the court will, in general, allow them further time to juſtify. But where they are rejected on account of ſome perſonal inſufficiency, the court will ſeldom allow further time to add and juſtify others. And if the bail do not juſtify at the time appointed, and no further time is given, they are out of court.] Lofft. 72. 187. *Per Cur.* M. 25 G. 3. Tidd's Pr. 143. *Ibid.* & *per Cur.* 24 G. 3. 1 Crompt. 66. 7 Mod. 50.

If the plaintiff accepts the bail, he may take away the bail-piece from the judge's chamber, and file it for his own expedition; but after twenty days it becomes abſolute, and the defendant takes it away and files it.

2. To what Time it ſhall have Relation.

In *B. R.* though the bail of the defendant be taken and entered the laſt day of the term, and the bill be put in at any time the ſame term, this is well enough by the courſe of that Roll. Abr. 333. Hob. 70. S. C. adjudged.

Cro. Jac. 384. S. C. adjudged; becauſe the bill, whenſoever filed, hath relation to the firſt day of the term.

court; though in ſtrictneſs of law the defendant is anſwerable but from the time of putting in bail as *in cuſtodiâ mareſchalli*, and not before.

Vent. 135. adjudged. * But the bill ſhould be of a particular day ſubſequent to the 3d of *February*.

If in trover commenced in *Hilary* term, the converſion is alleged to be the 3d of *February* in the ſame term, and bail is filed the laſt day of the term, yet this is well enough, for the action ſhall not be ſaid to be depending until the bill is filed *.

R. E. 5 G. 2. Reg. 1. b. Salk. 100. pl. 12. (*a*) It ſeems now to be the eſtabliſhed practice, that every bail taken before or upon the continuance-day ſhall be a bail, and filed of the precedent term, and every bail taken after the continuance-day ſhall be a bail, and filed of the ſubſequent term, and not otherwiſe: But where any new bail is added to any other, but ſo as aforeſaid taken on or before the continuance-day, the ſame ſhall be taken and filed as of that term in which the bail was firſt put in. [As to the continuance-day, ſee R. E. 11 W. 3. Reg. 2. 2 Str. 1215.] (*b*) For this *vide* Cro. Jac. 449. 2 Salk. 564.

Bail was put in one term, and new bail added the next term after; and the queſtion was, If this ſhould be bail of the firſt term, or only of the term when added? About which the clerks differed; but the court was of opinion, that it was only bail of that term when the additional bail was put in, for they ſaid it was not bail till (*a*) completed and accepted, and making the additional bail to be bail of the firſt term, might do a (*b*) wrong to a third perſon, who might be a purchaſer after the firſt, and before the additional bail was put in.

3. Where a different Action is proſecuted from that in which the Bail was given.

3 Lev. 235. Yates and Plaintain adjudged, and agreed by the prothonotaries, though by the courſe of the court the plaintiff might declare in another county, and the judgment would be good. *

If there be an original and *capias* in one county, and bail thereupon filed, and the plaintiff after declares in another county, and thereupon obtains judgment, by this variation the bail are diſcharged, and not liable to the damages upon this declaration.

* This relates to proceedings in *C. P.* or *B. R.* by original: but if the proceedings be in *B. R.* by bill of *Middleſex* or *latitat*, the bail will not be diſcharged for ſuch variation. [Nor will they be diſcharged for a variance between the *capias* and count in *C. P.*, the *ac etiam* being *in caſe on promiſes*, but the declaration *in debt, if the ſum ſworn to be under* 40*l.* Lockwood v. Hill, 1 H. Bl. Rep. 310. Nor for a variance between the ſum in the *ac etiam* part of the *latitat* and the declaration. Turing v. Jones, 5 Term Rep. 402. But where the writ was in plaintiff's *own right*, and the defendant holden to bail for 120*l.* due *in that right*, but the declaration was *as executor*, a common appearance was ordered. Hally v. Tipping, 3 Wilſ. 61.

Gunn v. Mackhenry, 1 Wilſ. 277.

[Although the plaintiff declare in an inferior court in debt upon a *conceſſit ſolvere*, and the cauſe being removed into *B. R.*, he declare there in caſe, yet by this variance, he doth not loſe the bail, for it is the very ſame cauſe of action; for if he declare in the ſuperior court in the former way, the defendant may wage his law, which he cannot do in the court below.]

2 Show. 335. pl. 345. Reſolved on motion; but how far the bail on a *latitat* have been holden liable in other actions at the ſuit of the ſame or other perſons, *vide* Cro. Jac. 449. 451. Stile, 464. 2 Sid. 163. 2 Jones, 188. Mod. 16. Comyns, 556.

If *A.* arreſts *B.* in an action of 20*l.*, and bail is put in thereto, and afterwards *A.* delivers two declarations, one for 200*l.* and another for 500*l.*, the bail ſhall be only liable for the 200*l.*

556. pl. 235. 10 Mod. 153. 2 Str. 922. 2 Barnard. *K. B.* 44. [It is now ſettled by rule of E. 5 G. 2. that "where the plaintiff declares for or recovers a *greater* ſum than is expreſſed in the proceſs upon "which he declares, the bail ſhall not be diſcharged; but be liable for ſo much as is ſworn to, and "indorſed on the proceſs, or for any *leſs* ſum which the plaintiff in ſuch action ſhall recover;" and alſo, by ſubſequent determinations, for the coſts of the original action. Jackſon v. Haſſell, Dougl. 330. Peterken v. Sampſon, B. R. M. 25 G. 3. Sheddon v. Curnes, B. R. E. 29 G. 3. See Tidd's Practice, 130., where the hiſtory of this practice is neatly traced out.]

A. brought a bill of *Middleſex*, with an *ac etiam* for 40*l.*, and recovered 100*l.*; and the court held, that the bail ſhould not be liable for more than the *ac etiam*, which was the meaſure of his undertaking: and *per Holt*, Ch. Juſt. He is not liable at all, for his recognizance is to anſwer the condemnation, and ſince that cannot be, he is bound to nothing; and *Clerk*, ſecondary, affirmed, that there was a rule of court, that where the plaintiff recovers a greater ſum than is laid in the action, the bail ſhall not be chargeable in *iſta actione*. Salk. 102. pl. 16. *Vide ſupra.*

4. What Defect or Irregularity may be amended.

If bail in debt is entered in this manner, *viz. ſub pœnâ executionis in adjudicatione executionis*, where it ought to have been *ſub pœnâ condemnationis*, (*a*) yet it ſhall ſtand as well for the judgment, as for the execution; adjudged upon a writ of error, and it was ordered to be amended, and made *ſub pœnâ executionis judicii*, as well as for the execution. Cro. Jac. 272. (*a*) For bail cannot be taken for part, *viz.* the execution, and not the judgment, no more than for part of the debt. Bulſt. 107.

If two are arreſted on a *latitat*, and one puts in bail in *Michaelmas* term, and the other of the term ſubſequent, the court will allow the bail put in of the *Michaelmas* term to be filed as put in of the ſubſequent term; for otherwiſe it would be error to proceed in a joint action on bail put in at different terms. Latch. 182. So ruled on motion. *Vide* Cro. Eliz. 459.

If a writ be taken out in the name of *A.*, and the officer takes a bail-bond to appear at the ſuit of *B.*, and after there is a *reddidit ſe*, by the ſame name; though this be *vitium ſcriptoris* in not making the bail-bond according to the writ, yet it cannot be amended, for the bail muſt be according to the bail-bond, and not according to the writ. 6 Mod. 309. *per Cur'*. Barnardiſton and *Vic. Middleſex*, *vide* title *Amendment*.

(D) Of the Proceedings againſt the Bail, and what Matters they may plead in their Diſcharge.

THE act of the court in delivering the defendant to bail being of record, entitles the plaintiff to a *ſcire facias*, when it appears that the defendant has not ſatisfied the judgment; a (*b*) *capias* muſt, therefore, be returned againſt the principal before the *ſcire facias* is to iſſue againſt the bail. (*b*) Roll. Abr. 308. 333. Moor, 432. Cro. Eliz. 597. Goldſb. 174. But this is reſolved and admitted in ſo many books, that it ſeems needleſs to cite them. *Vide* 1 Lev. 225. That it muſt iſſue and be returned, but may be filed at any time after;—and that it muſt be awarded within the year, elſe not till a *ſcire facias* againſt the principal.—2 Jones, 96. (Adjoined.)——And *note*, That every *capias ad ſatisfaciendum* to warrant a *ſcire facias* againſt bail, muſt have ſeven days at the leaſt excluſive betwixt the *teſte* and the return thereof; and every ſuch *capias* is to be delivered and left with the ſheriff to whom it is directed, four days excluſive at leaſt before the return. *Vide* 2 Salk. 620.

602. pl. 12. 2 Ld. Raym. 1176. That there ought to be eight days between the *teſte* and return. [A *capias* teſted the term prior to that in which judgment is ſigned againſt the principal, will not warrant proceedings againſt the bail. 1 H. Bl. Rep. 74. The *capias* againſt the principal is now conſidered as little more than matter of form, and chiefly intended to intimate to the bail, in what ſpecies of execution the plaintiff means to proceed; and the leaving it in the ſheriff's office, being a notice to the bail that the plaintiff will proceed againſt the perſon of the defendant, it is incumbent on the bail to ſearch there for it: And the court will not enter into an examination by affidavit, whether the *ca. ſa.* was actually returned, or ſuch return actually filed, *before* the iſſuing of the *ſcire facias* againſt the bail: For though the bail plead to the *ſcire facias* that no *ca. ſa.* was returned and filed *before* the teſte of the *ſcire facias*, ſuch return may be filed at any time before putting in a replication. 3 Burr. 1360.]

Salk. 101. pl. 13. [It was anciently the courſe of the court not to allow a render after the return of *non eſt inventus* to a *capias ad ſatisfaciendum*.

But though on the return of the *capias* the plaintiff is entitled to a *ſcire facias*, and the recognizance in ſtrictneſs is forfeited, yet if the defendant render himſelf at any time before, or on the day of the return of the ſecond *ſcire facias* againſt the bail, where two *nihils* are returned, or on or before the day of the return of the firſt (*a*) *ſcire facias*, where a *ſcire feci* is returned, *ſedente curiâ*, and notice of ſuch render be given to the plaintiff or his attorney, the bail ſhall be diſcharged.

Cro. Eliz. 738. But a great miſchief reſulted from this practice; for the plaintiff would ſue out a *capias*, returnable the next day, ſo that the bail had little or no time to bring in the body. 1 Ld. Raym. 157. To remedy this, the judges indulged the bail ſo far as to permit them to render the body, upon the return of the firſt *ſcire facias*, if the *capias* were returnable *de die in diem*; Cro. Eliz. 618. 738.; but if it were returnable the next term, the bail were ſtrictly holden to render the principal by the return of it. *Ibid.* Popham, C. J. extended this indulgence ſtill farther; and permitted the bail to render any time before the return of the ſecond *ſcire facias*, or upon the return, *ſedente curiâ*. Cro. Jac. 109. This practice, however, appears to have been diſallowed by Ld. Coke. Mo. 850. 3 Bulſtr. 182. S. C. But it was ſoon after revived by Croke, J., and is now fully eſtabliſhed. W. Jon. 139. Sty. Rep. 324. 8 Mod. 32. Before the return of the *capias ad ſatisfaciendum*, the render is a matter of right, and may be pleaded. 1 Ld. Raym. 156. But afterwards it is allowed by the grace and favour of the court, and not *ex debito juſtitiæ*; for the condition of the recognizance is broken upon the return of *non eſt inventus* to the *capias*. R. T. 1 Ann. Reg. 2. Ld. Raym. 721., and therefore a ſubſequent render cannot be pleaded. Kreley v. Medley, M. 24 G. 3. Barnes, 106.; though, if made in time, the bail may be relieved by motion. But if the plaintiff, upon the return of *non eſt inventus* to the *ca. ſa.*, proceed againſt the bail, and deliver a declaration conditionally; the court will not ſtay proceedings againſt the bail on their paying the debt and coſts in the original action *only*, but will oblige them to pay the coſts of the ſecond action, although they have tendered the original damages and coſts before the end of eight days from the return of the *ca. ſa.*, within which time, by the practice of the court, they might have diſcharged themſelves by ſurrendering the principal. Perigal v. Melliſh, 5 Term Rep. 363.] (*a*) How it is to be returned, and how many days there muſt be between the *teſte* and return, *vide* Cro. Eliz. 738. 2 Salk. 599. pl. 7., and title *Scire Facias*.

2 Roll. Abr. 600. 897. Jones, 29. Winch. 61, 62. Godb. 354. Raym. 14. 2 Show. 77. Salk. 101. pl. 13. 2 Salk. 600. pl. 10. Carth. 515. 6 Mod. 132. 8 Mod. 340. Ld. Raym. 721. 3 Salk. 56. pl. 8.

If an action of debt be brought on the recognizance, and the defendant render himſelf in cuſtody within eight days in full term after the day of the return of the proceſs againſt the bail, they ſhall be diſcharged.

Roll. Abr. 336. Jones, 29. Cro. Jac. 97. Moor, 432. pl. 607. 775. pl. 1073. Poph. 186. Hut. 47. Stile, 324.

If the defendant dies (*b*) *before* the (*c*) return of a *capias ad ſatisfaciendum* againſt him, his bail pleading the ſame may be diſcharged.

(*b*) They may plead that the principal died before any judgment againſt him, becauſe they cannot have a writ of error to reverſe that judgment. Cro. Eliz. 199. adjudged. But 2 Leon. 101., the whole court, except *Wray*, inclined otherwiſe. And *vide* Godb. 377. Roll. Abr. 742. (*c*) But if he dies after the return of the *capias*, this will not excuſe the bail. Roll. Abr. 336. Barnes, 106. 2 Wilſ. 67. 5 Term. Rep. 363. And where the defendant pleaded that the principal died before the *ſcire facias* brought, and without more, it was adjuged no good plea. Cro. Ja. 165. Hutt. 47.

If *A.*

If *A.*, as bail, enters into a recognizance that *B.* upon eight days warning *comparebit* to any action that ſhall be brought by *C.*, *necnon* that if *B.* ſhall be condemned in the ſaid action, and does not pay, *&c.* that then he will anſwer the condemnation, and *C.* does bring an action againſt *B.*, and he is condemned, and does not pay, *&c.*; in debt upon this recognizance, it muſt be averred that he gave *B.* eight days warning to appear, *&c.* for *A.* is bound only to anſwer the condemnation in ſuch action upon which eight days warning was given, for that is the foundation of the whole; and there is no reaſon that *B.*, by his voluntary appearance without warning, ſhould prejudice his bail. Cro. Jac. 45. and Yelv. 52. S. C. by three judges againſt two in both books, and the plaintiff accordingly diſcontinued his action.

If a defendant gives judgment with a ſtay of execution until a certain day, the plaintiff may, notwithſtanding ſuch ſtay of execution, ſue forth a *capias ad ſatisfaciendum* to the ſheriff of the county where the action is laid, and returnable before the day, to make out a *teſtatum* againſt the defendant; but no ſuch *capias ad ſatisfaciendum* ſhall be ſued forth to warrant a *ſcire facias* againſt the bail (*a*), becauſe it is to the prejudice of a third perſon. (*a*) Where there was a contrivance between the plaintiff and the principal to free and diſcharge the principal, and to charge the bail, *vide* Bulſt. 43.

If the plaintiff does not declare againſt the principal within two terms after bail put in, the bail will be diſcharged, as likewiſe the principal on filing common bail. Cro. Jac. 620. Salk. 98. pl. 5. 99. Comb. 295.

But if after bail put in, and before the plaintiff hath declared, the defendant obtains an injunction, and this is continued for ſeveral terms, and after diſſolved, and the plaintiff ſoon after declares and gets judgment, and brings a *ſcire facias* againſt the bail, they cannot plead that no declaration was delivered or filed againſt the principal within two terms after the action commenced and bail entered, for there was no default in the plaintiff that he did not declare ſooner. 3 Mod. 274. adjudged between Doe and Dawſon. 8 Mod. 315, 316. 3 Will. Rep. 36.

[If the plaintiff declare againſt the defendant, for a different cauſe of action than that which is expreſſed in the proceſs; or, by *original*, in a different county from that where the action is brought, the bail are diſcharged. 3 Lev. 235. R. E. 2 G. 2.

They are alſo diſcharged, where the defendant is made a peer of the realm (*b*), or member of the Houſe of Commons (*c*); or where he becomes bankrupt (*d*), and obtains his certificate at any time pending the action, and before the bail are fixed: *ſecùs*, if not till after they are fixed. And in any of theſe caſes, the court, on motion, will order an *exoneretur* to be entered on the bail-piece.] (*b*) Trinder v. Shirley, Dougl. 45. (*c*) Langridge v. Flood, H. 26 G. 3. (*d*) Woolley v. Cobbe, Cowp. 823.

1 Burr. 244. Cockerill v. Ouſton, *Id.* 436. Martin v. O'Hara,

J. S. acted as attorney for the plaintiff in the original action, and after judgment in that action took out a *ſcire facias*, and proceeded to judgment againſt the bail without any new or ſecond warrant; on a writ of error, as well of the principal judgment, as upon that againſt the bail, the court held, that any body might have taken out the *ſcire facias*; but as to the further proceedings they were irregular, the attorney's authority determining with the firſt judgment; and therefore they reverſed the judgment. Salk. 89. pl. 11.

Cro. Car. 300. Jones, 325. Godb. 440. S. C. adjudged between Lancaſter and Keyleigh. Hob. 72. Cro. Jac, 384. Roll. Rep. 294. Cro. Car. 408. 574. Jones, 360. Bulſt. 125. Lit. Rep. 93. Lev. 137.

If judgment be given againſt the principal, and after, upon a *ſcire facias* againſt the bail, judgment be alſo given againſt them, theſe judgments are ſeveral, and they ſhall not join in a writ of error no more than tenant for life, and he in reverſion, or the tenant and vouchee, may join.

Skin. 100. pl. 16. adjudged. (*a*) Where the bail may plead payment by the principal, and how ſuch plea is to be pleaded, *vide* Roll. Abr. 335. 336. 2 Lev. 212. Cro. Eliz. 233. Stile, 324. 2 Leon. 213. Cro. Eliz. 132.* Where a releaſe to the principal diſcharges the bail. Roll. Abr. 336.

If the condition of a recognizance be, that the principal ſhall ſurrender himſelf, or pay the money; and the breach aſſigned be, that he hath not ſurrendered himſelf; this is naught, for he might have (*a*) paid the money, and then the condition is not broken.

* The bail pleaded in *ſcire facias*, upon the recognizance, payment by the principal, before the return of the ſecond *ſcire facias*; and the plea held bad; for in ſtrictneſs of law the recognizance was forfeited, by ſuing out the firſt *ſcire facias*. 1 Ld. Raym. 157. In ſuch caſe, if the payment had been really made, the bail ſhould have moved to ſtay proceedings, on payment of coſts incurred againſt them before the payment.

2 Show. 147. pl. 128. Creſley and Darling adjudged *niſi*.

But if in a joint action againſt two, *J. S.* is bail for one of them, and there is judgment againſt the principals, in a *ſcire facias* againſt *J. S.* the bail, it is ſufficient to allege, that the defendant for whom he was bound, did not pay the money, and if the other had paid it, he ſhould have pleaded it.

Roll. Abr. 334, 335. Moor, 853. pl. 1165. Cro. Jac. 402. S. C. 3 Bulſt. 192. S. C. Roll. Rep. 392. S. C. 7 Mod. 97. S. P. Raym. 100. 3 Mod. 87.

A. and *B.* are bail to an action in *B. R.*, where judgment is given againſt the principal, who brings a writ of error in the *Exchequer-chamber*, pending which the bail bring in the principal, or the principal renders himſelf to priſon; though the recoverer cannot pray him in execution, nor can the court put him in execution, becauſe the writ of error is a *ſuperſedeas* to it; yet this is a good diſcharge of the bail, for the marſhal ought to keep him in priſon as a pledge till the judgment be affirmed or diſaffirmed, as he does upon meſne proceſs for want of bail.

Roll. Abr. 337. Moor, 888. Leon. 58. 2 Bulſt. 260. (*b*) Where the principal was in actual execution, and a *committitur* entered, yet after two *ſcire facias*'s returned, and judgment thereupon, the court would not ſet it aſide on motion, for the bail ought to have pleaded it. Skin. 120.——So where the principal ſurrendered himſelf before the return of the *capias*, yet the plaintiff having had no notice, and there being no diſcharge of the bail-piece, or *exoneratur* entered; and the plaintiff having proceeded to judgment againſt the bail, the court would not relieve them on motion, but put them to their *audita querela*. Salk. 101. pl. 14. (*c*) But if through want of notice he is at further charge againſt the bail, that ſhall not vitiate the ſurrender; but yet the bail ſhall not be delivered till they pay ſuch charges. 6 Mod. 238. [Say. Rep. 7. 1 Burr. 409. Where the bail-piece had been previouſly delivered out to be filed to the plaintiff's attorney, who neglected to file it, proceedings againſt the bail for want of an *exoneretur* were ſtayed. 8 Mod. 280. 1 Burr. 409. Upon what terms, and at what time the court will ſtay proceedings againſt the bail, pending a writ of error, ſee 1 Str. 419. 443. 526. 2 Str. 717. 781. 872. 1270. 1 Burr. 340.]

If the principal ſurrenders himſelf, or the bail render him up, this will diſcharge the bail, and may be (*b*) pleaded to the *ſcire facias*; but ſuch ſurrender or render are not ſufficient, unleſs the plaintiff or his attorney have (*c*) notice of it; and this is required, that the plaintiff may, if he pleaſes, charge him in execution; alſo, that he may not be at any further trouble or charge in proceeding againſt the bail.

If *A.* ſues *B.* in three actions, and *B.* puts in three ſeveral bails, the plaintiff recovers in all, and the defendant renders himſelf, on which one of the bail only enters an *exoneratur;* though the rendering is a diſcharge *in poſſe* as to all, yet it is not (*a*) complete and actual as to all, till an *exoneretur* entered upon all. Salk. 98. pl. 3. *per Cur'*.

(*a*) Where after a ſurrender at a judge's chamber the principal eſcaped from the tipſtaff, [it was holden not to be a good render. 6 Mod. 238. And a render is not complete till the bail have paid the gaoler's fees. Com. Rep. 554. In K. B. it is neceſſary to make an entry of the render in the marſhal's book, which is kept in the King's Bench office; it being holden, that until ſuch entry be made, the defendant is not in cuſtody, ſo as to charge the marſhal in an action of eſcape. 1 Salk. 272. 2 Str. 1226. 2 Burr. 1049.]

If the bail plead a render of the principal, they (*b*) muſt conclude their plea *prout patet per recordum;* for this is not to be tried *per pais*, but by the record. Latch. 149. Noy, 82. Poph. 185. S. C. Hob. 210. Moor, 888. pl. 1249. Keb. 761. 815. S. P. adjudged. Sid. 216. *dubitatur*, and ſaid there were precedents both ways; but *vide* Lev. 211. 2 Keb. 189. 206. Like point adjudged.

(*b*) So if in a *ſcire facias* againſt bail upon a writ of error, according to the ſtatute of 3 Jac. 1. c. 8. they plead the plaintiff proſecuted the writ of error with effect, and thereupon the judgment was reverſed, they muſt conclude *prout patet per recordum.* Raym. 50.

Alſo in pleading a render of the principal, the bail muſt ſay *quod venit hic in* (*c*) *curiâ & in* (*d*) *eâdem curiâ reddidit ſe & per eandem curiam commiſſus fuit;* but it being here laid to be done the 2d of *February*, (being *Candlemas-day*, and ſo *dies non juridicus*,) it judicially appears there could be no court that day, and ſo the render and commitment void. 3 Bulſt. 192. Poph. 186. Roll. Rep. 392, 393. S. C. and S. P. admitted *per cur'*, though it is ſaid *quod adhuc remanet in cuſtod'*, &c. for if in priſon without render or commitment, it is not material.

(*c*) *Vide* Stile, 330, 331. (*d*) The render muſt be made in that court where the record is at the time. Cro. Jac. 98. Roll. Abr. 334.

In a *ſcire facias* againſt bail, they cannot plead that the plaintiff hath arreſted the principal in the *Stannary-court*, *per quod* they could not have his body, for they might have removed him by *habeas corpus*. Moor, 400. pl. 524. adjudged. [A principal convicted of felony and under ſentence of tranſportation may, in proper circumſtances, be removed by *habeas corpus*, and ſurrendered in diſcharge of his bail. Caſe of the bail of Peter Vergun, 2 Str. 1217. Fowler v. Dunn, 4 Burr. 2034. How a ſoldier may be ſurrendered by his bail, ſee Bond v. Iſaac, 1 Burr. 339.]

So in a *ſcire facias* againſt bail, they cannot plead that before the return of the ſecond *ſcire facias* the plaintiff proſecuted a *teſtatum capias* againſt the principal, directed to the ſheriff of, &c. who took the principal in execution upon the ſaid judgment, *& adhuc habet & detinet*, for the recognizance was forfeited before *. 2 Jones, 75. 2 Mod. 312. S. C. 2 Lev. 195. S. C. Ventr. 314. S. C. Cro. Jac. 320. Roll. Abr. 897. *Vide* title *Audita Querela*, letter (B.)

* This is ſtrictneſs of law, yet the court, *ex gratiâ*, would have permitted the bail to have ſurrendered the principal, before the return of the *ſcire facias*. See *ante*.

[A *cognovit* by the principal, without notice to the bail, will not diſcharge them. Hodſon v. Nugent, 5 Term Rep. 277.

The bail are at liberty to render the defendant before they juſtify, notwithſtanding a rule has been obtained againſt the ſheriff to bring in the body, at any time before the expiration of ſuch rule; the attorney for the defendant giving notice of ſuch render to R. K. B. Tr. 33 G. 3. 5 Term Rep. 368. The like liberty after an aſ-

ſignment of the bail-bond. Edwin v. Allen, 5 Term Rep. 401. Meyſey v. Carnell. *Id.* 534. S. P.

to the plaintiff's attorney without delay, and making affidavit thereof.

(D 2.) Of the Proceedings on the Bail-bond.

Tidd's Pr. 153. Gilb. C. P. 20.

IF bail above be not put in and perfected in due time, the bail-bond is forfeited; and the plaintiff may either take an aſſignment of it, or proceed againſt the ſheriff for not bringing in the body.

1 Salk. 99. 1 Wilſ. 223. 1 Salk. 97. 7 Mod. 62. 117. 6 Mod. 122. Tidd's Pr. 134, 5. 153.

If he be diſſatisfied with the bail below, he ſhould not take an aſſignment of the bail-bond; for by ſo doing, he not only diſcharges the ſheriff, but if the ſame bail be put in above, he cannot afterwards except againſt them.

1 Mod. 228. *Vide ſupra.* 1 Sid. 23. 2 Mod. 84.

Before the ſtatute for the amendment of the law, the ſheriff was not compellable to aſſign the bail-bond; though if he had not aſſigned it, the court would have amerced him.

Paradice v. Holiday, Barnes, 77.

It hath been ſaid *arguendo*, that the bail-bond may be aſſigned *before* it is forfeited; though it cannot be put in ſuit till afterwards.

Tidd, 155. Str. 1262. See 2 Bl. Rep. 876. *contr.*

Where the defendant has neglected to put in and perfect bail above, the plaintiff is not out of court by omitting to declare in the original action, within two terms after the return of the writ; but he may ſtill take an aſſignment of the bail-bond; for he is not bound to declare *de bene eſſe*, within the time limited for the defendant's appearance; and after that time he cannot declare, until the defendant has actually appeared.

Sty. Pr. Reg. 257. Bellis v. Mitford, 2 Bl. Rep. 1009.

By a rule of the court of C. P. *Hil.* 9 *Ann.* no bail-bond, taken in *London* or *Middleſex*, can be put in ſuit till after four days, excluſive of the appearance-day of the return of the writ; and, taken any where elſe, till after eight days, excluſive of the appearance-day, of ſuch return, upon pain of having all proceedings thereon ſet aſide with coſts upon motion. The like rule was in B. R. *M.* 8 *Ann.*, except that in country cauſes, the time is limited to ſix days inſtead of eight.

Studley v. Sturt, 2 Str. 782.

If the laſt of the four days happen on a *Sunday*, the defendant has the whole of the *Monday* to put in his bail.

3 Term Rep. 572.

The court will not order the bail-bond to be delivered up to be cancelled, on the ground of a miſnomer.

R. M. 8 Ann. reg. 1. Cowp. 71.

Where the plaintiff has *not* loſt a trial, the court, or a judge, will ſtay the proceedings on the bail-bond, upon putting in and perfecting bail above; paying the coſts incurred by the aſſignment of the bail-bond, to be taxed by the proper officer; receiving a declaration in the original action; pleading iſſuably; and taking ſhort notice of trial, ſo that the cauſe may be tried the ſame term.

Cowp. 769.

And wherever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited,

feited, the notice (in caſe the party means to put in bail, in order to ſtay proceedings on the bail bond) ſhould be, that he will put in and *perfect* bail on ſuch a day; when the plaintiff may oppoſe them in court, without its being a waver of the bail-bond.

But if the plaintiff have *loſt* a trial, the court will further require, that the bail conſent that judgment be entered againſt them on the bail-bond for the plaintiff's ſecurity; after which they are liable to immediate execution, if the defendant ſhould fail in the action; and they cannot diſcharge themſelves by a ſurrender. R. M. 8 Ann. reg. 1. (*a*) 2 Str. 1252. Carmichael v. Troutbeck, Tr. 24 G. 3. Tidd's Pr. 157.

The ſheriff's bail are liable to pay what is really due to the plaintiff, though beyond the ſum ſworn to, and coſts, to the full extent of the penalty of the bond: and the court will not relieve them on the death of the plaintiff in the original action, where the plaintiff might have had judgment againſt him (*b*), if bail above had been put in and perfected in time. But where the defendant dies, before the plaintiff could have had judgment (*c*), if there has been no delay in putting in and perfecting bail, the court will ſtay the proceedings, upon payment of coſts only. Savage v. Weſt, 9 G. 3. cited in Cowp. 71. 1 H. Bl. Rep. 76. S. P. (*b*) R. M. 8 Ann. reg. 1. (*c*) Gilb. K. B. 362. Cowp. 71. Barnes, 112. (*b*) Cowp. 71. Barnes, 61. 70.

If after the death of the plaintiff, his attorney take an aſſignment of the bond, the proceedings thereon will be ſet aſide. Hutchinſon v. Smith, 8 Mod. 240.

If the plaintiff take an aſſignment of the bond during the pendency of a rule to ſet aſide proceedings for irregularity, and *to ſtay proceedings in the mean time*, ſuch aſſignment will be ſet aſide, for the rule is a ſuſpenſion of proceedings to *all purpoſes*. Swayne v. Crammond, 4 Term Rep. 176.

The action upon the bail-bond muſt be brought in the ſame court where the bail is given, even though an attorney of another court happen to be one of the bail; for the ſtatute empowers no other court to do equitable juſtice between the parties. Francis v. Taylor, Barn. 92. Walton v. Bent, 3 Burr. 1923. Morris v. Rees, 2 Bl. Rep. 838. How v. Bridgwater, Barn. 117.

The under-ſheriff may aſſign the bond, but his clerk cannot. Kitſon v. Fagg, Str. 60.

The ſheriff may aſſign the bond out of the county; and the action upon it may be brought either in the county where the aſſignment was made, or in that where the bond was taken. Gregſon v. Heather, 2 Ld. Raym. 1455. 2 Str. 727.

There muſt be two witneſſes to the aſſignment, elſe the bond is void. But (*d*) it is not neceſſary to ſet forth this or any other circumſtance of the aſſignment in a declaration on the bond, or to make a *profert* of the aſſignment. Neat v. Mills, Forteſc. 371. (*d*) Leaſe v. Box, 1 Wilſ. 121. Miſtlin v. Morgan, 2 Ld. Raym. 1564.

Neither is it neceſſary to ſtate that the debt was ſworn to, or writ marked; for theſe omiſſions do not avoid the bond; though the ſheriff, or perhaps the plaintiff, may be puniſhable for them. Nor (*e*) need it be ſhewn that the defendant in the original action was arreſted; for the arreſt is not traverſable.] Whiſkard v. Wilder, 1 Burr. 330. (*e*) Watkins v. Parry, 1 Str. 444. Haley v. Fitzgerald, 1 Str. 643.

Bail in Criminal Caſes.

2 Inſt. 189. 2 Hawk. P. C. 148.

IN all criminal caſes, in which it ſeems doubtful, whether the accuſed be guilty of the offence or not, bail is regularly to be allowed; and it is a general rule, that *whoſoever is judge of the offence, may bail the offender.*

(A) In what Caſes it is grantable by a Sheriff.
(B) Where by a Juſtice of the Peace.
(C) Where by Juſtices of Gaol Delivery.
(D) Where by the Court of King's Bench.
(E) Where by the other Courts of Weſtminſter.
[(E 2.) Where by the Houſe of Lords.]
(F) What ſhall be ſaid to be ſufficient Bail.
(G) The Offence of taking inſufficient Bail.
(H) The Offence of granting it where it ought to be denied.
(I) The Offence of denying, delaying, or obſtructing it, where it ought to be granted.
(K) In what Form it is to be taken.
(L) What ſhall forfeit the Recognizance.

(A) In what Caſes it is grantable by a Sheriff.

Vide 2 Hawk. P. C. 147.

BY the common law, according to ſome opinions, the ſheriff without any writ might *ex officio*, as (*a*) principal conſervator of the peace, bail any perſon arreſted on ſuſpicion of felony; and it is certain, that by the common law, he (*b*) might bail any perſon who was indicted before him at his torn for felony, or any other crime that is bailable.

(*a*) That a conſtable had the like power, *vide* 2 Hawk. P. C. 147. And how far this power is taken away by thoſe ſtatutes which empower juſtices of the peace to admit perſons to bail on an accuſation of felony, and particularly preſcribe in what manner they ſhall do it, *vide Ibidem.* (*b*) But this power is now taken away by 1 E. 4. c. 2., by which it is enacted, that the ſheriff ſhall not proceed on ſuch indictment, but ſhall remove it to the next ſeſſions of the peace. H. P. C. 106. 2 Hawk. P. C. 148.

Alſo

Alſo bail is grantable by a ſheriff by virtue of the following writs. 1. By that of *odio & atia*, by which a perſon committed for the death of a man, might on an inqueſt taken by the ſheriff, if he were found to have done the fact by miſadventure, or *ſe defendendo*, be mainprized by twelve men, upon the writ *de ponendo in ballium;* but this writ ſeems obſolete at this day. Co. Bail and Mainprize, c. 10. 2 Hawk. P. C. 148. Hawk. P. C. 114.

2dly, By writ of mainprize, which of late has been diſuſed, but ſeems ſtill in force, and may be brought by perſons bailable, as thoſe who are impriſoned for a ſlight ſuſpicion of felony, or indicted of larceny, before the ſteward of a leet, or of a treſpaſs before juſtices of the peace, *&c.* Regiſter, 269. H.P.C. 103, 104. 2 Hawk. P. C. 148.

3dly, That of *homine replegiando*, whereon if he return that the plaintiff is eſloigned, he may by *capias* of *withernam* impriſon the defendant, whether he be a peer or commoner, till the plaintiff ſhall be replevied. F. N. B. 68. C. Regiſter, 78, 79. 3 Bl. Comm. 129. *Vide* head of *Writs*.

By *Weſtm.* 1. *cap.* 15. it is enacted as followeth: "For as "much as (*a*) ſheriffs and others, who have taken and kept in "priſon perſons detected of felony, and incontinent have let "out by replevin ſuch as were not repleviſable, and have kept "in priſon ſuch as were repleviſable, becauſe they would gain "of one party and grieve the other; and foraſmuch as before "this time it was not determined which perſons were repleviſ-"able and which not, but only thoſe that were taken for the "(*b*) death of a man, or by (*c*) commandment of the king, or of "the (*d*) juſtices for the (*e*) foreſt: It is provided, and by the "king commanded, That ſuch priſoners as before were (*f*) out-"lawed, and they which have abjured the realm (*g*), provers, "and ſuch as be taken with the (*h*) manner, and thoſe which "have broken the (*i*) king's priſon, thieves (*k*) openly defamed "and known, and ſuch as be appealed by provers, ſo long as "the provers be living (if they be not of good name) and "(*l*) ſuch as be taken for houſe-burning felonioufly done, or for "falſe money, or for counterfeiting the king's ſeal, or perſons "(*m*) excommunicate, taken at the requeſt of the biſhop, or for "(*n*) manifeſt offences, or for treaſon touching the king him-"ſelf, ſhall be no wiſe repleviſable by the common writ, nor "without writ; but (*o*) ſuch as be indicted of larceny by in-"queſts taken before ſheriffs or bailiffs by their office, or of "light ſuſpicion, or of petit larceny that amounteth not above "the value of twelve pence, if they were not accuſed of ſome "other larceny afore-time, or accuſed of (*p*) receipt of thieves "or felons, or of commandment, or force, or of aid in felony "done, or accuſed of ſome other treſpaſs, for which one ought "not to loſe life or member, and a man approved by a prover, "after the death of the prover (if he be no common thief nor "defamed) ſhall be henceforth let out by ſufficient ſurety, "whereof the ſheriff will be anſwerable, and that without giving "ought of his goods."

(*a*) This ſtatute beginning wih inferior officers, extends not to judges of ſuperior courts. 2 Inſt. 185, 186. But though the ſuperior courts are not ſtrictly within the purview of the ſtatute, yet they will always in their diſcretion pay a due regard to the rules preſcribed by it, and not admit a perſon to bail who is expreſsly declared by it to be irrepleviſable, without ſome particular circumſtances in his favour. 2 Hawk. P. C. 175.—And by the 1 & 2 Ph. & M. c. 13. juſtices of the peace ſhall not bail any perſon for offences declared irrepleviſable by this ſtatute, *vide infra*. (*b*) For this *vide* 2 Hawk. P. C. 95. ; and the ſtatutes of Glouc. c. 9. 3 H. 7. 1. (*c*) This exception is not to be applied generally to every command of the king, but only to ſuch as proceed from him in perſon,

perſon, or from his privy council. 2 Hawk. P. C. 151.* (*d*) This is not to be underſtood of ordinary commitments by ſuch juſtices for ſafe cuſtody, but of impriſonments by their abſolute command, by way of puniſhment, as for contempts and ſuch like matters, which lie rather in their diſcretion than in their ordinary power. 2 Hawk. P. C. 151. S. P. C. 73. Dalt. c. 14. F. N. B. 251. 24 E. 3. 33. pl. 25. Roll. Rep. 134. (*e*) They muſt be foreſts, ſtrictly ſuch, and not parks or chaſes; but it is not material whether the foreſt be the king's or a ſubject's. Regiſter, 77. 4 Inſt. 314. Co. Lit. 2. a. 233. a. F. N. B. 67. Plowd. 124. *Vide* the 1 E. 3. c. 8.; and 7 R. 2. c. 4. *That no man ſhall be impriſoned by any officer of the foreſt without due indictment, or being taken with the manner, or treſpaſſing in the foreſt:* For the explanation of which, *vide* 2 Hawk. P. C. 152. And for what ſhall be ſaid a taking with the manner, *vide* Carth. 77, 78. (*f*) Yet the King's Bench may in diſcretion bail a man upon an outlawry of felony; as where an error is alleged in the proceedings, &c. 19 H. 6. 2. a. 2 Hawk. P. C. 154. *Vide* title *Outlawry*. (*g*) For this *vide* 2 Hawk. P. C. head of *Approver*. (*h*) Or rather *Mainer*, that is, with the thing ſtolen as it were in their hands. H. P. C. 101. 2 Hawk. P. C. 154. (*i*) Alſo they who have broken any other priſon. 2 Inſt. 188. 2 Hawk. P. C. 154. (*k*) The judgment whereof muſt be left to the diſcretion of the perſon who hath power to bail them. 2 Hawk. P. C. *ibid.* (*l*) Perſons taken for arſon, or for falſe money, or for falſifying the king's ſeal, or for treaſon which touches the king himſelf, are, in reſpect of the heinouſneſs of their offence, excluded from replevin, eſpecially if they be in actual cuſtody; but yet ſuch, according to the circumſtances of their caſes, may be bailed in the King's Bench. 2 Hawk. P. C. 156. (*m*) But if a perſon appear to be impriſoned for an excommunication, in a cauſe whereof the ſpiritual court hath no cognizance, he may be delivered either by *habeas corpus*, or by quaſhing, or ſuperſeding the writ of *excommunicato capiendo*. 2 Hawk. P. C. 154. (*n*) Muſt be intended of inferior crimes of an enormous nature, under the degree of felony; the judgment whereof ſeems to be left to diſcretion. *Vide* 2 Hawk. P. C. 155. (*o*) But how far it muſt appear that thoſe excepted out of the ſtatute are of good reputation, and innocent of the fact, *vide* 2 Hawk. P. C. 159. And that it muſt be left to the diſcretion of the perſon who has the power of bailing them. (*p*) This is to be underſtood of acceſſaries before and after to capital offences, with theſe reſtraints, that the perſons ſo accuſed are of good reputation, and under no violent preſumptions of guilt. 2 Hawk. P. C. 159., and 31 Car. 2. c. 2. par. 21.

* With reſpect to the command of the king, or his council, the power of *ſecretary of ſtate* to commit, &c. the editor would refer the ſtudent to the caſes of *Entick Clerk* v. *Carrington and others*, 2 Wilſ. 275. 11 St. Tr. 317.; and the caſe of *Money et al'* v. *Leach* in *Error*, in *B. R.* 3 Burr. 1742, &c. Alſo *vide* the *King* and *Wilkes*, 2 Wilſ. 151. &c. The caſe of *Croſby*, Eſq. mayor of *London*, 3 Wilſ. 188., &c. As to a commitment by the commons, *vide Poſt*.

(B) Where by a Juſtice of the Peace.

H. P. C. 105. Coke, Bail and Mainprize, c. 6. Lamb. 347. 2 Hawk. P. C. 160.

IT ſeems clear, that wherever juſtices of peace have power to hear and determine any offence which is bailable within the ſtatute *Weſtm.* 1., any one of ſuch juſtices ſeems conſequently to have power to bail any perſon indicted at the ſeſſions for ſuch offence, becauſe every ſuch juſtice is a judge of the court which is to determine it.

Alſo every juſtice of the peace has a diſcretionary power of admitting perſons to bail who have given a dangerous wound.

2 Hawk. P. C. 161.

But the power of juſtices in admitting to bail, is chiefly regulated by acts of parliament; to which purpoſe it is recited by 1 *R.* 3. *cap.* 3. "That divers perſons had been daily arreſted and "impriſoned for ſuſpicion of felony, ſometime of malice, and "ſometime of a light ſuſpicion, and ſo kept in priſon without "bail or mainprize, to their great vexation and trouble; and "thereupon it is enacted, that every juſtice of the peace in "every ſhire, city, or town, may, by his or their diſcretion, let "ſuch priſoners and perſons ſo arreſted to bail or mainprize, "in like form as though the ſame priſoners or perſons were "indicted thereof, of record, before the ſame juſtices at their "ſeſſions."

By

But this ſtatute, ſo far as it gives ſuch power to a ſingle juſtice, is repealed by 3 *H.* 7. *cap.* 3. which enacteth, "That juſtices "of the peace, or two of them at the leaſt, whereof one to be "of the *quorum*, have power to bail any perſon mainpernable by "law, to their next general ſeſſions, or to the next general gaol-"delivery, as well within franchiſe as without; and that the "ſame juſtices, or one of them, ſhall certify the ſame to ſuch "ſeſſions or gaol-delivery, on pain of 10*l.*"

But theſe ſtatutes having been often abuſed by juſtices of the peace bailing perſons in the name of two juſtices, where one only was preſent, and for offences not bailable;

It is enacted by 1 & 2 *Ph.* & *Mar. cap.* 13. "That no juſ-"tice ſhall bail any perſon for offences declared to be irreple-"viſable by *Weſtm.* 1. and that no perſon arreſted for man-"ſlaughter or felony, or ſuſpicion thereof, ſhall be let to bail or "mainprize by any juſtices of the peace, if it be not in open "ſeſſions, except it be by two juſtices at the leaſt, and one to "be of the *quorum*, and the ſame juſtices to be preſent together "at the time; which bailment or mainprize they ſhall certify in "writing, ſubſcribed or ſigned by them at the next general "gaol-delivery; and ſuch juſtices, before ſuch bailment for fe-"lony, ſhall take the examination of the priſoner, and the in-"formation of them that bring him, of the fact and circum-"ſtances thereof; and ſhall put in writing ſo much thereof as "ſhall be material, before they make the bailment; and ſhall "certify ſuch examination and bailment to the next general "gaol-delivery; and ſhall have authority to bind all ſuch by re-"cognizance or obligation, as do declare any thing material to "prove the ſaid offences, to appear at the next general gaol-"delivery, and to give evidence, *&c.* and ſhall certify the ſaid "evidence and bonds, *&c.* before the time of the trial; and if "any juſtice of *quorum* ſhall offend againſt this act, he ſhall be "fined in diſcretion by the juſtices of gaol-delivery, on proof by "examination before them, *&c.*" *But it is provided*, "That "juſtices in *Middleſex*, and in cities, boroughs, and towns cor-"porate, ſhall have authority to bail priſoners in ſuch manner "as was before accuſtomed; and alſo ſhall take examinations "and bonds as aforeſaid, upon every bailment, and certify the "bailment-bond and examination at the next general gaol-deli-"very."

The authority given to one juſtice of the peace by 1 *R.* 3. to admit perſons to bail for felony, being repealed by 3 *H.* 7. *c.* 3. and 1 & 2 *Ph.* & *Ma. c.* 13., one juſtice of the peace cannot admit perſons to bail, unleſs it be for an offence directly tending to a breach of the peace, the reſtraint whereof is the chief end of his office; or for an offence by ſtatute put under the cognizance of one juſtice; or for an offence indictable at the ſeſſions. 2 Hawk. P. C. 163.

But though the ſtatute of 1 & 2 *Ph.* & *Ma. c.* 13. has preſcribed the ſtatute of *Weſtm.* 1. *c.* 15. as a pattern for juſtices to follow in relation to bail, and it therefore follows, that a perſon under 2 Hawk. P. C. 164.

under an actual arreſt for any crime declared to be irrepleviſable by that act, cannot be bailed by any juſtice; yet if a perſon at large be only accuſed of any ſuch crime on a ſlight ſuſpicion, before a juſtice of the peace, it ſeems that the juſtice ought not to commit him, but ought to take ſurety from him to appear before a proper court.

2 Hawk. P. C. 164. Roll. Rep. 268. H.P.C. 99. Dalt. c. 114. Lamb. 346. 2 Inſt. 314.

Alſo the ſtatute of 1 & 2 *Ph. & Ma. c.* 13. expreſsly mentioning the bailing of perſons for manſlaughter, as well as for other felonies, it is clear that juſtices of the peace may, by force thereof, ſafely bail any perſon impriſoned on a ſlight ſuſpicion of a fact, appearing to be no higher an offence than manſlaughter; and much more if it appear to amount to no more than homicide by miſadventure, or in ſelf-defence; but the juſtices ought to be cautious the offence does not amount to murder; alſo that there be no violent preſumptions that the party did the fact; for if any ſuch appear, the party ought not to be bailed, though the offence amount to no more than homicide by miſadventure or ſelf-defence.

(C) Where by Juſtices of Gaol Delivery.

Crompt. 154. a. H.P.C. 101. F. N. B. 246. S. P. C. 15. 2 Hawk. P. C. 165.

JUSTICES of gaol delivery, not being within the reſtraint of the ſtatute *Weſtm.* 1. *c.* 15. may bail perſons convicted before them of homicide by miſadventure or ſelf-defence, the better to enable them to purchaſe their pardon.

H.P.C. 101. Crompt. 153. 2 Hawk. P.C. 165.

Alſo it ſeems, that in diſcretion they may bail a perſon convicted before them of manſlaughter, upon ſpecial circumſtances; as, if the evidence againſt him were ſlight; or, if he had purchaſed his pardon.

S. P. C. 72. 2 Hawk. P. C. 106.

Alſo if an appellee plead an excommunication in diſability of the plaintiff, it ſeems they may bail him till the plaintiff ſhall be abſolved; for otherwiſe the appellee might lie in priſon for ever, without having an opportunity of coming to his trial.

2 Hawk. P. C. 165.

And where ſuch juſtices have power to admit perſons to bail, it ſeems that they may do it after their ſeſſions is over, as well as during their ſeſſions.

Kelyng, 25. F. N. B. 251. G.

[Although the ſtatute of 3 *H.* 7. *c.* 1. is expreſs, that on an acquittal of murder within the year at the king's ſuit, the juſtices cannot diſcharge, but are bound *ex officio* to hold to bail; yet it has been the practice at the *Old Baily*, and in all the circuits in *England*, not to hold the party to bail, unleſs an appellant appear, and apply by motion for bail.]

(D) Where by the Court of King's Bench.

THIS court, by the plentitude of its power, may in diſcretion admit perſons to bail, though committed by other courts, for crimes not bailable by thoſe courts, on conſideration of the nature and circumſtances of the caſe. Vaugh. 157. 6 Mod. 73. 3 Salk. 91. pl. 1. 284. pl. 12. Holt, 590.

2 Ld. Raym. 978. 12 Mod. 102. 155, 156. Raym. 381.

But here it muſt be obſerved, that with reſpect to the nature of the offence, although this court is not tied down by the rules preſcribed by the ſtatute of *Weſtm.* 1. *cap.* 13. yet it will in diſcretion pay a due regard to thoſe rules, and not admit a perſon to bail who is expreſsly declared to be irrepleviſable, without ſome particular circumſtances in his favour. 175. 2 Inſt. 185, 186. 189. H. P. C. 104. Salk. 61. 3 Bulſt. 113. 2 Hawk. P. C. 5 Mod. 454.

And therefore if a perſon be attainted of felony, or convicted thereof by verdict general or ſpecial, or be notoriouſly guilty of treaſon or manſlaughter, *&c.* by his own confeſſion, or otherwiſe, he is not to be admitted to bail, without ſome ſpecial motive to induce the court to grant it. Kelynge, 90. Dyer, 79. Bulſt. 87. 2 Hawk. P. C. 175.

As where a perſon taken by a *capias utlegatum* on an appeal of felony, by the name of *J. S.* gentleman, pleads that his name is *J. S.* yeoman, and not gentleman, and ſo he is not the ſame perſon that was outlawed; in which caſe the court in diſcretion may bail him; for until the plea be determined, it appears not whether he were the perſon intended or not. 2 Hawk. P. C. 175. So for any other error in the outlawry, eſpecially if it be an apparent one. *Vide* 5 H. 7. 16. pl. 7. 2 Inſt. 188. H. P. C. 101. Sid. 316.

So if a man be convicted of felony upon evidence, by which it plainly appears to the court that he is not guilty of it; in which caſe even the juſtices of gaol-delivery may bail him. Cromp. Juſtice, 154. 2 Hawk. P. C. 175.

Or where a proſecution is unreaſonably delayed; or where the priſoner may be in danger of loſing his life, either by famine, or dangerous diſtemper, *&c.*, unleſs he be bailed. 5 Mod. 455. Sid. 78. Bulſt. 85. Palm. 558.

Keb. 305. Str. 4. 858. Andr. 64. Latch. 12. Cro. Jac. 356. Co. Lit. 289. [The indiſpoſition, upon which the court will bail, muſt be a preſent indiſpoſition, ariſing from the confinement, and not from any conſtitutional or family diſtemper, or from the act of the priſoner. R. v. Wyndham, 1 Str. 4. See too Cowp. 333.]

The court of *King's Bench* hath always admitted perſons to bail impriſoned by the king's ſpecial command, or by order of the privy council, where the commitments expreſſed the crime or cauſe for which the party was committed, on the like circumſtances, on which, in diſcretion, it will grant bail on other commitments. 5 Mod. 78. Sid. 143. Palm. 559. Alſo where it hath appeared that perſons have been committed by colour of an authority claimed under an illegal patent, this court hath always diſcharged the perſons ſo committed without bail. Leon. 70. And. 297. 2 Hawk. P. C. 166.

But it was formerly (*a*) holden by many, and at length adjudged in (*b*) Sir *John Corbet*'s caſe, that perſons committed by the ſpecial command of the king, ſignified by warrant from the lords of (*a*) 33 H. 6 28. b. And. 298. Roll. Rep. 234. 192. 219.

Moor, 839. F. N. B. 66. S. P. C. 72. (*b*) See the arguments on the *habeas corpus*, concerning Loans, and Rushworth's Collections, 1 part, fol. 458. *Vide* Cro. Car. 507. 579. 593.

of the privy council, were not bailable without the king's conſent, unleſs there appeared ſome extraordinary circumſtances in the caſe; it being to be preſumed that the king would not exert his prerogative in ſuch a manner, without ſome good reaſon for the ſafety of the ſtate, not fit to be divulged; but this being thought to be a great ſtrain of the prerogative, and to make the liberty of the ſubject precarious, and contrary to the purport of *magna charta*, and many other ſtatutes, which declared, that no man ſhall be impriſoned but by due proceſs of law, *&c.* occaſioned the petition of right, 13 *Car.* 1. and the 16 *Car.* 1. *cap.* 10. by which it ſeems now eſtabliſhed, that where commitments by the privy council do not with convenient certainty expreſs the crime alleged againſt the party, he ought to be bailed.

2 Hawk. P. C. 170.

The great regard which is ſo juſtly due, and which has always been paid to the proceedings of either houſe of parliament, who are the guardians of the liberty of the ſubject, makes it ſomewhat doubtful in what caſes the court of *King's Bench* will diſcharge or bail a perſon committed by either of thoſe houſes.

2 Hawk. P. C. 170.

Hence no precedent can be found, where the court of *King's Bench* has bailed a priſoner, ſitting the parliament, on a commitment, which, on the return of it, ſtands indifferent whether it be ſtrictly legal, or not.

Mod. 144, 145, *&c.* 3 Keb. 792. 1 Freem. 453. 2 St. Tr. 615. S. C. 2 Show. 336. [See confirmations of this doctrine in Murray's caſe, 1 Wilſ. 299.

And, therefore, in the Lord *Shafteſbury*'s caſe, who, upon his *habeas corpus* in the *King's Bench*, was returned to have been committed by the Houſe of Lords, for a high contempt committed againſt the houſe; the court would not take notice of any exceptions againſt the form of the commitment; as that it was too general, and did not expreſs the nature of the contempt, or in what place it was committed, *&c.* for that it ſhall be preſumed that it was ſuch, for which the lords might lawfully make ſuch an order, and no other court ſhall preſcribe to them in what form they ought to make it.

Braſs Croſby's caſe, 3 Wilſ. 188. 2 Bl. Rep. 755.; and part of Lord Camden's argument in the caſe of Entick v. Carrington, 11 St. Tr. 317.]

2 Hawk. P. C. 171. Keb. 871. 887. 889. Sid. 245. Lev. 165. Mod. 155. 157. (*c*) But Q: For though the prorogation of the parliament was the chief reaſon why the Earl of *Danby* was bailed; yet the binding him to appear at the next ſeſſions of parliament was an affirmance of the commitment, and a plain proof of the opinion of the court at that time, that the commitment was not avoided or diſcharged by the prorogation of the parliament. Carth. 132, 133. *Vide* Skin. 56. that the Earl of *Danby* was not bailed *.

But a perſon committed for a contempt, by the order of either houſe of parliament, may be diſcharged by the court of *King's Bench*, after a diſſolution or prorogation of the parliament, whether he were committed during the ſeſſions, or afterwards; for that all the orders of parliament are (*c*) determined by a diſſolution or prorogation; and all matters, before either houſe, muſt be commenced a-new at the next parliament, except only in a few caſes; and if the ſubject ſhould be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could ſay when his impriſonment would end.

* In Skin. 162, 3. there are further arguments in his favour; but in Carth. 132, it is ſaid he was bailed, when Ch. Juſt. *Jeffries* came in. See Ch. Juſt. *Holt*'s opinion in Salk. 503.

And though the court of *King's Bench* may in their diſcretion bail a lord upon an impeachment of high treaſon, after a diſſolution or prorogation of the parliament, yet may they refuſe it, not as a matter out of their power, but as a thing which they are not bound to do, and improper on conſideration of the whole circumſtances of the affair. Raym. 381. Lord Staffford's caſe. [The court of King's Bench bailed the Earl of Caſtelmain, whom the commons had committed for high treaſon, the attorney-general not oppoſing. 4 St. Tr. 398.]

The Earl of *Saliſbury* was impeached for being reconciled to the church of *Rome*, by the convention that was turned into a parliament 1 *W. & M.*, and lay in the *Tower* till the next parliament, which being adjourned for two months, he moved to be diſcharged on the act of Oblivion, wherein neither his crime nor his perſon were excepted, but clearly within the act of Pardon, or that he might be bailed: As to the act of Pardon, the court held, that it ſhould be (*a*) pleaded with proper averments, which could not be done here, becauſe there was nothing before the (*b*) court upon which to ground ſuch plea; and that as to the bailing him, this being a ſhort adjournment, the application for that purpoſe ſhould be to the parliament. Carth. 131, 132. Show. 100. S. C. Earl of Saliſbury's caſe. (*a*) For which are cited Plow. 484. 8 Co. 68. 4 H. 7, 8. Raſt. Ent. 665. (*b*) But the reporter makes a *Quære*, Whether he might not plead it in diſcharge of the matter returned by the *habeas corpus*, and enter it on the ſame roll? Carth. 132.

In former days, and particularly at the time when Sir *Edward Coke* was chief juſtice, ſeveral perſons committed to the *Fleet* by the lord chancellor, were bailed by the court of King's Bench, upon exceptions to the (*c*) generality of the form of the commitments. (*c*) As not ſhewing the time of the commitment. Roll. Rep. 192. Or ſetting forth only the command of the lord chancellor as the ground of the impriſonment, without mentioning any crime at all. Moor, 839. Roll. Rep. 219. Or mentioning the crime in general terms; as for a contempt to the court of Chancery, without mentioning what the contempt was. Roll. Rep. 192. 218.

Alſo one *Glanvil*, who was generally committed by the command of the lord chancellor, without ſetting forth any cauſe of ſuch command, ſeems to have been bailed upon examination of the merits of the decree, for diſobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the common law; which was thought contrary to the purport of 27 *E.* 3. *cap.* 1., and 4 *H.* 4. *cap.* 23. But this proceeding being reſented by the lord chancellor, the ſaid *Glanvil* was afterwards recommitted by him for the ſame matter, and yet was on another *habeas corpus* bailed a ſecond time by the court of *King's Bench*. Roll. Rep. 111. 219. Moor, 838. 2 Bulſt. 301. Cro. Jac. 343. 3 Bulſt. 115. Roll. Rep. 277. *Vide* Daliſon, 81. 3 Leon. 18.

But as there have been no ſuch proceedings of late days, the diſuſe of them has certainly leſſened, if not wholly removed, the force of theſe reſolutions, eſpecially, as it is now eſtabliſhed, that a court of equity can give relief after a judgment at law; for otherwiſe it would have no power of moderating the rigour of the law, it being in many caſes very doubtful what the law is before it be determined; the ſuperior courts therefore will put the (*d*) moſt favourable conſtruction on one another's proceedings, and not intend that they acted beyond their juriſdiction. 2 Hawk. P. C. 172. Abr. Eq. 130. (*d*) A commitment from Chancery for diſobedience to a decree is good, without ſhewing what the decree was. 1 Mod. 155. Moor, 840. S. P.

Vaugh. 157. 6 Mod. 73. 3 Salk. 91. pl. 1. 284. pl. 12. Holt, 590. 2 Ld. Raym. 978. 12 Mod. 102. 155, 156. 2 Hawk. P.C. 173.

The court of King's Bench having the ſupreme controul of all inferior courts, may in diſcretion admit perſons to bail committed by ſuch courts, upon conſideration of the whole circumſtances of the caſe, as the (*a*) length and hardſhip of the impriſonment, the (*b*) enormity, or dangerous tendency, or notoriety, or ſmall conſequence of the offence, or obſtinacy of the offender, or the (*c*) dignity of the court by which he was committed, and other ſuch like circumſtances, of which the court will receive information by ſuggeſtion or affidavit, being (*d*) conſiſtent with the return of the *habeas corpus*.

(*a*) Roll. Rep. 218. 337. 2 Bulſt. 140. Latch. 12. (*b*) 3 Bulſt. 48 to 54. (*c*) For this *vide* 2 Hawk. P.C. 173. Vaugh. 139. 2 Bulſt. 139. Cro. Jac. 219. Cro. Car. 579. Sid. 144. 286. 320. Salk. 348. pl. 2. 5 Mod. 19. March, 52. (*d*) That no one can in any caſe controvert the truth of the return to a *habeas corpus*, or plead or ſuggeſt any matter repugnant to it; yet a man may confeſs and avoid ſuch return, by admitting the truth of the matters contained in it, and ſuggeſting others not repugnant, which take off the effect of them. Sid. 287. 5 Mod. 323. 454. 2 Jones, 222. 2 Hawk. P. C. 113. [The King's Bench may bail in all caſes at their diſcretion. Com. Dig. tit. *Bail*, (F. 4.) Cowp. 333.; and they will in general do ſo in every caſe not capital: In every capital caſe where there is any circumſtance to induce a preſumption of the priſoner's innocence; and in every caſe where the charge is not alleged with ſufficient certainty. R. v. Judd, 2 Term Rep. 255. R. v. Remnant, 5 Term Rep. 169. They will, therefore, bail a perſon acquitted on an indictment of murder, and afterwards in cuſtody on an appeal, unleſs the judge certifies a diſſatisfaction with the verdict. Caſtell v. Bambridge, 2 Str. 854. So a perſon committed for manſlaughter, or even murder, if it appear to be no more than manſlaughter, on the depoſitions before the coroner. R. v. Dalton, 2 Str. 911. R. v. Magrath, *Id.* 1243. So in murder, and *pardon pleaded and allowed*, the defendant ſhall not give bail to anſwer the appeal, though the heir is beyond ſea, for this is not within the 3 H. 7. R. v. Chetwynd, 2 Str. 1203. In rape both principal and acceſſary will be bailed, if it appear they do not mean to abſcond. R. v. Lord Baltimore, 4 Burr. 2179. 1 Bl. Rep. 648. S. C. The court is bound *ex debito juſtitiæ* to bail an accomplice entitled to the king's pardon. R. v. Rudd, Cowp. 334. But they will not bail an appellee for murder, unleſs circumſtances of delay appear on the part of the appellant. Caſtell v. Bambridge, 2 Str. 854. Nor a perſon charged with a highway robbery, if the proſecutor attends and ſwears he is the man, notwithſtanding a number of affidavits are produced to ſhew an *alibi*. R. v. Greenwood, 2 Str. 1138. Or for aſſiſting in the running of contraband goods, &c. R. v. Norton, Bunb. 143. Nor will they order, at the inſtance of the priſoner, a medical man to attend the perſon wounded, in order to ſtate his ſituation for the purpoſe of bail. R. v. Sarah Saliſbury, 1 Str. 547. Nor will they bail after a bill for murder found, though the fact were plainly manſlaughter. Caſe of Kirk and Caſe for the murder of Seymour Conway, M. 12 W. 3. See too 1 Salk. 104. Skin. 683. They have refuſed to bail on a ſpecial verdict on the ſtatute of Stabbing. Sty. 467. 5 Mod. 288. It is ſaid in ſome caſes never to be allowed in manſlaughter till clergy had. Sty. 371. Salk. 103. 5 Mod. 288. But it ſeems the court of K. B. may bail in this caſe, though juſtices of *oyer* and *terminer* or gaol-delivery cannot. Keilw. 70. 2 Inſt. 188. Salk. 61.]

Com. Dig. tit. *Bail*, F. 2. 1 Mod. 58. 3 Wilſ. 199. 2 Term Rep. 190.

[It is to be obſerved, that neither this court nor any other court can bail perſons in execution, or puniſhed under any ſtatute with impriſonment for their offence. And this is one reaſon why they cannot interfere where a party is committed for a contempt.]

(E) Where by the other Courts of *Weſtminſter*.

2 Inſt. 53. 55. 615. 4 Inſt. 290. Vaugh. 154. 2 And. 297. Daliſon, 81. 3 Leon. 18. 2 Jones 13, 14. 2 Mod. 198. [The

THE courts of Common Pleas and Exchequer, at any time during term, and the Chancery, either in term or vacation, may by the common law, award a *habeas corpus* for any perſon committed for a crime under the (*e*) degree of felony or treaſon; and thereupon diſcharge him, if it ſhall plainly appear by the return that the commitment was illegal, or bail him if it ſhall appear doubtful.

court of C. P. may, by the common law, grant a *habeas corpus* in all caſes of miſdemeſnour. Wood's caſe,

case, 3 Wilf. 172. 2 Bl. Rep. 745. S. C. Wilkes's case, 2 Wilf. 151.] (*c*) That in ſome caſes the Chancery may by the common law bail perſons for felony. 2 Hawk. P. C. 177.

And by the *habeas corpus* act, any of the ſaid courts in term-time, and any judge of the ſaid courts, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any perſon bailable within the intent of that act, for any crime under the degree of felony. *Vide infra.* tit. *Habeas Corpus.*

[(E 2.) Where by the Houſe of Lords.

THE Houſe of Lords may bail a peer committed upon an indictment for murder, if the indictment be removed before them by *certiorari*. Skin. 683, 4.

Upon impeachments by the commons for high crimes and miſdemeſnours, the recognizance of bail is taken by order of the Houſe of Peers, at their lordſhips' bar, the bail being previouſly approved by a committee, to whom it is referred to conſider of their ſufficiency. The condition of the recognizance in ſuch caſe is, that the criminal ſhall appear perſonally before the lords in parliament, and from day to day, until the further order of the houſe. Dr. Sacheverell's caſe, Dom. Proc. 13th Jan. 1709. Caſe of Warren Haſtings, Dom. Proc. die Lunæ, 21° Maij 1787.]

(F) What ſhall be ſaid to be ſufficient Bail.

NO perſon ſhall be bailed for felony by leſs than two, and it is ſaid not to be uſual for the *King's Bench* to bail a man on a *habeas corpus*, on a commitment for treaſon or felony, without four ſureties (*a*); the ſum in which the ſureties are to be bound, ought to be never leſs than 40*l.* for a capital crime; but it may be higher in diſcretion, on conſideration of the ability and quality of the priſoner, and the nature of the offence; and the ſureties may be examined on oath concerning their ſufficiency, by him that takes the bail; and if a perſon be bailed by inſufficient ſureties, he may be required either by him who took the bail, or by any other who hath power to bail him, to find better ſureties, and on his refuſal may be committed; for inſufficient ſureties are as none. 2 Hawk. P. C. 141. H. P. C. 97. Dalt. c. 14. That formerly none under the degree of ſubſidy-men were admitted to be bail for any perſon. Dalt. c. 70. and 114. [And, according to Crompt. Juſt. 194. a. are required bail muſt be

ſubſidy-men were ſuch as had 40*s.* a-year in the county. (*a*) In felony four perſons for bail; but for any inferior offence two are ſufficient. In both caſes the number of the mentioned in the notice, otherwiſe the court will reject the whole. *Per* Lord Mansfield, Rex v. Bolton, M. 23 Geo. 3. Hawk. P. C. 141., notes, 6th edit. Sty. Pr. Reg. 110. In the caſe of the King v. Judd, though the commitment did not ſufficiently charge a felony, and therefore the defendant was entitled to bail; yet enough appearing to ſhew an offence of great enormity, the court inſiſted upon four ſureties. 2 Term Rep. 255. In an appeal of murder on the civil ſide, two bail only are required; but where it comes on the crown ſide by *certiorari*, there muſt be four. Caſtel v. Bambridge and Corbet, 2 Str. 855.]

But juſtices muſt take care, that under pretence of demanding ſufficient ſurety, they do not make ſo exceſſive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as ſuch by 1 *W. & M. Seſſ.* 2.; by which it is declared, that exceſſive bail ought not to be required. 2 Hawk. P. C. 141.

[R. v. Bowes, Dougl. 466. notes.] The defendant's attorney may be bail for him; for the rule that no attorney or officer of the court ſhall be bail does not extend to criminal caſes.]

(G) The Offence of taking inſufficient Bail.

S. P. C. 333. H.P.C. 97. 2 Hawk. P. C. 142. *Vide infra* letter (H.)

IF the party bailed by inſufficient ſureties do not appear according to the condition of the recognizance, the juſtice, *&c.* who bailed him is finable by the juſtices of aſſiſe; but if he appear, it ſeems that the perſon who bailed him is excuſed.

And that if a juſtice admits a perſon to bail by inſufficient ſureties, whom he knows not to be bailable by law, corruptly for lucre or reward, the court of King's Bench will grant an information againſt him, as in Rex v. Brooke, 2 Term Rep. 190.; and ſee title *Informations*; it is an offence too for which he may be indicted, *vide* title *Indictments*.

(H) The Offence of granting it where it ought to be denied.

2 Hawk. P. C. 142. S. P. C. 33. *Vide* title *Eſcape.*

THE bailing a perſon not bailable by law, is puniſhable at common law, as a negligent eſcape, or as an offence againſt the ſeveral following ſtatutes.

By the ſtatute of *Weſtm.* 1. *cap.* 15. it is enacted, "That if "the ſheriff or any other let any go at large by ſurety that is not "repleviſable, if he be ſheriff or conſtable, or any other bailiff of "fee, which hath keeping of priſons, and be thereof attainted, "he ſhall loſe his fee and office for ever; and if the under-ſheriff, "conſtable, or bailiff of ſuch as have fee for keeping of priſons, "do it contrary to the will of his lord, or any other bailiff, being "not of fee, they ſhall have three years impriſonment, and make "fine at the king's pleaſure."

And it is enacted by 27 *E.* 1. commonly called the ſtatute *de Finibus levatis*, *cap.* 3. "That the juſtices aſſigned to take aſſizes, "*&c.* when they deliver the gaols, *&c.* ſhall inquire if ſheriffs, "or any other, have let out by replevin priſoners not repleviſable, "or have offended in any thing contrary to the form of the ſaid "ſtatute of *Weſtm.* 1. and whom they ſhall find guilty they ſhall "chaſten and puniſh in all things according to the form of the ſaid "ſtatute."

And it is further enacted by 4 *E.* 3. *cap.* 2. "That at the time "of the aſſignment of keepers of the peace, mention ſhall be "made, that ſuch as ſhall be indicted or taken by them, ſhall not "be let to mainprize by the ſheriffs, nor by none other miniſters, "if they be not mainpernable by law, nor that none who are in-"dicted ſhall be delivered but by the common law; and that the "juſtices aſſigned to deliver gaols ſhall have power to inquire of "ſheriffs, gaolers and others, in whoſe ward ſuch perſons in-"dicted ſhall be, if they make deliverance, or let to mainprize "any ſo indicted which be not mainpernable, and to puniſh the "ſaid ſheriffs, gaolers and others, if they do any thing againſt the "ſaid act."

And

And it is enacted by 1 & 2 *Ph. & M. cap.* 13. "That no "juſtice or juſtices of the peace ſhall let to bail or mainprize any "perſon or perſons, which for any offence or offences by them "or any of them committed, be declared not to be repleviſed or "bailed, or be forbidden to be repleviſed or bailed by the above-"mentioned ſtatute of *Weſtm.* 1. *cap.* 15. And that the juſtices "of gaol-delivery of the place where ſuch juſtices of the peace "ſhall be guilty of ſuch offence, upon due proof thereof, by ex-"amination before them, ſhall for every ſuch offence ſet ſuch fine "on every ſuch juſtice, as the ſame juſtices of gaol-delivery ſhall "think meet."

A juſtice of Surry committed a man on ſuſpicion of ſtealing a mare, and bound over the owner to proſecute; afterwards, upon examining two other perſons, he admitted the party to bail. The proſecutor appeared at the aſſizes, and found a bill, but the party accuſed did not appear, and the court granted an information againſt the juſtice, declaring they ſhould not have bailed the man themſelves. 2 Stra. 1216.

Juſtices of the peace, before they bail a man under commitment, muſt at their peril inform themſelves of the cauſe for which he was committed; for if he were in truth committed for a cauſe not bailable by law, it is no excuſe that they did not know that he was committed for ſuch cauſe.

Poph. 96. Dalt. c. 114; 2 Hawk. P. C. 143.

(I) The Offence of denying, delaying, or obſtructing it where it ought to be granted.

IT is clearly agreed to be an offence by the common law as well as by ſtatute, and puniſhable by indictment as well as by action, to deny, or delay, or obſtruct bail where it ought to be granted.

14 H. 7. 7. pl. 19. H. P. C. 143. Dalt. 114.

But it ſeems alſo clear, that he who has power to bail another, is not bound to demand of him to find ſureties, and to forbear committing him till he ſhall refuſe to find them, but may well juſtify his commitment, unleſs the party himſelf ſhall offer his ſureties.

2 Hawk. P. C. 143.

The principal ſtatutes relating to this offence are the above-mentioned ſtatute of *Weſt.* 1. *cap.* 15.; and the ſtatute *de Finibus*, 27 *Edw.* 1. *cap.* 3.; and 31 *Car.* 2. *cap.* 2. commonly called the *Habeas Corpus* act; by the firſt whereof it is enacted, "That if any withhold priſoners repleviſable after that they have "offered ſufficient ſurety, he ſhall pay a grievous amercement "to the king; and if he take any reward for the deliverance of "ſuch, he ſhall pay double to the priſoner, and alſo ſhall be in "the great mercy of the king." And by the ſecond of the ſaid ſtatutes it is enacted, "That juſtices of aſſiſe ſhall inquire if "ſheriffs, or any other, have offended in any thing contrary to "the ſaid ſtatute of *Weſtm.*; and whom they ſhall find guilty, "they ſhall puniſh in all things according to the form of the ſaid "ſtatute."

H. P. C. 97. 2 Hawk. P. C. 143.

[The laſt-mentioned ſtatute is ſet out at length *infra*, tit. *Habeas Corpus*, B. 4. to which part the reader is referred.]

(K) In what Form it is to be taken.

2 Jones, 210. Lev. 106. Sid. 211. 4 Inſt. 178. 2 Stra. 911. 1242. 2 H. H. P. C. 125. H.P.C. 97. Cromp. Juſt. 157. a. ſuch form.

WHERE a perſon actually preſent in court is bailed for a crime puniſhable with loſs of life or member, it ſeems to be in the diſcretion of the court to take a recognizance from each of the bail, either in a certain ſum, or body for body, or both ways; however ſuch recognizance of body for body (*a*) doth not make the bail liable to the ſame puniſhment with the priſoner, but only to be fined, *&c.*

and *per* 2 Hawk. P. C. 177. (*a.*) Juſtices of the peace may take the recognizance in [But this kind of bail is now in diſuſe. 2 H. H. P. C. 125.]

2 Hawk. P. C. 177. Where the court on motion may diſpenſe with

But for a crime of an inferior nature, it ſeems that the recognizance ought to be only in a certain ſum of money, and not body for body.

the principal's joining in the recognizance. Salk. 3. pl. 7. [Where the principal is an infant, or in priſon, and ſo abſent, the recognizance is taken of the bail only; and the juſtice or juſtices grant a warrant under hand and ſeal to diſcharge the priſoner out of gaol. 2 H. H. P. C. 126. Burn's Juſt. tit. *Bail.* Bail muſt be taken for a time certain, elſe it will be erroneous. Rex v. Rainer, 3 Sid. 214.]

(L) What ſhall forfeit the Recognizance.

2 Inſt. 150. 4 Inſt. 178. S. P. C. 178. Dalt. c. 127. 2 Hawk. P. C. 177, 8.

IF the recognizance be in the uſual form, *ad ſtandum recto de feloniâ prædictâ & ad reſpondendum domino regi*, and at the trial the party ſtands mute, though it may be reaſonably argued from the import of theſe words, that in ſtrictneſs the recognizance is forfeited, yet the later opinions hold otherwiſe; for if a man's bail, who are his gaolers of his own chooſing, do as effectually ſecure his appearance, and put him as much under the power of the court as if he had been in the cuſtody of the proper officer, they ſeem to have anſwered the end of the law, and to have done all that can be reaſonably required of them.

2 Hawk. P. C. *ibid.* R. v. Ridpath, Forteſc. 358.

If *A.* enters into a recognizance that *B.* ſhall appear in the *King's Bench* ſuch a term, to anſwer ſuch an information, and not to depart till he ſhall be diſcharged by the court, and afterwards a *nolle proſequi* is entered on that information, and another exhibited, whereto he refuſes to appear, *&c.* the recognizance is forfeited. [But it ſeemeth, that the recognizance ſhall not be forfeited by the party's not appearing in court the firſt day of every term, after he hath pleaded to the information as it may be before he hath pleaded.

By ſtat. 4. *G.* 3. *c.* 10., reciting, that many recognizances had been eſtreated into the court of Exchequer againſt perſons for not appearing as parties or witneſſes, or for not proſecuting indictments, or otherwiſe not performing the conditions of ſuch recognizances; many of which neglects of duty had happened by the inattention of ignorant people, it is enacted, "That it ſhall be "lawful for the barons of the Exchequer upon affidavit and pe-

"tition

« tition to be preſented to them by or on the behalf of the perſon or « perſons impriſoned, or liable to be impriſoned on the forfeiture « of any ſuch recognizances, to diſcharge ſuch perſon or perſons, « by order from the ſaid barons without any *quietus* to be ſued « out for that purpoſe; for which order no more than one pound « and one ſhilling ſhall be taken by the officer appointed to give « out the ſame: Provided that no diſcharge ſhall be given on « ſuch petitions where any debt is due to the crown, other than « by the recognizances ſo prayed to be diſcharged; nor in any « caſes of defrauding his majeſty's revenue by contraband trade, « or aſſaulting his majeſty's officers of the cuſtoms or exciſe in « the execution of their duty, or any perſon or perſons lawfully « aſſiſting them therein."

Recognizances in caſes of felony, are to be certified to the general gaol delivery by 1 & 2 *P. & M. c.* 13.

Neither the defendant, nor his bail can be called upon their recognizance without notice, except on the day on which the defendant is bound to appear (*a*): And if the defendants do not appear on that day, the court will not diſcharge the recognizance, although the attorney-general conſent to it, but will reſpite it to the next term (*b*); for the judges of *oyer* and *terminer* are the proper judges whether recognizances ought to be eſtreated or ſpared (*c*).

(*a*) Ca. Temp. Hardw. 237. (*b*) 11 Mod. 200. (*c*) 10 Mod. 278.

If a defendant indicted for perjury be acquitted, the bail ſhall be diſcharged from their recognizance, on motion, though the acquittal be not entered on record, for it appears on the *poſtea*.] 1 Wilſ. 315.

Bailiff.

BAILY or *bailiff*, ſaith my Lord *Coke*, is an old *Saxon* word, which ſignifies a keeper or protector; and though there be ſeveral officers called bailiffs, whoſe offices and employments ſeem quite different from each other, yet doth ſomething of keeping or protection belong to them all. Hence the ſheriff is conſidered as bailiff to the crown; and his county, of which he hath the care, and in which he is to execute the king's writs, is called his bailiwick; alſo his officers, who by his precept execute writs, are called bailiffs; there are likewiſe bailiffs of liberties, who are officers under lords who have franchiſes exempt from the juriſdiction of the ſheriff; there are likewiſe bailiffs of lords of manors, who collect their rents, and levy their fines and amerce-

Co. Lit. 61. b. [See Lambard's Expoſition of Saxon words. Dr. Johnſon ſaith, that this word is of doubtful etymology in itſelf, but borrowed by us from the French « *bailli.*"

See too 3 Bl. Com. 344. Blount's Law. Dict. tit. *Bailiff*.] By ſome opinions a bailiff in *magna charta*, c. 28. ſignifies any judge. *Vide* Co. Lit. 168. b. *Vide* 10 H. 4. 4. Mirror, c. 5. f. 2. Bracton, 409. Fleta, lib. 2. c. 63. Glanv. lib. 1. c. 9. Kitch. Retorn. Brev. 285. 2 Inſt. 453. Co. Lit. 172. Manwood, part 1. p. 113.

ments; alſo he is called a bailiff who hath the adminiſtration or charge of lands, goods, or chattels to make the beſt benefit for the owner, againſt whom an action of *account* doth lie for the profits which he hath raiſed or made, or might by his induſtry and care reaſonably have made, his reaſonable charges and expences deducted; there are likewiſe thoſe termed bailiffs, to whom the king's caſtles are committed, as the bailiff of *Dover-Caſtle*, &c. The chief magiſtrates in divers ancient corporations are called bailiffs, as in *Ipſwich*, *Yarmouth*, *Colcheſter*, &c. There are likewiſe officers of the foreſt who are termed bailiffs; but as there is but little ſaid of ſome of theſe in our books, and as what relates to others will more properly fall under other heads, we ſhall in this place only conſider what we find relating to

(A) Sheriffs' Bailiffs.
(B) Bailiffs of Liberties or Franchiſes.
(C) Bailiffs to Lords of Manors.

(A) Of Sheriffs' Bailiffs.

6 Co. 54. A bailiff is to take the ſame oath which the under-ſheriff takes, preſcribed by the ſtatute 27 Eliz. c. 12.

A Sheriff's bailiff is an officer appointed in every hundred to execute all writs within the hundred, directed to the ſheriff; he is likewiſe to collect the (*a*) poſt-fines, fee-farms of the king, &c. for the ſheriff, and to attend the juſtices of aſſiſe and gaol-delivery, and juſtices of peace in their courts.

But a ſpecial bailiff, or one employed by the ſheriff for a particular time only, as to execute one writ, &c. is not obliged to take the oath. Jones, 249. 2 Lev. 151. But what he doth is conſidered as done by the ſheriff himſelf; and therefore a reſcue from him ſhall be judged a reſcue from the ſheriff, and his eſcape the eſcape of the ſheriff, for which the ſheriff ſhall anſwer. (*a*) See 32 Geo. 2. c. 14., whereby he is not to collect them.

Stile, 18. Stoughton and Day. [Alleyn, 10. S. C. This was adjudged upon demurrer. But after verdict the objection would not avail. Weſton v. Maſon, 3 Burr. 1725.

If an under-ſheriff takes bond from a bailiff, conditioned to ſave him harmleſs in executing all proceſſes, &c. and on action brought on this bond, the ſheriff aſſigns for breach that the bailiff had not executed a certain warrant ſent to him upon a proceſs directed to him out of the Exchequer, to levy iſſues upon certain lands in *D.* and it is not alleged that *D.* is within his hundred; this is no breach of the condition, for the bailiff (*b*) cannot execute a precept out of the hundred where he is bailiff.

And Q. Whether for the purpoſe *of executing proceſs*, the authority of theſe bailiffs does not extend over the whole county?] (*b*) Unleſs it be directed to him particularly, and he be made ſpecial bailiff for that purpoſe. Salk. 176.

8 E. 4. 14. a. 14 H. 7. 9. b. 6 Co.

A ſworn bailiff, commonly known to be an officer, acting within his own precinct, need not ſhew his writ to the perſon he arreſts;

arrests; but when he has made his arrest, he is to inform him of of the substance of his writ, at whose suit the action is, and out of what court the process issues; but a special bailiff is obliged to shew his warrant. 54. 9 Co. 69. Stile, 405. Cro. Jac. 485, 486.

A sheriff, who has a writ directed to him, may authorize others to execute it; but the person to whom he directs it, must personally execute it; yet it seems that one may (*a*) lawfully assist him. 8 E. 4. 14. a. Dalt. c. 117.

(*a*) But an arrest by a bailiff's follower is not good: *Quære*, if good by the follower in the bailiff's presence? 6 Mod. 211. A contempt to the court to hinder a bailiff from arresting; but no rescue unless the arrest be made. 6 Mod. 210.

A bailiff caught one by the hand (whom he had a warrant to arrest) as he held it out of a window, and the court said that it was such a taking of him that the bailiff might justify the breaking open of the house to carry him away. Vent. 306. 6 Mod. 173. S. P. In what cases a bailiff may justify breaking open a house. *Vide* Cro. Jac. 280. Palm. 53. Fost. Cro. L. 136. 320. 6 Mod. 105. and the authorities there cited; and title *Sheriff* *.

* In General Gansell's case, B. R. it was determined, that the street door being open, the officers might legally break open the defendant's inner or chamber door, the General being a lodger. Cowp. 1.

One who is arrested by a sheriff's bailiff, is in the sheriff's custody, and if rescued, the sheriff may allege that he was rescued out of his custody. 2 Jones, 197. Lev. 214. 2 Lev. 28. But where the sheriff returned *virtute brevis mihi direct' feci warrant'* A. and B. *ballivis meis qui virtute inde ceperunt* the defendant, *& in custodia mea habuerunt quousque* such and such *recusserunt* him *ex custodiâ ballivorum meorum*; it was held ill; for when the bailiffs have arrested the party, he is in fact and in truth in their custody; but in law he is in the custody of the sheriff, and an answer either way is good; but to say that he was in the custody of the sheriff, and yet rescued out of the custody of the bailiffs, is repugnant. 2 Salk. 586. pl. 2.

A bailiff having a warrant against *A.* went to him in his yard, and being at some distance told him he had a warrant, and said he arrested him; *A.* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house; and on motion for an attachment for a contempt, the court held that bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have an attachment or rescous against him; but as this case is, the bailiff has no remedy but an action for the assault; for the holding up of the fork at him, when he was within reach, is good evidence of that. Salk. 79. pl. 2. Genner and Sparks. 6 Mod. 173. S. C.

By the 29 *Car.* 2. *cap.* 7. it is enacted, "That no person or "persons upon the Lord's day shall serve or execute, or cause to "be served or executed, any writ, process, warrant, order, judg- "ment, or decree, (except in cases of treason, felony, or breach of "the peace) but that the service of every such writ, process, "warrant, order, judgment, or decree, shall be void to all in- "tents and purposes whatsoever; and the person or persons so "serving or executing the same, shall be as liable to the suit of "the party grieved, and to answer damages to him for doing "thereof, An arrest on *Sunday* is void, and the party may have an action for false imprisonment. Salk. 78. pl. 1. *A.* was taken on a *Sunday*

without any warrant, and locked up all that day, and then on *Monday* morning a writ was gotten againſt him; the court held, that he might have an *attachment*, or an action of *falſe impriſonment* againſt thoſe who took him on the *Sunday*, but they refuſed to diſcharge him. 6 Mod. 96. [But where the writ was returnable on a *Sunday*, and the officer arreſted the defendant on the *Monday* morning, the court diſcharged him out of cuſtody, notwithſtanding the writ was renewed within two hours after the arreſt. Loveridge v. Plaiſtow, 2 H. Bl. Rep. 29.] Where an *attachment* was granted for arreſting one on *Chriſtmas-day*. Hetley, 19. But bail may take their principal on *Sunday*, and confine him till *Monday*, and then ſurrender him. 6 Mod. 231. [But ſee Brookes v. Warren, 2 Bl. Rep. 1273. *contr.* in the caſe of bail to the ſheriff. *Vide* ſtat. 5 Ann. c. 9. ſ. 3. by which one may be taken on an eſcape warrant on a *Sunday*. [And he may be taken on that day by the officer upon freſh purſuit; 2 Ld. Raym. 1028. 2 Salk. 626. 6 Mod. 95. S. C.] That a bailiff may arreſt in the night, *vide* 9 Co. 65. b. Cro. Jac. 486. Where he may juſtify entering the houſe of a ſtranger to make an arreſt, *vide* Lutw. 1432. If a ſheriff make out a precept to his bailiff to arreſt one before any writ directed to him, and the bailiff arreſt the party accordingly, and afterwards a writ iſſue to the ſheriff, the party arreſted may have an action of *falſe impriſonment*. Sand. 298. 2 Keb. 173. 838.

" thereof, as if he or they had done the ſame without any writ, " proceſs, warrant, order, judgment, or decree at all."

Sid. 271. Lev. 173. Keb. 930. 932. S. C. *Vide* 1 Burr. 20. 2 Burr. 814.

A ſpecial verdict found that a *fieri facias* bore *teſte* 4 *June*, but was really ſued forth 11 *June*, and executed 12 *June*; and that the party, againſt whom it went, became a bankrupt 6 *June*, and a commiſſion was taken out 17 *June*, and *trover* and *converſion* was brought againſt the bailiff who executed the writ; and the court held, that though the property was ſo bound that the execution ſhould not have effect againſt the aſſignment of the commiſſioners, yet it was hard to puniſh the officer in *trover*, and make him a treſpaſſer for doing what he was obliged to do, and from which he could not plead to excuſe himſelf, and therefore gave judgment for the defendant.

Vide 5 Mod. 225. An action brought againſt a bailiff on this ſtatute, for taking 5 *s.* 4 *d.* for an arreſt.

The ſtatute 23 *H.* 6. *cap.* 10. enacts, " That for an arreſt or " attachment the ſheriff ſhall have 20 *d.*, and the bailiff who " makes the arreſt 4 *d.*, and that the ſheriff or bailiff who doth " contrary ſhall pay treble damages to the party grieved, and " forfeit the ſum of 40 *l.*; one moiety to the king, and the other " to the party that will ſue; and that the juſtices of aſſiſe " in their ſeſſions, juſtices of the one bench and of the other, " and juſtices of peace in their county, may determine the ſaid " offences."

By the 1 *H.* 5. *cap.* 4. it is enacted, " That they which be bailiffs " of ſheriffs by one year, ſhall be in no ſuch office for three " years next following, except bailiffs of ſheriffs which be in- " heritable in their ſheriff-wicks; and that no under-ſheriff, " ſheriff's clerk, receiver, nor ſheriff's bailiff, be attorney in the " king's courts during the time that he is in office with any ſuch " ſheriff."

Hob. 62. 263, 264. 11 H. 6. 42. b. 43. a. Noy, 101. Moor, 770. pl. 1064. 2 Roll. Abr. 278. Barnard. K. B. 259. 296.

Bailiffs, being officers who are to execute the king's writs, are moſt commonly puniſhed in thoſe courts out of which ſuch writs iſſue, by attachment; but it is impoſſible to ſet down all the miſdemeſnours, and oppreſſive practices for which they are puniſhable in the diſcretion of the court: however, attachments have been granted againſt them where they have uſed needleſs force, violence, and terror in making an arreſt; or where they have broken open doors where by law they could not, and there was

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no plauſible excuſe for doing it; where they have treated the perſons arreſted baſely and inhumanly, or kept them in cuſtody till they conſented to pay money for their deliverance; or where they have extorted (*a*) money for taking bail; or made an arreſt without authority, by force of a blank warrant filled up with the name of a ſpecial bailiff, by the party himſelf, without the privity or ſubſequent agreement of the ſheriff; or if a bailiff levy a debt by virtue of an execution, and keep the money in his hands, and embezzle it; but even in theſe caſes there may be ſuch circumſtances or matters of alleviation as will induce the court to excuſe, if not wholly diſcharge them.

2 Barnard. K. B. 213. (*a*) 2 Bur. Rep. 926. *Vide* 2 Geo. 2. c. 22 & 32 Geo. 2. c. 28. *Infra*, tit. *Gaolers*, and tit. *Sheriff*.

(B) Of Bailiffs of Liberties or Franchiſes.

A Bailiff of a liberty is one who hath the ſame juriſdiction with the ſheriff's bailiff, granted to him by the lord of a liberty or franchiſe.

Theſe liberties and franchiſes began by the lords purchaſing the bailiwicks of the hundreds, ſometimes for years, for life, or in fee, at a certain rate in fee-farm; and for this the lords had the court-leet, the aſſiſes of bread and beer, and the amends, *viz.* the fines for the breach of any of the articles examinable in the leet; and they likewiſe had the return of writs.

Theſe franchiſes proving very inconvenient, becauſe the ſheriff could not enter into them to execute the king's writs, but was to direct them to the bailiff of the liberty, who had the execution of all writs, the ſtatute *Weſtm.* 2. *cap.* 29. enacts, That if ſuch bailiffs give no anſwer to the ſheriff, the court ſhould grant ſpecial warrant with a *non omittas*, which authorizes the ſheriff to enter the franchiſe; and it being uſual to take out the *capias* and *non omittas* together, we have but little material in our books relating to this matter.

But there are ſome caſes in which the ſheriff may enter without any clauſe of *non omittas*; as in caſe of a *quo minus*. So where the ſheriff is by *Weſtm.* 1. *cap.* 17. to make deliverance by replevin; ſo where he is judge, as in a writ of *redisſeiſin*; ſo in *waſte*; ſo in executing a warrant for breach of the peace.

Dalt. Sher. 463. 11 H. 4. 694. Bro. Offic. 34. Bro. Ret. 26.

If the ſheriff executes the writ of a common perſon without a *non omittas*, the execution is good; but the ſheriff is liable to an action by the lord for entering into his bailiwick.

2 H. 4. 1. Plow. 216. 243. F. N. B. 95.

The bailiff of a franchiſe cannot enter into the guildable; and if he does, it is erroneous, becauſe he has no authority out of the franchiſe more than the ſheriff has in another county.

If there be two liberties within a county, *viz.* *St. Edmund de Bury* and *St. Ethelbed de Ely* in *com' Suffolk*, and a *capias* is directed to the ſheriff to take the body of *B.* and the ſheriff returns that he has made his mandate to the bailiff of *Ethelbed*, who has made no anſwer, the ſheriff, on a *non omittas*, ſhall enter into the liberty of *Bury*, though the bailiff of that liberty has made no default.

Bro. Offic. 35. Dalt. Sher. 464. Offic. Brev. 135. Theſ. Brev. 166.

If

3 H. 7. 11. 5 H. 7. 27. Bro. Ret. 89. 2 Term Rep. 11. See too, 8 H. 6. c. 9. § 11.

If the bailiff of a franchiſe had made an inſufficient return, which the ſheriff returned to the court, they formerly held the ſheriff was anſwerable, and not the bailiff; for an inſufficient return is no return, and the bailiff making no return, the ſheriff ought to have ſaid *nullum dedit mihi reſponſum;* but this is altered by the 27 *H.* 8. *cap.* 24. which ſays that the amercement for inſufficient returns made by bailiffs of franchiſes, ſhall be ſet on the bailiff's head, and not on the ſheriff's.

[Boothman v. Earl of Surry, 2 Ter. Rep. 5.

If the bailiff of a liberty, who hath the return and execution of writs, remove a priſoner taken in execution to the county gaol, and there deliver him into the cuſtody of the ſheriff, he is liable to an action for an eſcape.]

Bro. Ret. Brev. 99. 14 E. 4. 1.

If the bailiff of a liberty dies after he has returned *cepi*, a *diſtringas* iſſues againſt his ſucceſſor, becauſe he takes it up under the return of his predeceſſor.

(C) Of Bailiffs to Lords of Manors.

Roll. Abr. 339.

BAILIFF of a manor may himſelf, or may command another to take cattle *damage-feaſant* upon the land; for he hath the care of all things within the manor.

5 Co. 76. Pilkington and Haſtings. [If the diſtreſs be impounded, the tender is too late either to the bailiff or principal, for it is then *in cuſtodiâ legis*. But whether a tender to the bailiff before impounding be good, was not the point in Pilkington's caſe; for *there* the tender was after the impounding, and to a common ſervant, the maſter himſelf being preſent. Cro. El. 813.]

But if a diſtreſs be taken for *damage-feaſant*, amends cannot be tendered to the bailiff; for he cannot deliver a diſtreſs when it is once taken, no more than he can change the avowry of his maſter (*a*), or demand a rent upon a condition of re-entry.

(*a*) Dy. 222. *Vid.* 2 Str. 1128.

Vide Cro. Jac. 178. Owen, 28. Hob. 154.

A bailiff of a manor, though he has no intereſt in the land, has an authority to receive rents, take fealty, pay quit-rents, repair houſes and fences, and in other things act for his maſter's benefit; but he cannot do any thing to his prejudice, nor can he tile a houſe that was before thatched, nor impale a place before mounded with a hedge.

Cro. Jac. 178.

A bailiff may be ſteward of the ſame manor; for thoſe are offices which are compatible.

Cro. Jac. 178.

A bailiff hath no permanent eſtate, but is removable at the lord's pleaſure.

Roll. Abr. 339. Diverſity where he may make a leaſe at will, though not a leaſe for years. Lit. Rep. 71. for this *vide* Roll. Rep. 258. Cro. Jac. 377. 2 Leon. 46.

A bailiff of a manor may leaſe the piſcary for years, but he cannot by any uſage make a leaſe of his maſter's land.

Roll. Abr. 685. But for this *vide* Godb. 110. Kelw. 174. Fitz. *Bailiff*, 7. Bro. *Diſtreſs*, 83. Comp. *Incumb.* 481.

If a man takes cattle without any command for ſervices due to the lord, if the lord after agree to the taking, he ſhall be adjudged his bailiff, although he was not his bailiff in any place before.

A bailiff

A bailiff may give licence to another to go over the land; for this is a treſpaſs to the poſſeſſion only, and the bailiff hath the diſpoſal of the profits of the poſſeſſion. Roll. Abr. 339. But *quære*, If there muſt not be a conſideration given for ſuch licence? *vide* 1 Roll. Rep. 258. Cro. Jac. 337.

In debt for rent, upon a leaſe for years, the defendant pleaded that the plaintiff made *J. S.* bailiff of his manor, of which the lands in leaſe were part, and gave him power to receive the rents of the leſſees, *&c.* and alſo power to make leaſes for years; and that an agreement between the ſaid bailiff and defendant was made, that he ſhould pay 100*l.*, and alſo ſurrender his leaſe to the uſe of the lord, and then ſhould be diſcharged of the rent, which he hath done; and whether this agreement would bind the lord was doubted, and a peremptory day given to the defendant to maintain his plea, after which the reporter *nil plus inde audivit*. Palm. 402.

A. leaſes to *B.* for ninety-nine years, if *B.*, *C.*, or *D.* ſhall ſo long live, reſerving a heriot of 5*l.* upon the death of every of them; *B.* dies, and the bailiff of *A.* makes conuzance as bailiff generally for a heriot, but does not ſhew that *A.* had made his election; and whether this was not good and incident to the place of bailiff, or at leaſt whether this ſhould not be intended for the benefit and advantage of the maſter till the contrary was ſhewn, *dubitatur*; and after the parties agreed. Lit. Rep. 33. 70, 71. Hetl. 12. 16, 17. S. C. ill reported.

No bailiff can diſtrain for a fine or amercement without a ſpecial warrant for ſo doing, which muſt be ſet forth by him in an avowry or juſtification of ſuch a diſtreſs *. 3 Mod. 138. Cro. Eliz. 698, 748. Moor, 57.

Salk. 107. pl. 2. 108. Skin. 587. pl. 1. 2 Keb. 745. 2 Hawk. P. C. 96.

* The caſe in Salkeld ſays, he ſhould have ſet out ſome *eſtreat* from the court, or warrant from the ſteward.

Bailment.

BAILMENT, properly ſo called, is a delivery of goods in truſt, on a contract, expreſs or implied, that the truſt ſhall be duly executed, and the goods re-delivered, as ſoon as the time or uſe for which they were bailed ſhall have elapſed or be performed. Improper bailment is, where the goods are legally in the hands of the poſſeſſor, upon ſuch truſt by *finding*, *or in conſequence of ſome diſtinct contract*.—Bailment is derived from the *French* verb, *bailler*, to deliver; which word, as well as the others of this origin, are applied *Law of Bailment*, 117.

(a) *Bail*, in *French*, is *contrat par lequel on donne une terre à ferme, ou une maiſon a lonage:* and *bailleur*, is the perſon, *qui baille à ferme.* Dict. de l'Academ.

applied in that language (a) to one only of thoſe ſpecies into which this contract is diviſible, *viz.* letting to hire.]

(A) Of ſimple Bailment, by which the Bailee has only the bare Poſſeſſion.

(B) Of pledging Goods as a Security for Money.

(C) Of Bailment, which veſts a ſpecial Property; and therein of Lending on ſpecial Contracts.

(D) Where the Thing bailed is deſtroyed or deteriorated, to whom is the Loſs, and to whom is the Remedy.

(A) Of ſimple Bailment, by which the Bailee has only the naked Poſſeſſion.

IF a man delivers goods to another to be kept, or, which is all one, to be ſafely (b) kept, the bailee undertakes to keep them only from all damage that ariſes from his own negligence; and the undertaking being only to keep them, he ought not to uſe them as though he had an intereſt in them.

(b) [This notion, that to *keep*, and to *keep ſafely*, are one and the ſame thing, was denied by the whole court in the caſe of Coggs v. Barnard, 2 Ld. Raym. 911.] But it was formerly held, that where goods were bailed generally, if thoſe goods, with others of the bailee's, were ſtolen, though without his default, the bailee ſhould be reſponſible for them, there being a warranty in law annexed to all ſuch bailments. 4 Co. 83. Southcote's caſe. But for this *vide* Co. Lit. 89. a. Cro. Eliz. 815. Kelw. 77. Sav. 74. Sid. 36. Roll. Abr. 3. pl. 2. Bro. tit. *Bailment*, 7. title *Detinue*, 35.

Co. Lit. 89. a. 4 Co. 83. b.

So *a fortiori*, if a man delivers goods to another to keep as a man would keep his own; and this is called a ſpecial bailment, in which the bailee doth undertake for no more than for his diligence in the keeping of them, and has no manner of uſe of the thing to him committed, but the naked poſſeſſion only.

Co. Lit. 89. a. b. 4 Co. 83.

If *A.* leave a cheſt locked with *B.* to be kept, and take away the key, without acquainting *B.* with the particulars, the goods in the cheſt are in the poſſeſſion of *A.*; for ſince *A.* keeps the key, the goods are locked out of the poſſeſſion of *B.*; and *B.* (c) being acquainted with the particulars, cannot be ſuppoſed to have them under his cuſtody; ſo that neither the poſſeſſion nor uſe of the goods are in *B.*; for though the poſſeſſion of the box is in *B.*, yet is he ſhut out from the poſſeſſion of the goods in the box; for that cannot be ſaid to be in his poſſeſſion which he cannot take hold of and remove, or order, during the continuance of ſuch poſſeſſion.

(c) [*B.*'s knowledge or ignorance of the particulars would not affect the caſe at all under theſe circumſtances.]

Hartop v. Hoare, 3 Atk. 44. 2 Str. 1187.

[And if *B.* open the cheſt, and take the goods to a broker's, and borrow money upon them, and depoſit them with the broker as a ſecurity for the money ſo borowed, *A.* may maintain trover

ver (*a*) for them againſt the broker, without tendering him the money for which they were pledged by *B.*] S. C. 1 Wilſ. 8. S. C.

(*a*) The like law in the caſe of a remainder-man, upon the death of a mere tenant for life of goods pawned. Hoare v. Parker, 2 Term Rep. 376.]

If the goods of *A.* are bailed by *B.* to *C.*, *C.* muſt deliver them to *B.*, for *C.* cannot pretend to remove or alter that poſſeſſion committed to him, in order to reſtore it to the right owner; for the right of reſtitution muſt be demanded of him that did the injury, of which *C.* has no pretence to judge; and therefore it would be downright treachery in him to deliver them to any other than him from whom he had it. Roll. Abr. 607.

But if *A.* bails goods to *B.* to which *C.* has a right, and *B.* dies, his executors are chargeable only to *C.* that has right; for the executors came to the poſſeſſion by the law, and therefore muſt deliver it to thoſe perſons in whom the law has eſtabliſhed the property; and the taking up of an executorſhip is an engagement to anſwer all debts of the deceaſed, and all undertakings that create a debt, ſo far as there are aſſets; but doth not embark the executor in the perſonal truſts of the deceaſed, any more than he is obliged to anſwer for his ſeveral injuries; and no man can tell how they might have been diſcharged or anſwered by the teſtator. Roll. Abr. 607. *Vide* tit. *Trover and Converſion.*

(B) Of pledging Goods as a Security for Money.

PLEDGING is where goods and chattels are delivered in ſecurity for money lent, and by ſuch pledging the pawnbroker hath more than the naked poſſeſſion in the nature of a bailment, for he hath the property and intereſt (*b*) in the thing itſelf; and by the better opinions, ſhall have a reaſonable uſe of it, ſo that it be without damage to the thing thus pledged. Doct. & Stud. 130. Roll. Abr. 338. 673. Owen, 124. 2 Salk. 522. pl. 1.

[(*b*) But every bailee has a temporary *qualified* property in the things of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action, or an appeal in his own name againſt any ſtranger, who may damage or purloin them. 21 H. 7. 14. b. 15. a. See Tr. on the *Law of Bailments*, 80, 1, 2.]

If a man pledge goods to *B.*, and they are (*c*) ſtolen, *B.* ſhall not anſwer for them, becauſe he hath a property in them; and his cuſtody is but a conſequent of that property, and therefore he doth undertake to keep them as his own; though a man that undertakes to ſecure what is another's, is bound to keep them at all adventures, ſince the right owner might poſſibly defend them with his life; but where a man is only obliged to keep them as his own, no unavoidable accident is to be imputed to him. Co. Lit. 89. a. 3 Inſt. 108. 4 Co. 83. Palm. 551. Owen, 123. Yelv. 178. Cro. Jac. 244. Bulſt. 29, 30. Roll. Rep. 181.

[(*c*) That is, if the bailee be *robbed* of them; for if they are taken *clandeſtinely*, (the proper ſenſe of the word *ſtolen*) he ſhall be anſwerable. 10 H. 6. 21. Br. Abr. tit. *Bailment*, pl. 7.]

But if a man pledge goods, and tender the money to the pawnbroker, and he refuſe, this determines the qualified property; and therefore if after ſuch tender the goods are ſtolen, *&c.* the bailor ſhall have ſatisfaction made him in an action of *trover*; for a tender Cro. Jac. 243. Yelv. 179. Bulſt. 29. Bro. *Bailment*, 7. Roll. Rep.

129. Co. Lit. 89. Bull. *Ni. Pri.* 72. 2 Salk. 441. Cro. Jac. 243. Yelv. 179. Bulſt. 29. 31. If *A.* pawns goods to *B.* for 25*l.*, and *B.* delivers them over to *C.*, and makes *D.* his executor, and dies, *A* ſhall tender the 25*l.* to the executor, and not to *C.*, for *C.* is no more than a bailee, and hath only the cuſtody of them; but the property of them is in *D.* as repreſentative of *B.*, and therefore to him muſt the tender be made; otherwiſe it is in the caſe of a mortgage, where the tender may be to the aſſignee, becauſe the property of the land is in him. Cro. Jac. 244. Yelv. 178, 179.

a tender and refuſal muſt in thoſe caſes amount to a payment, becauſe otherwiſe no man could again come to his own, ſince pawns are over the value lent.

And though the borrower tender the money and recover the goods in an action of *trover*, yet the pawnbroker may have an action of *debt* for his money; becauſe though the ſecurity ceaſes, yet the duty remains, inaſmuch as the money lent is not paid back to the party from whence it came *.

* But, where a tender has been made, he ſhould demand the money before he brings his action.

Yelv. 179. Co. Lit. 209.

So if a man lend periſhable goods as a pledge, and they decay, yet the perſon to whom they are pledged may have an action of *debt* for his money, becauſe the duty continues.

Bro. *Attach. in Aſſiſe*, 20. [But *qu.* Whether they are not liable to be diſtrained for rent? 3 Burr. 1498.]

Theſe goods thus taken to pledge cannot be forfeited by the pawnbroker for his offence, nor can they be taken in execution, nor attached for his debt, for the abſolute property is in another; and therefore they are not alienable, nor by conſequence forfeitable, becauſe they cannot be forfeited without loſs and danger to the abſolute owner; and all qualified poſſeſſors take the thing under the reſtriction to preſerve it for the right owner.

2 H. 7. 1. Bulſt. 29.

If a man pledge goods, and after is attainted of felony, the king ſhall not have the goods without paying the ſum for which they were pledged; for the alteration of the general property doth not alter the ſpecial property in the pawnbroker.

Bulſt. 29.

If a man pledge goods, and then be outlawed, he cannot redeem them, becauſe then the abſolute property of them is in the king; but if the outlawry be reverſed, then the outlawed perſon is reinſtated in his property as if there had been no outlawry, and therefore may redeem them.

If the money be not paid at the day, the property is abſolute at law, but ſtill the right owner has his redemption in equity, as in caſe of a mortgage.

2 Vern. 691. 698. Abr. *Ca. in Eq.* 324. Demaindray and Metcalf, Pr. Ch. 420. S. C. Gilb. Eq. Rep. 104. S. C. 1 Atk. 229. 236. S. C. cited by Ld. Hardwicke.

One pawned jewels to *A.*, who ſigned a writing that they were to be redeemed in twelve months, otherwiſe for the 110*l.* lent, they were to be as bought and ſold; *A.* within a ſhort time after delivers over the jewels, together with ſome plate of his own to *B.* as a pledge for 200*l.*; afterwards *A.* borrowed 38*l.* and 50*l.* of *B.* on promiſſory notes, to be repaid on demand; *B.*, by his anſwer in chancery, inſiſted it was agreed that the pledge ſhould be a ſecurity as well for the money on the notes, as for the money firſt lent, but could make no proof of any ſuch promiſe or agreement; and though a redemption was decreed, yet it was on payment of all that was due to *B.*, as well upon the notes as on the pawns; but the goods of *A.* which were pawned were to be firſt applied as far as the value of them would extend.

In

In the old books they took the nature of a pledge to be, that it ought to be delivered at the ſame time that the money was lent; and if the goods were not delivered at the ſame time, in ſecurity of the money, they did not plead it as a pledge, but in the nature of a licen e, to excuſe the treſpaſs. 5 H. 7. f. 1.

But by later authorities it appears, that the pawnbroker hath a ſpecial property, though it be not delivered at the time of the money lent. 2 Leon. 30. Yelv. 164.

As if *A.* be indebted to *B.*, and delivers goods to *C.* in ſatisfaction for the debt of *B.*, the property is thereby altered, and the right to the goods is veſted in *B.*; ſo it is where the goods are delivered to *C.* in ſecurity of the money of *B.*, there *B.* hath a ſpecial property in them; and in theſe caſes *A.* cannot countermand ſuch delivery to *C.*, or take the goods back again, becauſe the property of theſe very goods is veſted in *B.*; for here there is a conſideration to alter the property, and that is the debt due to *B*; ſo that it is not a bare naked donation which the party may poſſibly revoke before the poſſeſſion be veſted in *B.* himſelf, for *ex nudo pacto non oritur actio*; there is no conſideration to found an action on a naked donation; but here there is a conſideration to alter the property; ſo that upon the immediate delivery of the goods the property is veſted in *B.* 2 Leon. 30, 31. Yelv. 164.

Before theſe reſolutions that the property was altered by the delivery of the goods by *A.* to the uſe of *B.*, the only remedy for ſuch goods when countermanded was in equity, upon the conſideration; for it was ever thought altogether inequitable that ſuch delivery of the goods upon a valuable conſideration ſhould be countermanded at pleaſure. Dyer, 49. 1 Str. 164. Cowp. 125.

There is great difference between a pawn and a mortgage of lands; for if goods be pawned without mention of time for redemption, they may be redeemed after the death of the pawnbroker; but if lands are mortgaged without any mention of the time for redemption, they cannot be redeemed after the death of the feoffee in mortgage; for when the feoffment is made to the mortgagee and his heirs, the limitation is abſolute, and the condition only goes in derogation of that abſolute feoffment; ſo that as far as the condition doth not extend, the abſolute words in the feoffment muſt take place; and from hence it is that a condition muſt be taken ſtrictly, and can never be extended, becauſe ſince the condition goes in defeaſance of the eſtate abſolutely limited, it abſolutely muſt come in to ſhut out all extended conſtruction; and therefore in this caſe, where the feoffment is made on condition that the feoffor pay ſo much money to the feoffee, the money muſt be paid to the feoffee during his life; for money is not limited to be paid to his heirs, and therefore there the words of the abſolute feoffment take place; but where goods are pawned, the pawnbroker hath but a qualified property, the abſolute ownerſhip is in the perſon that depoſits them; and this property cannot be extended beyond the intent for which it was created; and that is only for ſecuring the money lent; for ſhould 2 Co. 79. Bulſt. 29. *Vide* head of *Mortgages.* 1 Vez. 278.

[(a) In such case, therefore, the statute of limitations will not attach. 1 Vez. 278. And if the pledger become bankrupt, his assignee may file a bill in equity for the redemption of the pledge; for, being a stranger to what is due, he cannot otherwise ascertain the precise sum he is to tender. *Ibid.*]

the property be thus extended, it would be to the injury of him that has the absolute ownership. Now the intent of the parties in not limiting a time of redemption was plainly in ease of the pledger, and therefore the time of redemption must be during his life (*a*); and he cannot be confined to the life of the pawnbroker, for that might fall more to the disadvantage of the person pledging, than if a time had been limited; and there are no absolute words to induce such a rigorous construction, contrary to the design of the parties; but if the pledger doth not redeem during his own life, his executors cannot redeem, for then the words and intent both agree to make an absolute property to the pawnbroker *.

* *Qu.* In these cases equity would not relieve, unless it was clearly proved, in case of death, the benefit of redemption was to be lost?

Bulst. 29, 30.

But if time be set for the redemption of a pledge, and before the time the pledger dies, his executors may redeem it, and it shall be assets in their hands; for where there is a time limited, there by the express words the party hath till the time appointed; and the time appointed is indefinite, and not during the life of the pledger; and therefore if he dies his executors shall redeem; and therefore the death of either party cannot prejudice.

Bulst. 31. Owen, 124. But if a thing is not in my possession, I cannot grant it as a pawn, though I have a right to it; for a naked right is not transferable over. 2 Roll. Rep. 439.

Some have holden, that upon a valuable consideration a pledge is assignable over, and that on such assignment the tender of the money from the pledger must be to the assignee, because the pawnbroker hath a special property, and what he hath he may transfer over.

Paterson v. Tash, 2 Str. 1178. (*b*) Daubigny v. Duval, 5 Term. Rep. 604; but Ld. Kenyon in this case thought that the principal was bound to make tender to the pawnee to the extent of the money due from the principal to the factor, though not beyond that sum.

[A factor hath no authority to pledge the goods of his principal; and if he (*b*) do, the latter may recover the value of them from the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee.

But if a man obtain goods from another under *fraudulent* pretences, and pawn them, and the owner afterwards prosecute the pawnor to conviction, and recover the possession of his goods, yet the pawnee may maintain trover for them against the owner. Parker v. Patrick, 5 Term Rep. 175.

By st. 1. Jac. 1. c. 21. § 5. The pawn of any goods wrongfully purloined, taken, robbed, or stolen from any person, to any broker in *London*, *Westminster*, *Southwark*, or within two miles of *London*, shall not alter the property thereof.]

2 Salk. 522. pl. 1. *per* Holt Ch. Just. and Eyre Just.

If a pawnbroker refuse, upon tender of the money, to redeliver the goods pledged, he may be indicted; for, being secretly pawned, it may be impossible to prove a delivery in *trover* for want of witnesses.

Carth. 277. King v. Gallwich; but the re-

A pawnbroker was indicted for refusing to deliver a silk petticoat which the wife of *J. S.* had given him in pawn for the repayment of 2*s.* 6*d.*, after a tender of the money; and it being moved

moved to quaſh the indictment, the court (*abſente Holt*,) refuſed, becauſe of the great abuſe by pawnbrokers. porter adds a *quære*, and ſays, that if the defendant had demurred to this indictment, it could not have been maintained by law, being only a breach of contract, which is actionable but not indictable. *Vide* 2 Hawk. P. C. 301. and ſtat. 29 G. 3. c. 57. for preventing the unlawful pawning of goods, and for the eaſy redemption of goods pawned. [This act does not extend to any loan above ten pounds, or to perſons lending money upon pledge at 5*l. per cent.* without further profit.]

(C) Of Bailment which veſts a ſpecial Property; and herein of lending on ſpecial Contracts.

IF *A.* puts his beaſts into *B.*'s paſture, on agreement to pay *B.* 6*d. per* week for the paſturage, *B.* cannot retain the beaſts of *A.* until he hath paid him the money, unleſs this were at firſt provided by their agreement; but the only remedy that *B.* has is upon the contract *. Cro. Car. 271. 2 Roll. Abr. 92. * The law did not oblige *B.* to take the cattle into paſture; conſequently *B.* gave credit to the perſon of the owner.

But if a horſe be committed to an hoſtler, he ſhall detain him till he is paid for his meat †. 8 Co. 147. 39 H. 6. 18. 5 E. 4. 2. b. 2 Roll. Abr. 85. † He was obliged by law to take in the horſe, if he had room.

So if cloth be committed to a tailor to make up into a garment, he ſhall detain the cloth until he is ſatisfied for his labour. 22 E. 4. 49. Cro. Car. 271. 8 Co. 147. For in behalf of trade and commerce, the law doth annex the condition that the bailee ſhall retain in certain caſes; for men that get their livelihood by commerce, and by entertainment of others, cannot annex ſuch diſobliging conditions that they ſhall retain the bailor's property in caſe of non-payment, or make ſuch diſadvantageous and impudent ſuppoſitions that they ſhall not be paid; and therefore the law annexes ſuch a condition, without any expreſs agreement of the parties. Beſides, goods that are put into the places of publick entertainment and trade, are, for the ſake of publick commerce, taken into the cuſtody of the law as well as of the party, and therefore cannot be there diſtrained. Now goods, that are in the cuſtody of the law, cannot come out thence till the purpoſes are ſatisfied for which they were there placed; and the purpoſe for which theſe chattels are firſt committed to ſuch publick places is, that they might be there conſerved, and the party to whom they were committed paid for his trouble and charge about them. Now ſince the act of the law doth no man any injury, it cannot free any thing from ſuch publick cuſtody till the party is ſatisfied to whom they were thus committed. *Vide* tit. *Inns and Innkeepers*, and *Trover*.

A tailor hath cloth delivered to him to make up into a garment, which he doth accordingly, he ſhall have an action for his work, without delivering the garment; and if the tailor refuſe to deliver the garment upon requeſt, it ought to be ſhewn on the other ſide in excuſe of the action; for the tailor's action is founded upon the promiſe; and if he hath done the work, and is ready to deliver the garment, he hath performed all that the law requires on his part, and on that conſideration is entitled to the benefit of the defendant's promiſe. Palm. 223, 224.

If a man lends another his ſheep, oxen, or his cart, the borrower hath a qualified property in them, according to the purpoſes for which they were borrowed; and by force of this loan they may be uſed reaſonably for theſe purpoſes and for the time agreed on; and if they periſh in ſuch occupation, it is at the peril of the lender; but if they periſh in any other manner, the borrower muſt anſwer for them. Doct. & Stud. D. 2. c. 38.

Yelv. 172. Cro. Ja. 236. S. C. [Where a bailee may be guilty of larceny. See 1 Hawk. P.C. 134, &c. Leach's Cases, 327. 173.] Roll. Rep. 128.

If *A.* borrow a horſe to ride to *Dover*, and he ride out of his way, and the owner of the horſe meet him, he cannot take the horſe from him, for *A.* has a ſpecial property in the horſe till the journey is determined; and being in lawful poſſeſſion of the horſe, the owner cannot violently ſeize and take it away, for the continuance of all property is to be taken from the form of the original bargain, which in this caſe was limited till the appointed journey was finiſhed.

But if *A.* borrows a horſe to go to *Dover*, and goes to other places, the owner may have an action on the caſe againſt him for exceeding the purpoſes of the loan; for ſo far it is a ſecret and fallacious abuſe of his property; but no general action of treſpaſs, becauſe it is not an open and violent invaſion of it.

Co. Lit. 57. Cro. Eliz. 784. Mo. 248. Owen, 52. Dyer, 321. pl. 17.

If a man lend another his ſheep to ſtock his land, the borrower hath the bare uſe of them; but if he kill them the owner ſhall have a general action of treſpaſs, or an action of trover, at his election; for though the uſe is in the borrower, yet the property is in the lender, and the killing of the ſheep is an open violation of another's property, which is complained of in the general action of treſpaſs.

5 E. 4. 2.

If I ſell you a horſe for 20*l.*, I ſhall retain him unleſs the money be actually paid, or conditioned to be paid at a future day; for unleſs there be *quid pro quo* the property is not altered.

Doct. & Stud. D. 2. c. 38.

As to the borrowing of things periſhable, as corn, wine, honey, or the like, a man muſt, from the nature of the thing, have an abſolute property in them, otherwiſe they could not ſupply the uſes for which they were lent, and therefore he is obliged to return ſomething of the ſame ſort, the ſame in quantity and quality with what is borrowed.

(D) When the Thing bailed is deſtroyed or deteriorated, to whom is the Loſs, and to whom is the Remedy.

4. Durnf. & East 581.
For cases of fire, see 1. Durnf. & East 27.]

4 Co. 83. Southcote's caſe. Doct. & Stud. D. 2. c. 38.

IT is holden by ſome, that if *A.* commits goods to *B.* to be kept, or, which is all one, to be ſafely kept, and they are ſtolen, that *B.* muſt anſwer the value of them to *A.* Others have made a diſtinction, that if *B.* had undertaken for a price to keep them, that then he ſhould have been bound to anſwer for them if they had been ſtolen, becauſe there is a conſideration to found the promiſe; but where no reward is agreed on, there they ſay there can be no conſideration on which the promiſe is built, and therefore a naked promiſe which affords no action; but the reaſons urged againſt this are, that where another loſes by my undertaking, I am equally bound to make good the value of my promiſe, as if I myſelf was to receive gain by the bargain; for ſince another man's property, and poſſibly the whole fruits of a long and painful induſtry are loſt, and waſted by my undertaking to ſecure it, certainly I, from whom the damage aroſe, ought

Poſt. (243). Coggs and Barnard. 2 Ld. Raym. 913. 2 Stra. 1099. 12 Mod. 487.

ought to make him ſatisfaction; for every man is preſumed to guard his own, and not eaſily to part with that which cannot be acquired without great difficulty; and therefore it muſt be preſumed that he would have ſafely kept his property, and not have committed it to me, unleſs I had undertaken to ſecure it; and if I fail in that undertaking, I am bound to a reſtitution; for I am equally obliged to a reſtitution where another man ſuffers an injury by my means, as where I myſelf commit an injury; and had the law any other courſe in theſe caſes, it were a perfect inlet to all colluſion; for agreements and contrivances might ariſe between the men of violence and ſuch treacherous undertakers, as are not eaſy to be diſcovered.

If a carrier, ferryman, or hoſtler, be robbed, he ſhall anſwer the value of the goods, for the carrier, *&c.* hath his hire, which implies an undertaking for the ſafe cuſtody and delivery of them; for no man would give another money for ſecuring his property, if the party that received it were not to undertake on his part to ſecure it. 4 Co. 84. Co. Lit. 89.

If *A.* delivers goods to *B.* to be delivered over to *C.*, *C.* hath the property, and *C.* hath the action againſt *B.*; for *B.* undertakes for the ſafe delivery to *C.*, and hath no property or intereſt but for that purpoſe. Roll. Abr. 606.

But if the bailment were not on valuable conſideration, the delivery is countermandable; and in that caſe if *A.*, the bailor, bring trover, he reduces the property again in himſelf, for the action amounts to a countermand of the gift; but if the delivery was on a valuable conſideration, then *A.* cannot have trover, becauſe the property is altered, and in trover the property muſt be proved in the plaintiff. Bulſt. 68. compared with 2 Leon. 30. Yelv. 164.

If a man delivers goods to another, the bailee ſhall have a general action of treſpaſs againſt a ſtranger, becauſe he is anſwerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to reſort to the original cauſe of that injury, and in amends there to do himſelf right. 13 Co. 69. 21 H. 7. 14. b.

If I deliver goods to *B.*, and *C.* that hath right demands them of him, if *B.* either before or pending the action deliver over the goods to me, this is a good bar to the action of *C.* brought againſt *B.*, for ſince *B.* hath undertaken to deliver the goods back to me, he ſhall not be chargeable for the honeſt performance of that undertaking; for *B.* that is truſted with my poſſeſſion, ſhall not remove or alter my poſſeſſion, and therefore ſhall not be put to anſwer for that to which the law obliges him. F. N. B. 138. M. Roll. Abr. 607.

But if I find goods and convert them, and another recover them from me, yet a ſtranger that has right ſhall have his action againſt me, and therefore two perſons claiming in trover ſhall interplead with each other; for I have by my finding the property in me till another ſhews a better right; now this property continues until the real owner appears; and if I by weak defences do not ſupport that property, that ſhall be no injury to the right of another; for the original injury begins from me, by Roll. Abr. 607.

undertaking to intermeddle with what is another's, and which I am ſure is none of my own.

Roll. Abr. 607. If a bailee deliver the goods to another, there he ſhall have an action of detinue againſt him, becauſe he hath his poſſeſſion, and undertakes for the cuſtody; and the original bailor may have his action againſt either of them, becauſe in him is the property which both are bound to anſwer to him.

5 Co. 14. Cro. Eliz. 777. 784. Owen, 52. Dyer, 121. Godb. 72. Doct. & Stud. D. 2. c. 38. The reaſon of theſe ſeveral caſes is this, That when any man borrows or hires any thing, and only uſes it according to the purpoſes of the loan, that contract bears him out from all accidents that are conſequent upon ſuch uſage; for there is no reaſon why the borrower ſhould not have the uſe of it according as the owner had licenſed and empowered him; and if any unavoidable accident happen upon ſuch a licence, the lender muſt impute it to the folly of his own permiſſion; but if it happen through the negligence of the borrower, then it it fit he ſhould anſwer for it.

If a man lend or let another his horſe, and for want of ſafe keeping the horſe die, the owner is entitled to an action on the caſe; ſo if a man lend another ſheep to tath his land, and by the negligence of the borrower they are drowned, an action on the caſe lies; ſo if a man lend another a horſe, and he put him into a ſtable that is ruinous, and the ſtable tumble in upon the horſe and kill him, an action on the caſe lies; but if the ſtable had been ſtrong and ſubſtantial, and had fallen by violent tempeſt, then is the borrower excuſed; ſo if a man lend another a horſe, and he die of divers diſeaſes, the borrower is excuſed.

Moor, 543. [See 1 Roll. Abr. 4. S.C. (a) But Rolle mentions no ſuch reaſon; and according to him, Popham, C. J. advanced generally, "That if a man, to whom horſes are bailed for "agiſtment, leave open the gates of his field, in conſequence of which neglect they ſtray and are "ſtolen, the owner has an action againſt him."]

If *A.* take a gelding to paſture, and the gelding be ſtolen, no action lies againſt *A.*, unleſs he had made a ſpecial (a) *aſſumpſit* to deliver him; for the undertaking of *A.* is to feed the gelding in the fields and in the open air, and not to keep him ſafely as the hoſtler is obliged to do in his ſtable; and the law will not ſtretch men's promiſes beyond their firſt undertaking.

Leon. 123. 223. Owen, 141. 2 Bulſt. 21. If a man find goods and abuſe them, or if he find ſheep and kill them, this is a converſion; but if a man find butter, and by his negligent keeping it putrify; or if a man find garments, and by negligent keeping they be moth-eaten, no action lies; ſo it is if a man find goods and loſe them again; And the reaſon of the difference is this; where a man delivers goods to another, the bailee by acceptance of the goods undertakes for the ſafe cuſtody of them; and it is to be preſumed that the owner would not have parted with them but under the confidence of that ſecurity; but where a man only finds the goods of another, the owner did not part with them under the caution of any truſt or engagement; nor did the finder receive them into his poſſeſſion under any obligation; and therefore the law only prohibits a man in this caſe from making an unjuſt profit of what is another's; but the finder is not obliged to preſerve thoſe goods ſafer than the owner himſelf did; for there is no reaſon for the law to lay ſuch a duty on the finder in behalf of the careleſs owner; and it ſeems too rigorous to extend the charity of the finder beyond the diligence of the proprietor; it is therefore a good mean to puniſh

an injurious act, *viz.* the converſion of the goods to his own uſe, but not to puniſh a negligence in him, when the owner is guilty of a much greater one.

A carrier is bound to the ſafe delivery of a box, though he doth not know what is in the box, unleſs he refuſes to carry it without he be inſtructed in the particulars, for the party is not obliged to tell him. Allen, 93. *Vide* head of *Carriers.*

I ſhall, as applicable to this doctrine, inſert the following noted caſe, with the argument at large of the Lord Chief Juſtice *Holt:*

In an *aſſumpſit* the caſe was this: The defendant did undertake to remove a quantity of brandy from *Brook's Market* to *Water-Lane*, and by reaſon of his neglect one of the caſks broke; and on not guilty, a verdict was found for the plaintiff; and in arreſt of judgment, two exceptions were taken: *Trin. Term. Anno 2 Ann. Reginæ* in B. R. 1703. Coggs v. Barnard, 2 Ld. Raym. 909. S. C. Salk. 26. S. C. Com. Rep. 133. S. C.

1ſt, Becauſe in the declaration he was not alleged to be a common porter.

2dly, Becauſe it was not averred that he had a reward.

But the whole court reſolved, That in this caſe the plaintiff ought to have his judgment.

Holt, Chief Juſtice, his argument was to this purpoſe:

There be ſix ſeveral ſorts of bailments, which lay a care and obligation upon the party to whom the goods are bailed.

1. The firſt is a bare and naked bailment to another, to keep for the uſe of the bailor, which is called *depoſitum*. [Sir Wm. Jones thinks this diviſion of bailments a little inaccurate; that in truth the *fifth* ſort is no more than a branch of the *third*, and a *ſeventh* might with equal reaſon have been added, ſince the *fifth* is capable of another ſubdiviſion. He acknowledges, therefore, but *five* ſpecies. 1. *Depoſitum*, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. *Mandatum*, or *commiſſion*; when the mandatory undertakes, without recompence, to do ſome act about the things bailed, or ſimply to carry them; and hence Sir Henry Finch divides bailment into two ſorts, to *keep*, and to *employ*, Law. Bk. 2. c. 18. 3. *Commodatum*, or *loan for uſe*; when goods are bailed, without pay, to be uſed for a certain time by the bailee. 4. *Pignori Acceptum*; when a thing is bailed by a debtor to his creditor in *pledge*, or as a ſecurity for the debt. 5. *Locatum*, or hiring, which is always for *a reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary uſe of the *thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed and beſtowed on the thing delivered; or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being *carried* from place to place, either to a *publick* carrier, or to a *private* perſon. Law of Bailm. 35, 6.]

2. A delivery of goods to another which are in themſelves uſeful to keep, and theſe are to be reſtored again in ſpecie, which is called *accommodatum*.

3. A delivery of goods for hire, which is called *locatio* or *conductio*.

4. A delivery by way of pledge, which is called *vadium*.

5. A delivery of goods to be carried for a reward.

6. Such a delivery as here in the caſe at bar, where goods are delivered to do ſome act about them, as the carrying, and without a reward, which is called *mandatum* by *Bracton*, *lib.* 3. 100.; in *Engliſh*, an acting by commiſſion.

And though I do not think all theſe immediately neceſſary to the caſe in queſtion, yet the explanation of them will make the caſe clearer.

1. Then

1. Then as to the firſt, if a perſon out of kindneſs keeps the goods of another, he ſhall not be anſwerable if they be ſtolen, without there be a particular default in him: And 2dly, ſuch a bailee is not chargeable for a common neglect, for it muſt be a groſs neglect for which he ſhall be liable. I muſt confeſs I have a great authority to encounter, which is *Southcott*'s caſe, 4 *Rep.* 83. *b.* However, my Lord *Coke* in his report goes farther than the caſe itſelf, for he there makes a difference between keeping generally, and ſafe keeping; which in the caſe itſelf is not mentioned, but in his note at the end of it; and I cannot think it to be juſtice to charge the bailee if the goods be loſt without any default of his; for why ſhould he anſwer for the wrongs of other people, againſt whom he undertook not?

Mytton v. Cock, 2 Str. 1099.

There never was, before *Southcott*'s caſe, any ſolemn determination of this matter; the firſt caſe of it was in 29 *Aſſ. pl.* 28. 8 *Ed.* 2. *Fitz. Detinue*, 59., both quoted in *Southcott*'s caſe; but I cannot agree to the reaſons of thoſe caſes, for the neglect of the party may be as great where goods are locked up in a cheſt, as where not (*a*), and by that reaſon ought to be chargeable as much in the one caſe as in the other; and the 4 *Ed.* 4. is only a debate of two counſel at the bar, for ——— was not then Ch. Juſt., and what he ſaid was only for his client, and not of authority; and 3 *H.* 7. is only a ſudden opinion: Now *Southcott*'s caſe came long after, *viz.* 43 *Eliz.*; and there two judges in the abſence of the other two gave that opinion, which cauſe was improved by my Lord *Coke*; but it has been the conſtant practice for as long as I knew the court, that in all the trials at *Guildhall*, where upon the evidence no default appeared in the bailee, to direct for the defendant; nor did ever any one venture, upon the authority of *Southcott*'s caſe, to find the matter ſpecially; I take it that this bailee is ſo far from being charged, that though the goods be loſt by a common neglect, he ſhall not be anſwerable; as if he negligently keep his own goods, and that his own and his friend's goods are both loſt; now the loſs of his own is an argument of his ſincerity, and therefore he ſhall not be chargeable; this is in *Bracton*, 99.; and though this is an ancient author, yet it is agreeable to reaſon, and is not in this point only the law of *England*, but of foreign countries, as may be ſeen in *Juſtinian*'s *Inſt.* where I believe *Bracton* got his notion. Now if there be an apparent groſs neglect, it is looked upon to be a fraud; but otherwiſe if it be not a groſs neglect; and I know no reaſon why the bailee upon taking goods, if it were in writing, ſhall not be charged againſt the wrong of a third perſon, as in *Hob.* 34. *Cro. Jac.* 425. *and* 3 *Cro.* 514.; and yet without writing, as in *Southcott*'s caſe, to be charged; and the *Doctor and Student*, 128. 212., ſays, it is for the advantage of the bailor, and that an action does not lie unleſs they be loſt through negligent keeping; ſo that I do not find ſufficient reaſon nor authority to ſupport the opinion of *Southcott*'s caſe.

(*a*) See *Law of Bailm.* 37, 8, 9.

2. A lending *gratis* to uſe for his advantage, there the borrower is ſtrictly bound to keep it, for if he be guilty of the leaſt neglect

neglect he ſhall be anſwerable; as if I lend a horſe to go to the *North* of *England*, and he goes to the *Weſt*, and the horſe is ſtolen, he ſhall in that caſe be chargeable; for if he had gone as I directed, the horſe, perhaps, would not have been ſtolen; this ſort of bailment is mentioned in *Bracton*, 99.; but in this caſe, if this horſe had been in the ſtable of the bailee, and ſtolen thence without his default, as perhaps the thieves might firſt have bound the bailee, and then have taken the horſe, he ſhall not be anſwerable; but if he left the ſtable doors open, he ſhall for that neglect be anſwerable. *Bracton* ſays, he ought to take the utmoſt care, but in no place ſays he ſhall be charged where no default was in him.

3. As to the third bailment, where goods are hired out for a reward, *Bracton*, 62. ſays, the hirer is to take all imaginable care (*a*), and to reſtore it at the time, and he is bound to ſuch a care as a diligent maſter of a family uſeth to his family, which care, if he ſo uſeth, he ſhall not be bound; now the moſt diligent man is liable to be robbed, and therefore I collect, that if he be ſo careful as according to *Bracton*'s definition, and be robbed, he ſhall not be liable.

(*a*) See *Law of Bailm.* 86.

4. If goods be pawned, the pawnee has a ſpecial property, which is in nature of a ſecurity, to compel the pawner to pay; and if the goods be the worſe for uſing, the pawnee muſt not uſe them; as clothes, *&c.*; but if they be not the worſe for uſing, he may uſe them at his peril; as jewels pawned to a lady, and ſhe keeps them in a box, and they are ſtolen, ſhe ſhall not be charged; but if ſhe goes abroad with them to a play, and there they are ſtolen, ſhe ſhall be anſwerable. 2dly, If the pawnbroker be at charge in keeping them, as if it were a horſe, and he gives it meat, he may uſe it for his reaſonable charge he has been at, *Bracton*, 99. If a creditor takes a pawn, he is bound to reſtore it upon payment; but if he, notwithſtanding all his diligence, loſe it, he ſhall howſoever recover his debt, 29 *Aſſ. pl.* 28.; for the law does not lay upon him an obligation to keep againſt all accidents; but if the money be tendered, and he after detains, and then it is loſt, he ſhall then be liable, for he is then a wrongdoer, and his keeping it after is the occaſion of its being ſtolen, and he is then anſwerable at all events.

5. Goods to be carried for a reward. 1. If you deliver them to a publick or common carrier, and they are ſtolen, he muſt be liable, for the law charges him at all events; but yet the act of God, or the enemies of the queen, may excuſe; and this is a political inſtitution by the laws of *England*, that people may be ſafe in their dealing; for otherwiſe carriers, that are frequently truſted with things of great value, would be often tempted to confederate with thieves. 2dly, But he who has a particular private employment, though he has a reward, yet he is not bound againſt all events, as a factor or a bailiff, if they do to the beſt of their power; and that is *Southcott*'s caſe; and he is bound no otherwiſe than as his maſter himſelf ſhould do, for it were unjuſt to charge him with what he cannot prevent.

6. To

6. To this point, here is a man not intruſted to keep, but to carry, and not to have any thing for his pains; and he, through his own negligence, miſcarries; though he be to have nothing, yet it appears there was a neglect, and for that reaſon he is chargeable; but if the goods had been miſuſed by a third perſon in the way as he carried them, and without any neglect of his, I hold that he would not then be liable, becauſe he had nothing for a reward. In *Bracton*, *lib.* 3. 100., this is called *mandatum*, and ariſeth upon the *emendato*, in *Engliſh*, acting by commiſſion; and if he through his negligence ſuffer his goods to be damaged, he is liable. *Vinnius*'s Comment upon *Juſt. Inſt.* 684.; *mandatum* is there defined to be a contract whereby any thing is committed *gratis* to be done for another; and with this agrees *Bracton*; and though this word be not uſed in any other book of the law, and this be an old authority, yet in this point he is ſupported by reaſon; and, upon the whole, I am of opinion that the defendant in this caſe is liable, for it is a deceit to the plaintiff his being negligent; for it is upon the confidence of his carefulneſs that the plaintiff intruſted him; and in *Godb.* 64., and in 2 *H.* 7., for the negligent keeping of ſheep, *&c.* an action lay; for there is a conſideration, *viz.* the truſting, though no money be paid; and here he becomes chargeable by the miſchief he has done. 29 *H.* 6. 49. 33 *H.* 6. 24. 11 *H.* 4. 33. By theſe caſes, though a man promiſes to build an houſe for another, he ſhall not be bound, being *nudum pactum*; yet I doubt not but if he had once gone about the building it, and he do it ſo ill that it falls, an action would lie; and in *Yelv.* 4. the plaintiff declared, that in conſideration that he delivered to the defendant twenty quarters of corn, the defendant aſſumed upon requeſt to deliver the corn again to the plaintiff; and it was there held that the action lay; but this judgment was after reverſed in the *Exchequer-chamber*; and contrary to it is a caſe in *Yelv.* 128.; but in the ſame book 50., is the caſe, *fol.* 4., of *Biggs* and *Riches*, confirmed and allowed good law; and there *Gaudy* and the court held it a bad reverſal; and contrary to that reverſal ſolemnly adjudged in 2 *Cro.* 667. Now if a truſt be once undertaken, that is a ſufficient conſideration; the caſes in the *Regiſter*, 110., are full in point, for there the very precedent is *quod* (the defendant) *tam negligenter, &c. carriavit quod papa illa confracta fuit*, without any mention of a reward, or that he was a common carrier; though in latter days for the greater caution they inſert theſe words, *pro quâdam mercede**; ſo that he that is intruſted by commiſſion, if he enters upon the employment, and after any loſs accrues to the owner through his neglect, he is liable though he receive no reward; but if any loſs accrues to the owner not through any neglect of his, though he receive a reward as a factor, *&c.*, yet ſhall not he be liable. So that upon this whole matter, I am of opinion judgment ought to be given for the plaintiff.

* Theſe words ſhould not be inſerted, if not warranted by the fact, as I conceive a plaintiff would be nonſuited, if he could not prove it.

See more on this ſubject, tit. *Carriers, Inns and Innkeepers, Trover.*

FH
MVSEVM
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Bankrupt.

THE granting of commiſſions of bankrupt ſeems to be derived from the civil law, which conſtituted a guardian to a prodigal in the ſame manner as to a madman; and ſuch guardian the pretor appointed on the petition or application of relations, as well as creditors: But the feudal law, though it admitted of commiſſions of lunacy *ex neceſſitate*, would allow of none for prodigality; that not being reckoned injurious, becauſe ſuch prodigal could not alien his lands without the leave of his lord: And farther, the condition of a freeman was not to be altered without the crime of felony. But, as trade and commerce increaſed, it was found neceſſary, for the ſupport of credit, to introduce ſuch a law amongſt us, and therefore our acts of parliament have confined it to traders and creditors only.

Digeſt. lib. 27. tit. 10. For the definition and derivation of the word, *vide* 4 Inſt. 277. [2 Bl. Com. 471. "Perhaps," ſaith a writer upon this ſubject, "it can, in "no caſe, "be leſs ne- "ceſſary to "inveſti-

"gate the etymology of a word, becauſe the whole ſyſtem of the bankrupt-law is founded upon poſitive "ſtatutes; and no light can poſſibly be derived to the ſubject but what tends to elucidate them." Co. Bpt. Laws, 1.] 2 Bl. Comm. 474.

[The firſt ſtatute noticing the crime of bankruptcy, was made againſt the *Lombards*, who, after they had made obligations to their creditors, ſuddenly eſcaped out of the realm: It was therefore enacted, "That if any merchant of the company acknow- "ledge himſelf bound in that manner, that then the company "ſhall anſwer the debt; ſo that another merchant, who is not "of the company, ſhall not be thereby aggrieved nor impeach- "ed." But the firſt ſtatute made concerning *Engliſh* bankrupts was 34 *H.* 8., which has been much altered by 13 *Eliz.*, and other ſubſequent ſtatutes.

Co. *Bankrupt Laws*, 3.

It is to be obſerved, that all the acts concerning bankrupts make but one ſyſtem of law: they are, therefore, to be taken together, and to be conſtrued favourably for the benefit of creditors, and to ſuppreſs fraud: For though a bankrupt was formerly conſidered merely in the light of a criminal, and therefore a ſtrict conſtruction might be expected, in conformity to the univerſal practice in deciding upon penal ſtatutes; yet, at preſent, the laws of bankruptcy are conſidered as laws calculated for the benefit of trade, and founded on principles of humanity as well as juſtice.]

1 Burr. 474.

2 Bl. Comm. 471.

We ſhall conſider the laws of bankruptcy, as moulded by the ſeveral acts of parliament, under the following heads:

(A) What

(A) What Kind of Trade, Occupation, or Profeſſion a Man muſt be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he muſt do, permit, or ſuffer, which will make him one.

(B) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

(C) Of the Commiſſioners, their Duty; and herein of the Power they may exerciſe over the Bankrupt, or others, in diſcovering of the Bankrupt's Eſtate.

(D) Of the Aſſignees; and herein of the Manner and Time of chooſing them, and Nature of their Truſt.

(E) Of the Creditors, who are ſuch; and herein of proving their Debts, and Time of coming in.

(F) Of the Bankrupt's Eſtate and Effects, to which the Commiſſioners or Aſſignees are entitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and of the Actions the Aſſignees may bring for the Recovery thereof.

(G) Of ſetting off, ſubmitting to Arbitration, and compounding Debts due to the Bankrupt.

(H) Of the Diſtribution to be made of the Bankrupt's Eſtate.

(I) How the Bankrupt is to demean himſelf; and herein of the Crime in not appearing, not diſcovering his Eſtate, and the Privilege he is to enjoy during his Attendance.

(K) Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate.

[(L) Of Partners.]

(A) What

(A) What Kind of Trade, Occupation, or Profeſſion a Man muſt be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he muſt do, permit, or ſuffer, which will make him one.

BY the 13 *Eliz. cap.* 7. "Any perſon being a ſubject or denizen, uſing or exerciſing the trade of merchandize by way of bargaining, exchange, re-change, bartry, chevisance, or otherwiſe, in groſs or by retail, or ſeeking his or her trade of living by buying and ſelling, that departs the realm, or begins to keep houſe, or otherwiſe to abſent himſelf, or take ſanctuary, or ſuffers himſelf willingly to be arreſted for any debt not due, or ſuffers himſelf to be outlawed, to defraud any of his creditors, being ſubjects born, ſhall be deemed a bankrupt."

The 1 *Jac.* 1. *cap.* 15. *ſect.* 1. is the ſame with the foregoing ſtatute, the following addition only, *viz.* "or fraudulently procures his goods to be attached or ſequeſtered, or makes any fraudulent grant of his land, &c. to the intent that his creditors, being ſubjects born, may be defrauded, ſhall be adjudged a bankrupt."

21 *Jac.* 1. *cap.* 19. *ſect.* 2. ſets forth, "That every perſon that uſes the trade of merchandize, or that uſes the trade of a ſcrivener, receiving other men's money into his truſt and cuſtody, who by himſelf or others ſhall procure any protection, except ſuch as ſhall be lawfully protected by privilege of parliament, or by petition, bill (*a*), &c. ſhall endeavour to compel their creditors to take leſs than their juſt debts, or gain longer time than was given upon the original contract; or being arreſted for debt, ſhall after ſuch arreſt lie in priſon two months or more, upon that or any other arreſt or detention in priſon for debt, or being arreſted for 100 *l.* or more juſt debts, ſhall at any time after ſuch arreſt eſcape out of priſon, ſhall be adjudged a bankrupt; and in caſe of arreſt, or lying in priſon, from the time of the firſt arreſt."

See Atk. Rep. 141. pl. 82. [Privilege of parliament not to prevent the iſſuing of a commiſſion. 4 G. 3. c. 35. (*a*) No ſuch bill can now be maintained.]

By the 14 *Car.* 2. *cap.* 24. it is provided, "That whereas divers noblemen and gentlemen, and perſons of quality, no ways bred up to trade, do often put in great ſtocks of money into the *Eaſt-India* and *Guinea Company*, no perſons adventurers for putting in money or merchandize into the ſaid companies, or for adventuring or managing the fiſhing, called the Royal Fiſhing Trade, and receiving their part or dividend of fiſh, goods, or merchandizes in ſpecie, and ſelling or exchanging the ſame, ſhall be reputed or taken to be a merchant or trader within any ſtatutes for bankrupts; §4. provided, that perſons trading in any other way or manner, ſhall be liable to a commiſſion as fully, and not otherwiſe, as if that act had not been made."

[The manner in which the trade to the *Eaſt Indies* was carried on at the time when this act paſſed, was, by perſons advancing ſums of money to the then incorporated company, in conſideration whereof they became partners, and the return of the cargo from the *Eaſt Indies* was diſtributed among

among them, either ſpecifically, or by account, in proportion to the ſum advanced. It was not a dividend on a given ſtock, but an actual participation, either on account, or in a ſpecific return of goods. Sir John Wolſtenholme, a man of large fortune, had advanced a ſum of money on the adventure in the *Eaſt India* Company's trade, and he had received his return in ſpecie, and diſpoſed of the goods; and thereupon a queſtion aroſe, Whether he was liable to a commiſſion of bankrupt? which the court of K. B. determined in the affirmative. In conſequence of that judgment, this ſtatute was paſſed, which is declaratory, and annuls the judgment, as giving an unjuſt conſtruction to the ſtatutes.]

(*a*) 8 & 9 W. 3. c. 20. § 47., & 3 G. 1. c. 8. § 43. (*b*) 9 Ann. c. 21. § 42., & 8 G. 1. c. 21. § 12. (*c*) 6 G. 1. c. 18. § 10.

[By 9 & 10 *W.* 3. *c.* 44. § 74. the members of the *Eaſt-India Company* are exempted from being bankrupts on account of their ſtock only. No members of the *Bank* (*a*), *South Sea* (*b*), *London Aſſurance* (*c*), or *Royal Exchange*, Companies, ſhall be liable to be bankrupts on account of their ſtock in the ſaid companies.]

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 39. it is provided, "That whereas (*d*) Atk. Rep. 218. pl. 119. "perſons dealing as (*a*) bankers, brokers, and factors, are frequently intruſted with great ſums of money, and with goods and "effects of very great value belonging to other perſons; ſuch "bankers, brokers, and factors ſhall be and are hereby declared to be ſubject and liable to that and all other the ſtatutes "made concerning bankrupts."

Before this ſtatute it was held, that a drover might be a bankrupt. Jones, 304. But ſee Co. *Bankrupt Laws*, 55.

By the ſaid 5 *Geo.* 2. *cap.* 30. *ſect.* 40. it is enacted, "That "no farmer, graſier, or drover of cattle, or any perſon or "perſons who is, or are, or ſhall be receiver general of the "taxes granted by act of parliament, ſhall be entitled as ſuch to "any of the benefits given by this act, or be deemed a bankrupt "within the ſame, or within any of the ſtatutes now in force "concerning bankrupts."

[7 *Ann. c.* 12. § 5. No merchant, or other trader within the deſcription of the ſtatutes againſt bankrupts, who ſhall put himſelf into the ſervice of any ambaſſador or publick miniſter, ſhall have any benefit of this act.

By *ſtat.* 4. *G.* 3. *c.* 33. § 1. "Any ſingle creditor, or two or "more creditors being partners, whoſe debt ſhall amount to "100*l.* or upwards; or any two creditors whoſe debts ſhall "amount to 150*l.*; or any three or more creditors whoſe debts "ſhall amount to 200*l.*; of any perſon deemed a merchant, &c., "*having privilege* of parliament, at any time upon affidavit "being made and filed of record in any of his majeſty's courts "at *Weſtminſter*, by ſuch creditors, that ſuch debt is juſtly due; "and that every ſuch debtor, as they verily believe, is a merchant, "&c., may ſue out of the ſame court ſummons, or an original "bill and ſummons againſt ſuch merchant, &c., and ſerve him "with a copy thereof; and if ſuch merchant, &c. ſhall not, "within two months after perſonal ſervice of ſuch ſummons, "pay, ſecure, or compound for ſuch debt, to the ſatisfaction of "ſuch creditor; or enter into a bond in ſuch ſum, and with "two ſuch ſufficient ſureties, as any of the judges of that court "out of which ſuch ſummons ſhall iſſue ſhall approve of, to pay "ſuch ſum as ſhall be recovered in ſuch action, together with "coſts, he ſhall be accounted and adjudged a bankrupt from the "time of the ſervice of ſuch ſummons."

By

By *ſtat.* 5. *G.* 2. *c.* 30. § 24. " If any bankrupt, after iſſuing " any commiſſion againſt him, pay to the perſon who ſued out " the ſame, or otherwiſe give or deliver to ſuch perſon goods or " any other ſatisfaction, or ſecurity for his debt, whereby ſuch " perſon ſuing out ſuch commiſſion ſhall privately have and re- " ceive more in the pound, in reſpect of his debt, than the other " creditors, ſuch payment of money, *&c.* ſhall be deemed and " taken to be ſuch an act of bankruptcy, whereby on good proof " thereof ſuch commiſſion ſhall be ſuperſeded, and it ſhall be " lawful for the Lord Chancellor to award to any creditor " petitioning another commiſſion; and ſuch perſon ſo taking " ſuch ſatisfaction as aforeſaid, ſhall forfeit and loſe as well his " whole debt as the whole he ſhall have taken or received, and " ſhall pay back and deliver up the ſame, or the full value thereof, " to ſuch perſon as the ſaid commiſſioners acting under ſuch " new commiſſion ſhall appoint, in truſt for and to be divided " amongſt the other of the bankrupt's creditors in proportion to " their reſpective debts."]

Note: It is provided in the latter end of the ſtatute of 21 *Jac.* 1. *cap.* 19. " That that act, and all other acts heretofore made " againſt bankrupts, ſhall extend to ſtrangers born, as well " aliens as denizens, as effectually as to natural-born ſubjects, " both to make them ſubject to the laws as bankrupts, as alſo to " make them capable of the benefit, or contribution as creditors, " by theſe laws."

Upon theſe ſtatutes which deſcribe a bankrupt there have been ſeveral reſolutions, eſpecially in the common law courts, the judges being the proper expoſitors of all acts of parliament; and therefore the uſual method, when bankruptcy is denied, is for my Lord Chancellor to order it to be tried in a common law court, on an iſſue, *bankrupt*, or not *?

For though the commiſſioners declare him a bankrupt, he may traverſe it. 8 Co. 121. a.

* Or by action of trover, at the ſuit of the bankrupt, againſt the aſſignees, or the meſſenger.

[Every perſon being a trader, and capable of making binding contracts, is liable to become a bankrupt; as a nobleman, member of the Houſe of Commons, clergyman, *&c.* Hankey v. Jones, Cowp. 745.

Ex parte Meymot, 1 Atk. 200.

Infants and married women cannot be bankrupts. *Ex parte* Sydebotham, 1 Atk. 146. Bull. *Ni. Pri.* 38. R. v. Cole, 1 Ld. Raym. 443.

As to the latter, however, there are exceptions; for a *feme covert* in *London*, being a ſole trader according to the cuſtom, is liable to a commiſſion of bankrupt, and her ſeparate effects in trade may be ſeized and applied to the payment of her own debts contracted in ſuch ſeparate trade. 1 Bl. Rep. 570. S. C.

Ex parte Carrington, 1 Atk. 206, Lavie v. Philips, 3 Burr. 1776.

There is alſo another exception of a more doubtful nature, where a *feme covert* lives apart from her huſband, acting as a *feme ſole*, he not being liable to her debts. If a woman under theſe circumſtances, though not the wife or daughter of a freeman of *London*, enters into trade, and contracts debts, it ſeems that

Co. *Bankrupt Laws*, 30.

that ſhe is liable to a commiſſion of bankruptcy. The ſtatutes contain no exception either of an infant or *feme covert*; their incapacity to be made bankrupt ariſes from the operation of law, which declares them incapable of making binding contracts. The criterion, therefore, of a *feme covert* being capable of coming under the bankrupt laws, appears to be her liability to be ſued to execution for the debts ſhe has contracted during coverture. A commiſſion of bankruptcy is conſidered as a ſtatute execution. If a married woman is ſo circumſtanced as to be ſubject to a common law execution, there does not appear to be any reaſon why ſhe ſhould not likewiſe be ſubject to a ſtatute execution. And upon this principle it is preſumed Lord Chancellor *Apſley* relied in the caſe of Mrs. *Fitzgerald*, in 1772, where it appeared that *Richard Fitzgerald*, huſband of *Anne Fitzgerald*, having for ſome years carried on the buſineſs of a linen-draper in *St. Giles in the Fields*, in the county of *Middleſex*, on the 14th *March* 1768, agreed upon a ſeparation, when articles were accordingly entered into for that purpoſe, and executed by and between them: by theſe articles, *Fitzgerald*, in order to make proviſion for his wife and children, and in conſideration of 600*l.* then by him taken to his own uſe out of his eſtate and effects, aſſigned to truſtees all his ſtock in trade, houſehold goods, and all ſums of money due to him, and then outſtanding on his books, together with the ſaid books, and the leaſe of his houſe, upon truſt for the ſaid *Anne*, as her own ſeparate eſtate, to be diſpoſed of as ſhe ſhould think fit, and to be by no means ſubject to the debts, control, or intermeddling of her ſaid huſband. And it was thereby further agreed, that the ſaid *Anne* ſhould have the liberty of trading without any interruption from her ſaid huſband, ſhe paying all the debts then owing by him in trade, and maintaining their children at her own expence, and ſaving him harmleſs from the ſame, and from all contracts and agreements to be thereafter entered into by her, either in the way of trade or otherwiſe. The ſeparation took place, and the huſband received the 600*l.* to his own uſe; and they ever after lived ſeparate and apart from each other, and he went to the *Eaſt-Indies*. The ſaid *Anne* was left in poſſeſſion of effects to the amount of 900*l.*, to be employed, and which were employed by her, in the ſaid trade; and, by buying and ſelling goods in that trade, ſhe got her living and maintenance for herſelf and children, continuing in her huſband's houſe, and there carrying on the buſineſs of a linen-draper, on her own account, and in her own name, as a ſole trader, near four years. In *December* 1771, a commiſſion of bankrupt was taken out againſt her, when the commiſſioners refuſed to find her a bankrupt, becauſe ſhe was a *feme covert* reſiding in the county of *Middleſex*, and not a *feme ſole* merchant trading in the city of *London*: but, upon petition to the Lord Chancellor (counſel being heard on both ſides), his lordſhip ordered the commiſſioners to proceed to find Mrs. *Fitzgerald* a bankrupt, and the meſſenger to take poſſeſſion of her effects: and, accordingly, ſhe was afterwards declared a bankrupt (*a*).

Ex parte Preſton, Green, 8.

(*a*) The authority of this caſe hath been confirmed by ſubſequent deciſions. Ringſtead v. Laneſborough, Co. *Bankrupt Laws*, 32. Barwell v. Brooks, *ibid.* 36. Corbet v. Poelnitz, 1 Term Rep. 5.

A ſhoemaker

But if a *feme ſole* trader commits an act of bankruptcy, and afterwards marries, and lives with her huſband, ſhe cannot be made bankrupt. A commiſſion of bankrupt iſſued 20th *December* 1785, againſt *Frances Mear*, by the name of *Frances* the wife of *Henry Mear* of *Moſeley* in the pariſh of *Yardley*, in the county of *Warwick*, before her intermarriage known by the name of *Frances Piper* of *Birmingham*, in the county of *Warwick*, innholder. She had before her marriage kept an inn in *Birmingham*, but had declined buſineſs on 27th *December* 1784, previous to the date of the commiſſion, and on 14th *February* 1785, had intermarried with *Henry Mear*. The act of bankruptcy was proved before the commiſſioners to have been committed in *October* 1784. *Mear* and his wife petitioned to ſuperſede the commiſſion, alleging that neither the petitioning creditor's debt, the trading, nor the act of bankruptcy, could be proved, and alſo relying upon the illegality of the commiſſion, as having been iſſued againſt a married woman. The Lord Chancellor was of opinion, that the commiſſion was illegally iſſued againſt the ſaid *Frances Mear*, upon the ground of her marriage; and therefore it was ordered to be ſuperſeded, without going into the other objections.

Co. *Bankrupt Laws*, 44. *Ex parte* Mear, 23d July 1787.

An executor of a trader, who merely diſpoſes of the teſtator's ſtock, or buys things for the purpoſe of meliorating it, is not liable to be a bankrupt.]

1 Atk. 102. Comb. 185. 1 Show. 294. Teſtator ordered the reſidue of his eſtate to be employed in carrying on his trade: This reſidue is liable for all the debts of the trade. Hankey v. Hammond, at the Rolls, 1785. In Hankey v. Twogood, Mich. 1785, Lord Thurlow expreſſed the ſame opinion; and alſo intimated, that the executor carrying on the trade with it *might be a bankrupt*, even though his name did not appear, and that he would be perſonally liable for the debts. Co. *Bankrupt Laws*, 84.

A ſhoemaker is within 13 *Eliz. cap.* 7., for he lives by his credit in buying leather, and ſelling it again in ſhoes, and not on his manual labour only, as labourers and huſbandmen do; for the thing bought and ſold under different forms is the leather; and though the ſhoemaker's labour (*a*) is employed in the alteration of the form, yet men do not contract for the labour, but for the thing itſelf.

Cro. Eliz. 268. pl. 6. Cro. Car. 31. pl. 1. 3 Mod. 330. [(*a*) The labour, in this caſe, is only in melioration of the commodity, and rendering it more fit for ſale. A butcher hath been holden to be a trader within the ſtatutes; and this, though the court expreſſed themſelves very ſenſible of the inconvenience of extending the bankrupt laws to perſons whoſe living is undoubtedly gotten by mechanical labour, with a mixture of buying and ſelling. Dalley v. Smith, 4 Burr. 2148.]

A weaver and dyer are within the ſtatute, for they get their living by buying and ſelling, and therefore may have an action for calling them bankrupt.

Cro. Jac. 584. pl. 6.

If one covenants with the king to victual the fleet at a certain rate, and thereupon buys up a great quantity of proviſion, &c. though with the ſurplus he victuals merchants, yet being originally deſigned for the uſe of the navy, it will not make him a trader within the act; and it is one act or contract only, and not a continued trading.

Vent. 270. Sir Thomas Littleton's caſe, adjudged.

An inn-keeper, as ſuch, can be no bankrupt; for though he buys proviſions to be ſpent in his houſe, yet he does not properly ſell them, but utters them at ſuch rates as he thinks reaſonable,

Cro. Car. 549. Jones, 437. Criſp and Pratt,

March 35. S. C. 3 Lev. 309. S. P. adjudged between Newton and Trigg. Comb. 181. S. C. 3 Mod. 327. S. C. 1 Show. 268. S. C. Carth. 149. S. C. Salk. 109. S. C. Skin. 291.

and the attendance of his ſervants, furniture of his houſe, &c. are to be conſidered; and the ſtatutes only mention merchants that uſed to buy and ſell in groſs, or by retail, and ſuch as get their living by buying and ſelling; ſo that their principal ſubſiſtence is by buying and ſelling: Now the contracts with inn-keepers are not for any commodities in ſpecie, but they are contracts for houſe-room, trouble, attendance, lodging, and neceſſaries, and therefore cannot come within the deſign of ſuch words, ſince there is no trade carried on by buying and bartering commodities; and though in this caſe a jury ſhould find that the inn-keeper got his living by buying and ſelling, it would not bring him within the ſtatute, for the reaſons aforeſaid.

S. P. Luton v. Bigg. Upon the authority of theſe caſes, it hath been adjudged, contrary to an *obiter* opinion of Ld. Holt, in 1 Ld. Raym. 287. and 12 Mod. 159., that a *victualler, quà victualler*, is not an object of the bankrupt laws, even though he may occaſionally ſell liquors out of the houſe in ſmall retail quantities, if the ſale be confined to particular friends. Saunderſon v. Rowles, 4 Burr. 2064. Perking v. Proctor, 2 Wilſ. 382. But if an *inn-keeper* or a *victualler* ſell liquors out of the houſe to *any one* who applies, that will ſubject them to the laws, however ſmall the quantities ſold may happen to be. Patman v. Vaughan, 1 Term Rep. 572. Prieſt v. Pidgeon, B. R. 12 G. 3. Willet v. Edmonds, B. R. 13 G. 3. 1773. Co. *Bankrupt Laws*, 49.

Comb. 181. 3 Mod. 327. *Ex parte* Walker v.

[A ſchoolmaſter who buys books to ſell to his ſcholars; or the owner of a mine who buys candles to ſell to his workmen, cannot be bankrupts.]

Harvey, 22d November 1788. *Ex parte* Craddock, 21ſt Dec. 1792. Co. *Bankrupt Laws*, 74. It was formerly holden, that, if the buying and ſelling be *in proportion* to any other way the party hath of living, he may be a bankrupt; and, upon this principle, a farmer, who bought and ſold very large quantities of ſuch things as were the produce of his farm, was adjudged a bankrupt. Mayo v. Archer, 1 Str. 513. 3 Mod. 46. S. C. Bukall v. Hogg, 3 Wilſ. 146. S. P.; but ſee *infrn.*

3 Mod. 155.

A carpenter that ſells wrought timber ſeems to be within the ſtatute, for he ſells the materials, though altered by his workmanſhip, ſo that he gets his living by buying in and ſelling out the timber; but otherwiſe it ſeems it is of a mere working (*a*) carpenter.

(*a*) But a ſhip-carpenter is. Ld. Raym. 741. Sid. 411. Vent. 29. 2 Keb. 487. Comb. 181. S. P.

The buying part of a ſhip makes no trading, becauſe it is no buying and ſelling within the ſtatute; but the buying part in the ſhip, and the party's employing it in carrying and re-carrying goods for himſelf, is an evidence of trade, becauſe the exportation and importation of goods is the buſineſs of a merchant: but if a man buys a part of a ſhip which he lets to freight, this is no evidence of trade, for there is no exportation or importation; and if he repairs a ſhip, which is uſual on the credit of the bottom, and afterwards takes a ſhare in it for his debt, and employs the ſhip in exportation, it has been holden by ſome, that ſince this is compulſory upon him, having no other way to obtain his debt, it ſhall not be taken as an evidence of trading, becauſe it is only accidental, and not the way the party hath put himſelf in to get his livelihood.

March 35. Cro. Car. 549. Danv. Abr. 687. [But, in later caſes, it hath been eſta-

A man's buying and ſelling brings him not within the ſtatutes, for they intend ſuch as gain the greateſt part of their living thereby; and therefore where a farmer (*b*) bought and ſold cattle, it was adjudged that he was not a bankrupt, for a farmer is not within the ſtatutes, becauſe he only ſells the profits originally raiſed

raiſed from the ground; and if he buys in commodities, and ſells them again, this is only accidental.

bliſhed, that the *extent* of the trading is not material; that the true criterion is, whether the party means to ſell (with a view to profit) to any perſon who applies for the commodity in which he profeſſeth to deal. The intention of the party to trade in ſuch commodity, is a queſtion of fact to be left to a jury. As, where a farmer bought horſes not calculated for the farming buſineſs, and for the expreſs purpoſe of ſelling again, it was holden, that he made himſelf an object of the bankrupt laws: whether more or fewer inſtances of his ſo buying and ſelling, it was ſaid, was proper for the conſideration of the jury. Bartholomew v. Sherwood, 1 Term Rep. 573. (*b*) See Stat. 5 G. 2. c. 30. ſ. 40. [A perſon buys cattle at a fair, keeps them three or four days, and then drives them to another fair to ſell them, he is a drover within this ſtatute of 5 G. 2., and cannot be a bankrupt. Bull. Ni. Pri. 39.]

[If a man manufactures the produce of his own land, as a neceſſary or uſual mode of reaping or enjoying that produce, and bringing it advantageouſly to market; he ſhall not be conſidered as a trader, though he buy the neceſſary ingredients and materials to fit it for market; as in the caſe of a farmer buying rennet and ſalt, to convert his milk into cheeſe; or making his apples into cyder. So in the caſe of alum works; the rude maſs of which is the rock, which is dug, burned, ſteeped, and boiled in lead, and then mixed with kelp, lees, and urine. Such alſo is the caſe of coal-mines (*a*), where raiſing the coals out of the pit is as neceſſary to the enjoyment of that ſpecies of produce, as reaping and threſhing corn is to the enjoyment of corn. But where the produce of the land is merely the raw material of a manufacture, and uſed as ſuch, and not as the mode of raiſing ſuch produce, where the ſoil is manufactured and converted into quite another thing, there in truth the party is and ought to be conſidered as a trader. And ſuch ſeems to be the caſe of brick-making. With reſpect however, to this ſpecies of manufacture, caſes have ariſen, wherein the queſtion, Whether it will bring a man within the bankrupt laws? hath been much agitated: and as this queſtion hath, from accident, not being finally ſettled, we ſhall ſtate the facts at large. Upon a petition for a new trial, an iſſue having been directed to try, whether the petitioner was or was not a bankrupt, it appeared from the report to have been proved, that the petitioner, who was a farmer, renting a farm of upwards of 100*l.* a-year, made bricks of earth taken off the waſte without any licence from the lord (to whom he afterwards paid a conſideration); that he uſed a kiln for the purpoſe, not built by him himſelf, and had, at various times, made from 40,000 to 70,000 bricks every year, and ſold different quantities, ſometimes only to certain perſons, and ſometimes generally to all who came for them. It was further in evidence, that the kiln was a ſmall one, not fit for making more than 7000 bricks at a time. One of the witneſſes ſwore he was employed by the bankrupt to make bricks at a certain price, and that he ſold them at an advanced value. Mr. Juſtice *Buller*, who tried the cauſe, told the jury that the queſtion was, Whether the bankrupt kept a publick ſale kiln? if he did, it was a trading within the bankrupt laws; but if it was a mere private kiln for his own uſe, and that having too many, he had only ſold to a neighbour, that would not be ſuch a trading. The jury found that it was a public ſale-

Newton v. Newton, Co. *Bankrupt Laws*, 76. (*a*) Port v. Turton, 2 Wilſ. 169.

Ex parte Harriſon, 1 Br. Ch. Rep. 173.

kiln, and gave a verdict for the aſſignees; and Lord *Thurlowe*, C. refuſed to grant a new trial. "Purchaſing the earth," ſaid his lordſhip, "might, and he thought it would be holden to be for "the purpoſe of carrying on the trade of a brick-maker. Here "the earth was not indeed purchaſed, but taken by way of treſ- "paſs, purged by the ſubſequent conſideration, which would "amount to obtaining a licence, and that brings it within the "bankrupt laws; that it was not to improve his own eſtate, but "a purchaſing of the earth by licence, ancillary to carrying on "the trade of a brick-maker."

Co. *Bankrupt Laws*, 61 1 Term Rep. 34. 1 Br. Ch. Rep. 178.

In the caſe of *Parker* v. *Wells*, there was a ſpecial verdict, which ſtated a demiſe from the Archbiſhop of *Canterbury*, in the year 1767, to *John Parker*, the father of the plaintiff, of an extenſive farm of 800 acres, in which there was a parcel of brick ground, for 21 years. It ſtated ſimilar demiſes to *John Parker*, the father, prior to that in 1767; and alſo a ſubſequent ſimilar one to the plaintiff in 1780: it ſtated further, that one *William Berand*, for twenty years and more, before the year 1768, rented the ſaid parcel of brick ground from the ſaid *John Parker*, the father, and made and ſold bricks there. That the ſaid *W. Berand* died in 1768, and upon his death the plaintiff took the ſaid brick ground into his own poſſeſſion, and then and there bought certain materials and neceſſary things, which were of the ſaid *W. Berand*, in his life-time, uſed in making bricks there at the valuation of 130*l.*, and then and there made bricks and tiles of the earth there, and ſold them; and that, during the time the plaintiff ſo held the ſaid land, he made bricks and tiles for ſale of the earth or clay ariſing from the brick grounds, and bought ſand and fuel, which were neceſſary ingredients for converting the earth and clay into bricks and tiles. Upon theſe facts the court of *C. P.* gave judgment for the plaintiff, holding that he was not a bankrupt, the buſineſs of brick-making being carried on by him, *merely as a mode of enjoying the profits of a real eſtate.* This judgment, however, was reverſed by the court of *K. B.* Upon a writ of error from the judgment of this laſt court, the following queſtions were put to the Judges, by order of the Houſe of Lords. 1ſt, Whether the finding on this verdict be ſufficient whereupon to give final judgment? 2d, If the finding be inſufficient, what award ought to be made on ſuch finding? 3d, If the finding be ſufficient, whether upon ſuch finding the plaintiff in error appears to be a trader within the true intent and meaning of the ſtatutes concerning bankrupts? The judges preſent were unanimouſly of opinion on the firſt queſtion, in the negative; and upon the ſecond, that a *venire facias de novo* ought to be awarded; whereupon the judgments both of the court of *C. P.* and of *K. B.* were reverſed; and it was adjudged, that the court of *King's Bench* do award a *venire facias de novo*. The plaintiff did not proceed on the *venire facias de novo*, but another action was brought by agreement of the parties in the court of *K. B.* *Buller*, J., previous to ſumming up the evidence, told the jury, there were three queſtions for them to determine.

Dom. Proc. 15th May 1787.

1ſt, Whether *Parker* carried on the trade of making and ſelling bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom? 2d, How long he carried on trade for that purpoſe, whether from the 23d of *June* 1768, when *Berand* died, to the time of his abſconding, which was on 7th *January* 1783, or from what time to what time? 3d, Whether he was a joint occupier of the farm with his father, or the father had the ſole beneficial enjoyment of the farm to his death? 1ſt, The jury found that the plaintiff did carry on the trade of making bricks and tiles for ſale, for the purpoſe of drawing a profit therefrom. 2d, That he carried on the trade for that purpoſe, from the 23d of *June* 1768, when *Berand* died, to *Michaelmas* 1778; that he ceaſed to make bricks at *Michaelmas* 1778, and he alſo ceaſed to ſell them on the ſame day. 3d, That the father had the ſole enjoyment of the farm to the time of his death. This finding was to have been drawn up as a ſpecial verdict; but, as it appeared that Mr. *Parker* had left off brick-making before the petitioning creditor's debt accrued, the defendants waved a ſpecial verdict, and a general one was entered for the plaintiff. Another commiſſion was afterwards taken out by a creditor, prior to *Parker*'s quitting brick-making, which commiſſion was ſubmitted to.

A perſon who hath dealt merely in running and ſmuggling goods, though it is an offence, and contrary to an act of parliament, is ſtill a trader within the meaning of the bankrupt acts, and liable to a commiſſion. *Ex parte* Meymot, 1 Atk. 196.

Lord *Hardwicke* was inclined to think a pawn-broker within the bankrupt acts, and eſpecially within the 39th clauſe of 5 *Geo.* 2., the words of which are, "Whereas perſons dealing as bankers, "brokers, and factors, are frequently intruſted with great ſums "of money, and with goods and effects of very great value be"longing to other perſons; it is hereby further enacted, that "ſuch bankers, brokers, and factors ſhall be, and hereby are de"clared to be, ſubject and liable to this and other the ſtatutes "made concerning bankrupts." For, he ſaid, though pawnbrokers are not expreſsly named, yet the general word *broker* is the genus, and all other kinds of brokerage the ſpecies. Highmore v. Molloy, 1 Atk. 206.

The clauſe in 5 *Geo.* 2. relating to dealers as bankers, took its riſe from that part of 21 *J.* 1., relating to ſcriveners, who were more numerous than in latter days; for bankers having taken upon them to act as ſcriveners, have made it neceſſary for the legiſlature to add bankers; and a perſon acting as a banker will be conſidered as ſuch, although he does not keep an open ſhop. *Ex parte* Wilſon, 1 Atk. 218.

Drawing and re-drawing bills of exchange may or may not be exerciſing trade and merchandiſe: It depends upon circumſtances; it is a queſtion of law upon the fact. Drawing and re-drawing for *large* ſums, and for a long time, though no commiſſion money be allowed, it was adjudged would make a man a bankrupt; *ſecùs*, where a party drew bills upon his *own* account, at the expence of paying a quarter *per cent.* commiſſion, beſides intereſt at 5 *per cent.* for their being diſcounted, and borRichardſon v. Bradſhaw, 1 Atk. 128. Hankey v. Jones, Cowp. 745.

rowed accommodation-notes in exchange for his own to the ſame amount.

Colt v. Netterville, 2 P. Wms. 308.

Buying and ſelling bank ſtock or other government ſecurities will not make a man a bankrupt.

Bird v. Mayor, 2 Ld. Raym. 851.

Lord C. J. *Holt* inclined to think that a ſhare in the ſtationer's company would not make a man a bankrupt; but Lord Keeper *Wright* held otherwiſe.

Com. Dig. tit. *Bankrupt.*

A man who lives by buying only, or ſelling only, cannot be a bankrupt.

Small v. Oudley, 2 P. Wms. 429.

There can be no ſuch thing as an *equitable* bankruptcy; it muſt be a *legal* one.]

Palm. 325. Vent. 5. Lev 17. Sid. 411. Sir Robert Cotton's caſe. 3 Keb. 451.

If a man contracts a debt while he is a trader, and after leaves off, and lives upon his eſtate in the country, and then abſconds for this debt, he is a bankrupt, becauſe he lived by his trade when the debt was contracted; but if a merchant leaves off his trade, and after contracts debts, and then ſells off the ſurpluſage of his goods, but hath neither factor, correſpondent, nor packer, he is (*a*) no bankrupt.

(*a*) *Tamen Q.* For in Vent. 166., where the ſame caſe comes on again, the court holds that he is a bankrupt; otherwiſe the miſchief would be great, for men cannot take notice when another withdraws his trade, or when he commands his factors beyond ſea to deal no farther for him; but they ſeeing great quantities of goods and merchandiſe in his hands, are apt to truſt him; ſo that it is fit they ſhould be relieved by the ſtatutes.

Sid. 411. Vent. 5. Comb. 463. But ſee Dougl. 295. But if a perſon leaves

If a trader gives over his trade, and then contracts debts, and then goes into trade again upon a new ſtock, it ſeems upon the petition of ſuch intermediate creditors he cannot be made a bankrupt, becauſe ſuch creditors did not truſt him upon the credit of his trade.

goods in the hands of another to be diſpoſed of, and is to be partner with him in loſs and gain, he may be a bankrupt, for he ſtill carries on his trade by proxy. Palm. 325. But the having of a joint ſtock does not make a bankrupt, without ſome proof of a diſpoſal thereof; for otherwiſe there is no commerce driven. 2 Keb. 487.

Palm. 325.

If a trader becomes ſecurity for another, he is a bankrupt within the ſtatute, becauſe he is truſted upon the reputation of his ſtock and dealings, as well where he is ſecurity, as where he contracts for his own debts.

Raym. 375. Doweſworth and Anderſon, 2 Jones, 141. S. C. 2 Vern. 162. S. C. cited.

A man buys in *England* only, and ſells in *Ireland*, he may be a bankrupt, for many merchants buy beyond ſea, and ſell in *England* only, and others buy here, and ſell beyond ſea; for it is trading that makes a man capable of being a bankrupt.

Salk. 110. pl. 5. Bird and Sedgwick, on a trial at bar. [See the ſame point reluctantly ruled by Ld. Hardwicke, upon the

A gentleman of the *Temple* went from thence to *Liſbon*, where he turned factor, and traded to *England*, and broke: It was inſiſted upon that the ſtatutes of bankrupt did not extend to perſons out of the realm, the ſubject of them being caſes of arreſts, outlawries, and departing the realm; and that the 21 *Jac.* 1. *c.* 19 which extends to aliens, is to be underſtood of aliens here: But the court held him a bankrupt by reaſon of his trading hither and back again, which gained him a credit here.

authority of this caſe, in the matter of Aſtley, *ex parte* Smith, cited in Cowp. 402., and *ex parte* Williamſon,

Williamſon, 1 Atk. 82. And, conformably to theſe deciſions, it is now ſettled, that if a merchant who trades to *England*, but who is a native of, and hath been conſtantly reſident in, a country not ſubject to the *Engliſh* laws concerning bankrupts, comes into this country, and commits an act of bankruptcy, he becomes an object of the bankrupt laws. Alexander v. Vaughan, Cowp. 398. Inglis v. Grant, 5 Term Rep. 530. S. P. But the act of bankruptcy muſt be committed here: that cannot be committed abroad. *Ibid.*

[But the bankrupt's declaration of his fears of being arreſted, or of his bad circumſtances, is not evidence of a bankrnptcy, unleſs where it is concomitant with facts; ſuch as removing his goods, books, &c. or where the bankrupt himſelf conteſts the commiſſion. Ambroſe v. Clendon, Ca. Temp. Hardw. 267. Cockran v. Love, at

N. P. cor. Ld. Kenyon, 3d June 1790.

Departing the realm will not be an act of bankruptcy, unleſs done with a view of defrauding or delaying creditors: but if it appear that they are in fact delayed by ſuch abſence, it will be the ſame as if the original departure had been fraudulent. *Ex parte* Gulſton, 1 Atk. 193. 139. Davis's *Bankrupt Laws*, 30.

Therefore one *Woodier*, a mercer on *Ludgate-hill*, who fled beyond ſea for the murder of his wife, whereby his creditors were prevented from recovering their debts, was holden to have committed an act of bankruptcy. Bull. *Ni. Pri.* 39. See a confirmation of this caſe in Raikes v.

Poreau, cor. Buller J. *London* Sittings after Tr. Term 1786. Co. *Bankrupt Laws*, 92.

But a trader going abroad, to avoid performing a duty, will not, therefore, be a bankrupt; as if it be to avoid an arreſt upon an *excommunicato capiendo*, or the ſervice of proceſs to enforce a decree in Chancery, unleſs it be a decree for the payment of money: but if creditors, by ſuch abſence, are delayed and defrauded, it then becomes an act of bankruptcy, according to the principle of *Woodier*'s caſe, and that above referred to. Co. *Bankrupt Laws*, 93.

Though a trader depart the realm in good circumſtances, yet if he run in debt, and defer his return in order to avoid arreſts, this is tantamount to his departing in order to defraud his creditors.] Vin. Abr. tit. *Creditor and Bankrupt*, 59.

If a man keeps his houſe for a long time, this does not immediately make him a bankrupt; but if he conceals himſelf within his houſe but for a day, or hour, to delay or defraud his creditors, he is a bankrupt. Palm. 325. 1 Salk. 110.

If there be a proceſs out againſt a merchant, who thereupon keeps houſe to ſave himſelf from an arreſt, and after goes out to market, and other places, but hearing of a new proceſs, keeps houſe again, and after goes at large; *per Cur'*, he is no bankrupt, becauſe though the keeping houſe is an act of bankruptcy for which a commiſſion might have iſſued at that time, yet by his going abroad it is purged; and though the ſtatute makes the keeping houſe an act of bankruptcy, yet it muſt be underſtood of a keeping in order to conceal himſelf. Cro. El. 13. Godb. 25.

But if *A.* commits a plain act of bankruptcy, as keeping houſe, &c., though he after goes abroad, and is a great dealer, yet that will not purge ſuch act of bankruptcy, but he will ſtill remain a bankrupt: but if the act was not plain, but doubtful, then going abroad, and dealing, &c. will be an evidence to explain the intent of the firſt act; for if it was not done to defraud creditors, Hopkins v. Ellis, 1 Salk. 110. p. 6. [Colkett v. Freeman, 2 Term Rep. 59. S. P. A-plain

unequivocal act of bankruptcy cannot be purged or explained by ſubſequent circumſtances. *Ibid.*]

creditors, and keep out of the way, it will not be an act of bankruptcy within the ſtatute. Alſo, if after a plain act of bankruptcy, he pays off, or compounds with all his creditors, he is become a new man.

Garret v. Moule, 5 Term Rep. 575. Hawkes v. Saunders, Tr. 24 G. 3. B. R. Co. *Bankrupt Laws*, 94. 7 Vin. Abr. 6. pl. 14.

[Although the ſtatute of *Eliz.* mentions "the beginning to "keep houſe to defraud creditors" as an act of bankruptcy, yet the conſtruction which it hath obtained is, that there muſt be an actual denial to ſome one creditor, with intent to defraud or hinder ſuch creditor, in order to conſtitute the act; that the debtor's keeping houſe "with that intent," or giving general orders to a ſervant to deny him to creditors, without an actual denial to ſome creditor who hath a debt at that time due, will not be ſufficient.

A denial to a creditor coming at an unſeaſonable hour, or a denial in caſe of ſickneſs, or being engaged in company or buſineſs, is not an act of bankruptcy. Bull. *N. P.* 39. 1 Atk. 202.

(*a*) Barrow v. Foſter, cor. Ld. Camden, Norwich, S. A. 1765. Bromley v. Mundee, Bull. *N. P.* 39.

It hath been holden (*a*), that a denial to a perſon coming on behalf of a creditor to demand the debt will not be within the ſtatute. But it is certain, that, in practice, a denial to the clerk of a holder of a bill or note, is conſidered as ſuch evidence of keeping houſe as to make it an act of bankruptcy.

Colkett v. Falch, Co. *Bankrupt Laws*, 99.

Hooper v. Smith, 1 Bl. Rep. 441. Bull. *N. P.* 39. Allen v. Hartley, M. 25 G. 3. B. R. Co. *Bankrupt Laws*, 7. *Id.* 102.

Whether a denial in conſequence of a pre-concerted agreement between the debtor and his creditors ſhall be an act of bankruptcy, was formerly doubted: but it ſeems now to be ſettled, that if the denial be to any of the creditors privy to ſuch agreement, it is fraudulent, and not a good act of bankruptcy: *ſecùs* if to a creditor not acquainted with the agreement.

Cawley v. Hopkins, *London* Sittings after Mich. Term 1785. cor. Buller, J.

1 Salk. 110. 1 Burr. 484. Hall's caſe, 2 Str. 809. Green, 53.

Abſenting himſelf, may become an act of bankruptcy or not, from the intention of the party: if it be done with a view of defrauding, or even delaying his creditors, and the abſence be but for a ſingle day, it will be an act of bankruptcy; and his very abſenting himſelf is ſufficient *primâ facie* evidence of an intent to defraud or delay his creditors: but it muſt be voluntary, and not by means of an arreſt.]

Bradford's caſe, 1 Keb. 11. [2 Sid. 69. 114. 176. S. C. 1 Lev. 13. S. C. Ld. C. B. Comyns ſaith, that if the outlawry be

If a man permit himſelf to be outlawed to the intent or purpoſe to defraud his creditors of a juſt debt, it is one of the cauſes of bankruptcy; ſo that on a ſpecial verdict, if a jury find that he was outlawed, and do not find that it was *in fraudem creditorum*, this is not a ſufficient finding to make him a bankrupt; becauſe the intent of the ſtatute was, that it muſt be ſuch an outlawry as the debtor permits by keeping out of the way to defraud his creditors.

reverſed before the commiſſion iſſues, or for default of proclamation after the commiſſion, it ſhall not be an act of bankruptcy. Com. Dig. tit. *Bankrupt*, C. 4. But *Qu.* of this opinion? for it reſts merely on the great authority of that writer; and if the outlawry were originally fraudulent, and intended to defraud or delay creditors, it ſeemeth that no ſubſequent event would be ſufficient to purge the fraud, and prevent the effect of the bankrupt acts.]

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[An outlawry in *Ireland* doth not make one a bankrupt; but in the county palatine of *Durham* it doth.] Com. Dig. tit. *Bankrupt*, C. 4. Co. *Bankrupt Laws*, 103.

Yielding himſelf to priſon, is to be intended a voluntary yielding for debt; and if a perſon capable of paying will notwithſtanding, from fraudulent motives, voluntarily go to priſon, it is an act of bankruptcy. Billing. 95. Good. 25.

B. was arreſted for 28*l.*, and though he had money ſufficient to pay the debt, yet choſe rather to go to priſon, in order, as he declared, to force his creditors to come to a compoſition. The Lord Chancellor ſaid, this is an act of bankruptcy within 1 *Jac.* 1., though without ſuch intent, yielding himſelf to priſon was no act of bankruptcy, unleſs he lay there two months; otherwiſe when the party procures himſelf to be arreſted on a ſham debt, for that by the ſtatute of *Elizabeth* is immediately an act of bankruptcy. *Ex parte* Burton, Vin. tit. *Cred. and Bank.* 62.

Willingly or fraudulently procuring his goods to be attached or ſequeſtered, is declared to be an act of bankruptcy, for it is a plain and direct endeavour to diſappoint his creditors of their ſecurity. But an attachment out of a court for default or laches is not an act of bankruptcy; nor if *A.* has a rectory impropriate, and the tithes are ſequeſtered for not repairing the chancel, will he thereby become a bankrupt. The attachment here meant, and which the legiſlature had in view, is that ſort of attachment by which ſuits are commenced, as in *London* and other towns where that ſpecies of proceſs is uſed; therefore a fraudulent judgment and execution ſued thereupon, was held not to be procuring goods to be attached within the words of this act. 2 Bl. Com. 478. 1 Com. Dig. 523. Clavey v. Haley, Cowp. 427. Harman v. Spottiſwood, M. 13 G. 3. B. R. Co. *Bankrupt Laws*, 122.

Making any fraudulent grant or conveyance of his lands and tenements, goods or chattels. A fraudulent grant, to come within the meaning of this ſtatute, muſt be by deed; therefore a fraudulent ſale of goods, not by deed, is no act of bankruptcy in itſelf: but being a ſcheme concerted at the eve of a bankruptcy, to cheat innocent perſons, in order to ſecure particular creditors, it is ſuch a fraud as ſhall render the ſale void. Martin v. Pewtreſs, 4 Burr. 2478.

A trader, before he becomes a bankrupt, may prefer one creditor to another, and may pay him his debt, or may make him a mortgage, with poſſeſſion delivered, or may aſſign part of his effects: but a preference of one creditor to the reſt, by conveying by deed all his effects to him, or ſo much of his ſtock in trade as to diſable him from being a trader, is a fraud upon the whole bankrupt law, and an act of bankruptcy. Worſely v. De Mattos, 1 Burr. 467. Wilſon v. Day, 2 Burr. 827. Butcher v. Eaſto, Doug. 282. And it makes no difference whether the aſſignment be to indemnify a ſurety, or for a preſent debt. Haſſel v. Simpſon, Hill. 24 G. 3. 1784, B. R. Co. *Bankrupt Laws*, 106.

An aſſignment of all a trader's effects for the benefit of all the creditors, has been holden an act of bankruptcy, unleſs they all aſſent to the deed. But (*a*) in ſuch caſe it is not permitted to thoſe who execute the deed to ſet it up as an act of bankruptcy. Kettle v. Hammond, Sittings after Hil. 7 G. 3. Co. *Bankrupt Laws*, 108. (*a*) Bamford v. Baron, cited in 1 Term Rep. 594.

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Jacob v. Shepherd, 1 Burr. 478. Unwin v. Oliver, *id.* 481.

An aſſignment of part of a trader's effects may, under certain circumſtances, be good and valid; but an aſſignment of his effects, with only a colourable exception (*a*) of a ſmall part, will not prevent the deed from being fraudulent, and, of courſe, it will be an act of bankruptcy.

(*a*) Gayner's caſe, *id.* 477. Law v. Skinner, 2 Bl. Rep. 996. Compton v. Bedford, 1 Bl. Rep. 362.

Linton v. Bartlett, 3 Wilſ. 47. Devon v. Watts, Dougl. 86.

And an aſſignment by deed of only *part* of a trader's effects to a fair creditor will, if done in contemplation of a bankruptcy, be itſelf the very act.

Round v. Hope Byde, *London* Sittings after Mich. Term 1779. Co. *Bankrupt Laws*, 114.

Haſſel v. Simpſon, Co. *Bankrupt Laws*, 107.

A grant or conveyance fraudulent within the ſtatute 13th *Eliz.* or 27th *Eliz.*, is an act of bankruptcy.

Being arreſted for debt ſhall, after ſuch arreſt, lie in priſon two months or more, upon that or any other arreſt or detention in priſon for debt.

3 Lev. 58.

The arreſt muſt be lawful, and therefore an arreſt by an executor before probate is not within the act.

1 Burr. 439.

The ſtatute does not make the mere being arreſted an act of bankruptcy. The moſt ſubſtantial trader is liable to be arreſted; but the preſumption of inſolvency ariſes from his lying in priſon two months, without being able to get bail; nor will this preſumption be obviated by a mere formal bail put in for the purpoſe of changing from one cuſtody to another. Where bail is really put in, the bankruptcy only relates to the time of the ſurrender; but when it is only a formal bail, it will have relation to the firſt arreſt. Therefore a man arreſted in *Kent*, and brought up to *London* to be bailed, and immediately turned over to the King's Bench priſon, where he lay two months, was held a bankrupt from the firſt arreſt. In a caſe where a man was arreſted on the 2d of *May*, and on the 4th of *May* was charged in cuſtody with that and another action, and lay in priſon till the 2d *July* at the ſuit of the firſt plaintiff, when he was diſcharged out of cuſtody as to him, and continued in priſon at the ſuit of the ſecond plaintiff till the 6th of *July*; the court held there was plainly an act of bankruptcy on the 4th of *May*, whatever diſpute there might be as to its being a bankruptcy on the 2d.

Duncomb v. Walter, 3 Lev. 57. 1 Ventr. 370. Raym. 479. Roſe v. Green, 1 Burr. 439. King v. Leith, 2 Term Rep. 141. Coppendale v. Bridgen, 2 Bur. 818.

Hope v. Gill, Beawes Lex Mer. 489.

It has in one caſe been determined, that lying in priſon two lunar months will make the party bankrupt from the time of the firſt arreſt; and though the commiſſion was taken out before the two months expired, yet he appearing to be bankrupt by relation to a time before the ſuing it out, it was held ſufficient.

Bull. *N. P.* 38.

But where *A.* being arreſted puts in bail, afterwards ſurrenders in diſcharge of his bail, and is above two months in priſon, he is a bankrupt only from the time of his ſurrender, not from the time of his arreſt.

Being arreſted for 100*l.* *or more juſt debts, ſhall eſcape out of priſon.* The act clearly intends ſuch an eſcape as ſhews he means to run away, and thereby to defeat his creditors; it muſt be

be an eſcape againſt the will of the ſheriff, for a man ſhall not be made a criminal where he has not the leaſt criminal intention to diſobey any law.

Therefore, a man who was arreſted in *Kent*, and coming to town in cuſtody of the ſheriff's officer, was permitted by him to call at his attorney's houſe in the city, and from thence immediately carried to the judge's chambers in obedience to a *habeas corpus*, was held not to have eſcaped in the ſenſe of this act of parliament, but to have remained ſubſtantially in cuſtody notwithſtanding his being carried into another county. Roſe v. Green, 1 Burr. 440.

If any bankrupt, after iſſuing any commiſſion againſt him, pay to the perſon who ſued out the ſame, or otherwiſe give and deliver to ſuch perſon, goods or any other ſatisfaction and ſecurity for his debt, whereby ſuch perſon ſhall privately have and receive more in the pound in reſpect of his debt than the other creditors, ſuch payment of money ſhall be an act of bankruptcy.

In an action brought againſt the defendants (one of whom had been a co-aſſignee with the plaintiff, and removed for the purpoſe) to recover the proceeds of a variety of articles, amounting to upwards of 6000*l.*, which had been aſſigned to them by the bankrupt, after ſeveral acts of bankruptcy; *Buller*, J. ſaid, there have been three points made in this caſe; 1ſt, Whether by the leaving of her houſe, Mrs. *Tyler* intended to delay her creditors. 2dly, Whether the leaving of the kingdom without ſuch intention, but whereby in fact creditors are delayed, be an act of bankruptcy. 3dly, As to the compoſition with Mr. *Thackery*. They are all points of general conſequence and importance. The firſt is a queſtion of fact, and it is for you to ſay what you think was Mrs. *Tyler*'s intention when ſhe left her houſe; ſhe knew that a great number of bills were ſoon to become due, and had not made any proviſion for the payment of them; beſides, the affidavit of the defendant for the purpoſe of himſelf taking out a commiſſion is very ſtrong, and ſhews you what he thought at the time. I remember a caſe about fourteen years ago, in which Lord *Mansfield* held ſuch an affidavit concluſive evidence againſt the defendant, and upon application to the court, though it was ſaid not to be concluſive, the judges were all of opinion, that it was *primâ facie* evidence againſt ſuch perſon diſputing the bankruptcy he had ſworn to. Vernon v. Hankey, *London* Sittings after Trin. Term, 27 G. 3.

2dly, As to the going abroad, there cannot be any doubt that Mrs. *Tyler*'s creditors were thereby delayed; but it is ſaid, that it is not ſufficient unleſs the going was with an intention to delay them, and that the bankrupt went to *Calais* merely to avoid an impending proſecution. The law upon this ſubject is eſtabliſhed by *Woodier*'s caſe, which happened in 1739, and was not ſo ſtrong a caſe as this, for he had more ground for his apprehenſion, having killed his wife. The point, indeed, has never been neatly before the court ſince that time; but that caſe has always been conſidered, and acted upon as good law. And at this time, without examining into the expedience of that deciſion, I ſhould be extremely averſe to over-rule it. For as you have often heard

it obſerved from this ſeat, certainty and uniformity of deciſion are in matters of this ſort, of much more material conſequence than the eſtabliſhment of a rule one way or the other. 3dly, It appears from Mr. *Ward*'s evidence, that *Thackery* had ſued out a commiſſion which was ſealed on the 13th of *May*, and that on the 19th, in the preſence of one of the defendants, he agreed upon Mrs. *Tyler*'s paying him 200*l.*, and giving ſecurity for the remainder of his debt, that the commiſſion ſhould die away. This is expreſsly made an act of bankruptcy by the 5 *Geo.* 3 *c.* 30. § 24. The aſſignment then made to the defendants, being ſubſequent to thoſe acts of bankruptcy, there cannot be any doubt of the plaintiff's title to recover. The jury found a verdict for the plaintiff.

Cole v. Davies, 1 Ld. Raym. 725. Bull. *N. P.* 40. Packenham v. Blan, Select Caſes in Chancery, 42.

The legiſlature having by poſitive laws declared what acts ſhall be conſidered as criterions of inſolvency or fraud whereon to ground a commiſſion, none other can be admitted by inference or analogy. Therefore, it is not an act of bankruptcy for a trader ſecretly to convey his goods out of his houſe and conceal them to prevent their being taken in execution: nor to give money for notice when a writ ſhall come into the ſheriff's office; nor for a banker to refuſe payment, if he appears, and keeps his ſhop open.]

(B) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previous thereto.

THE commiſſion of bankrupt, which arms the commiſſioners with all the power they are to exerciſe over the bankrupt and his eſtate, is to be granted by the lord chancellor, lord keeper, or commiſſioners of the great ſeal, on the application of creditors (*a*) only; and this is a matter not diſcretionary, but to be granted (*b*) *de jure*.

(*a*) For if twenty ſwear that ſuch a one is a bankrupt, yet a commiſſion cannot be awarded without a petition from the creditors for that purpoſe, [ſupported by a proper affidavit of the debt. 5 G. 2. c. 30. But ſuch affidavit need not ſtate the particulars by which the bankrupt becomes indebted. *Ex parte* Ward, 1 Atk. 153.] 2 Chan. Ca. 190. (*b*) As if the words of the act had been, *ſhall* or *ought* to grant. Vern. 152. 2 Chan. Ca. 191.

By the 34 *H.* 8. *cap.* 4., "The lord chancellor, treaſurer, *&c.* "were to take order with the bankrupt's lands and goods for "payment of his debts."

And by the 13 *Eliz. cap.* 7., "The lord chancellor or keeper, "upon complaint in writing, ſhall have power, by commiſſion "under the great ſeal, to appoint honeſt and diſcreet perſons, "who, or the moſt of them, may take ſuch order with the "body, *&c.*"

Vide 2 Chan. Ca. 193. By the 1 Jac. 1. c. 15. the

By the 5th *Geo.* 2. *cap.* 30. § 44., it is enacted, "That no "commiſſion of bankrupt ſhall abate by the death of the king; "and that if it ſhall be neceſſary to renew any ſuch commiſſion "by

" by reaſon of the death of the commiſſioners named in ſuch " commiſſion, ſo that a ſufficient number of commiſſioners ſhall " not be living who can act therein, or for any other cauſe; in " every ſuch caſe ſuch commiſſion ſhall be renewed, and but " half of the (*a*) fees uſually paid upon granting or obtaining of " commiſſions of bankrupt, ſhall be paid for any ſuch renewed " commiſſion."

commiſſioners may proceed after the death of the bankrupt. 1 Vern. 153. On a joint commiſſion againſt two

bankrupts, they muſt be each found bankrupt; and though one of them ſhould die, the commiſſion may ſtill go on; but if one of the joint-traders be dead at the time of taking out the commiſſion, it abates, and is abſolutely void. Atk. Rep. 97. pl. 44. (*a*) By this ſtatute a maſter in Chancery is to ſettle the fees of the clerk to the commiſſion.

The 5 *Geo.* 2. *cap.* 30. § 23., for preventing the taking out commiſſions of bankrupt maliciouſly, enacts, " That no commiſ- " ſion of bankrupt ſhall be awarded againſt any perſon whatſo- " ever, upon the petition of one or more creditors, unleſs the " ſingle debt of the creditor, or of two or more perſons, be- " ing partners, petitioning for the ſame, do amount to the ſum " of one hundred pounds, or upwards; or unleſs the debt of " two creditors ſo petitioning as aforeſaid, ſhall amount to 150*l.* " or upwards; or unleſs the debt of three or more creditors ſo " petitioning as aforeſaid, ſhall amount to 200*l.* or upwards; " and the creditor or creditors, petitioning for ſuch commiſſion, " ſhall, before the ſame ſhall be granted, make an affidavit, or " (being one of the people called Quakers) make a ſolemn af- " firmation in writing, before one of the maſters of the high " court of Chancery, (which oath or affirmation they are hereby " empowered to adminiſter and which ſhall be filed with the " proper officer,) of the truth and reality of ſuch his, her, and " their reſpective debt and debts; likewiſe give bond to the " lord chancellor, lord keeper, or commiſſioners of the great " ſeal for the time being, in the penalty of 200*l.*, to be condi- " tioned for proving his, her, or their debts, as well by the " commiſſioners named in ſuch commiſſion, as upon a trial at " law, in caſe the due iſſuing forth of the ſame ſhall be conteſted " and tried; and alſo for proving the party a bankrupt at the " time of taking out ſuch commiſſion, and further to proceed on " ſuch commiſſion, as by the act is directed; and if ſuch debt " or debts ſhall not be really due or owing; or if, after ſuch " commiſſion taken out, it cannot be proved that the party was a " bankrupt at the time of the iſſuing the ſaid commiſſion; but " on the contrary it ſhall appear that ſuch commiſſion was taken " out fraudulently or maliciouſly; that then the lord chancellor, " lord keeper, or commiſſioners of the great ſeal for the time " being, ſhall and may, upon the petition of the party or parties " grieved, examine into the ſame, and order ſatisfaction to be " made to him, her, or them, for the damages by him, her, or " them ſuſtained; and for the better recovery thereof may, " in caſe there be occaſion, aſſign ſuch bond or bonds to the " party or parties ſo petitioning, who may ſue for the ſame in " his, her, or their name and names."

If

Goddard v. Vanderhaj-den, 3 Wilſ. 271. Barnaby's caſe, 1 Stra. 653.

[If a creditor has his debtor in execution, he cannot petition for a commiſſion of bankruptcy; for the body of the debtor being in execution, is a ſatisfaction of the debt in point of law. Therefore, where a commiſſion had iſſued on the petition of a creditor, who had the bankrupt in execution, it was upon that account ſuperſeded.

Ex parte Lewes, 1 Atk. 154.

Nor has the petitioning creditor the ordinary election to ſue the bankrupt at law, or come under the commiſſion; for if he were to elect to proceed at law, the commiſſion muſt be ſuperſeded, which would affect thoſe creditors who had proved debts under it, and this incapacity of the petitioning creditor to ſue the bankrupt, extends to other caſes in which common creditors are not put to their election; for if a creditor has demands on the bankrupt of diſtinct natures or in different rights, he is at liberty to prove one under the commiſſion, and proceed at law for the recovery of the other. But where a petitioning creditor, having founded his petition upon a debt ariſing for two notes of the bankrupt, arreſted the bankrupt upon a third diſtinct note, Lord *Hardwicke* allowed the bankrupt's petition for his diſcharge, becauſe the petitioning creditor had determined his election by taking out the commiſſion.

Ex parte Ward, 1 Atk. 153.

Forreſt. 243. 2 Ch. Ca. 191. Freem. 270. *Ex parte* Hylliard, 1 Atk. 147. 2 Vez. 407. Medlicot's caſe, 2 Stra. 809. 1 P. W. 783. *Ex parte* Lee.

The petitioning creditor muſt have a legal demand: A debt in equity will in no circumſtances be a foundation for a commiſſion; therefore if a legal demand is not in its own nature aſſignable, the aſſignee, notwithſtanding his equitable claim, cannot be a petitioning creditor.

Swayne v. Wallinger, 2 Stra. 746. *contra* Moſely, 37.

A debt at law, notwithſtanding the ſtatute of limitations has incurred, will ſupport a commiſſion; for the ſtatute does not extinguiſh the debt, but the remedy, and the leaſt hint will revive it.

Quantock v. England, 2 Black. Rep. 703. 5 Burr. 2628. S. C.

Indeed if the debtor himſelf applies on that ground to ſuperſede the commiſſion, the caſe may be different; but a debtor of the bankrupt's cannot avail himſelf of that defence to elude the payment of a juſt debt to the aſſignees.

Fowler v. Brown, Sittings at *Weſtminſter* after Mich. Term 1779.

And accordingly Lord *Mansfield*, at *niſi prius*, ruled that the ſtatute of limitations does not prevent a creditor from taking out a commiſſion of bankruptcy: It extends only to the remedies by action mentioned in the ſtatute: it does not extinguiſh the debt, or take away any other remedy.

Bickerdike v. Bollman, 1 Term Rep. 405.

If a creditor takes a bill for his debt, which is drawn by the debtor upon a payee, who had not at that time, nor previous to the bills becoming due, any effects of the drawer in his hands, this does not extinguiſh the original debt, although the creditor neglects to give notice of its being diſhonoured.

Ex parte Lee, 1 P. W. 782.

It has been determined, that a creditor by notes bought in at 10*s.* in the pound, was a creditor for the full ſum, and might take out a commiſſion.

Ex parte Penny, in Canc. Tr.

A creditor who has a ſecurity for his debt may take out a commiſſion without delivering it up; and though it be afterwards ſold,

ſold (*a*), and the debt thereby reduced under 100*l.*, the commiſſion will nevertheleſs be good. 33 G. 3. ruled on the authority of (*a*) Sir George Colebrooke's caſe, cited by Sir J. Mitford.

A debt on account, though not liquidated, is a foundation for a commiſſion of bankruptcy. Flower v. Herbert, 2 Veſ. 327.

If a tradeſman becomes ſecurity for another, it creates ſuch a debt that the creditor may take out a commiſſion: So a ſolicitor's bill for fees will ſupport a commiſſion: And notwithſtanding an order obtained that the bill ſhould be taxed by a maſter, and all proceedings at law in the mean time ſtaid; if the ſolicitor whilſt the bill is under taxation, ſues out a commiſſion of bankrupt againſt his client, it has in one caſe been determined to be no contempt nor a ſufficient cauſe to ſuperſede the commiſſion, becauſe the order of reference extends only to the bringing of actions, and the common and ordinary proceedings. Heylor v. Hall, Palm. 325. Moſely, 27.

The executor of a bankrupt, unleſs the commiſſion againſt his teſtator has been ſuperſeded, cannot take out a commiſſion for a debt due to the teſtator; becauſe the debt veſted in his aſſignees, and conſequently the executor is not entitled to be the petitioning creditor. *Ex parte* Goodwin, 1 Atk. 100.

A debt due from a partnerſhip, is a legal debt to ſupport a ſeparate commiſſion. *Ex parte* Criſp. 1 Atk. 134. Co. *Bankrupt Laws*, 20

A ſum awarded by arbitrators will ſupport a commiſſion notwithſtanding a bill filed to ſet aſide the award; for the arbitration bond is a debt at law, and binds the parties, until it is ſet aſide for corruption or partiality, *&c.* And if a bill filed were a foundation to ſuperſede the bond, a perſon by filing a bill might at once fruſtrate the effect of the award. *Ex parte* Lingood, 1 Atk. 241.

A creditor, before the party entered into trade, may on account of ſuch debt ſue out a commiſſion, but a creditor for a debt contracted after leaving off trade, cannot. But when a commiſſion is ſued out, thoſe creditors who have become ſuch ſince the party quitted trade, may come in and ſhare the dividend with thoſe who were creditors before or during the trading, provided they are not barred by a prior act of bankruptcy. Butcher v. Eaſto, Dougl. 282. Meggot v. Mills, 12 Mod. 159. 1 Ld. Raym. 287. Cotton v. Daintry, 1 Sid. 411. 1 Ventr. 29.

A creditor by *bond payable at a future* day, having ſued out a commiſſion of bankruptcy before the time of payment, Lord Chancellor *Parker* ordered it to be ſuperſeded becauſe the money was not then due: But this, though good law at the time of the deciſion, has ſince been altered by the 5 *Geo.* 2. *c.* 30. § 22. which extends to all ſorts of bonds and ſecurities given on good conſideration for the payment of money, notwithſtanding the preamble ſpeaks only of bonds given for goods in trade. *Ex parte* Mackerneſs, 1 P. W. 260. *Ex parte* James, 19th June, 1719, 1 P. W. 610. Swaine v. Demattos, 2 Stra. 1211.

Chilton v. Whiffen, 3 Wilſ. 17. The ſtatute extends to goods ſold on credit. Cockran v. Love, at *N. P.* cor. Ld. Kenyon, 3d June 1790.

If the debt of the petitioning creditor appears to have been contracted ſubſequent to a ſecret act of bankruptcy committed by the trader, no commiſſion ought to be granted upon his petition. Accordingly, where it appeared that a man was a bankrupt in *January* Toms v. Mytton, 2 Stra. 744.

nuary 1724, and the debt of the petitioning creditor was a note dated in *September* 1725, it was holden to be a void commiſſion.

Ambroſe v. Clendon, 2 Stra. 1042.

But if a debt originally upon a ſimple contract were extinguiſhed by the creditor's accepting a bond after a ſecret act of bankruptcy, it ſhall not operate as an extinguiſhment of the ſimple contract, ſo as to deprive the creditor of his right to petition.

This neceſſity of the petitioning creditor having a legal debt due before any act of bankruptcy, ſeems alſo to be tacitly admitted by the reaſoning of the judges in ſeveral caſes, where a queſtion has ariſen, Whether an indorſee of a note given before, but indorſed after a ſecret act of bankruptcy, is entitled to be a petitioning creditor? Such a creditor is allowed to petition, becauſe he ſtands in the place of the indorſer, and the debt is not created by the indorſement, but by the making of the note which was before the bankruptcy. The authority of theſe caſes, and the reaſoning on them, has been acknowledged and confirmed by the court of *King's Bench*, in *Bingley* v. *Maddiſon*, in that caſe a note was given by the bankrupt in *January*, and it became due in *June*. The act of bankruptcy was in *October* following, and the indorſement in *November*. The indorſee of the note was petitioning creditor, and ſued out the commiſſion.

Ex parte Thomas, 1 Atk. 73. 2 Wilſ. 135.

Bingley v. Maddiſon, B.R. Mich. Term 1783, Co. *Bankrupt Laws*, 24.

It was contended, that at the time of the bankruptcy the petitioning creditor had no debt, and therefore the commiſſion could not be ſupported.

The court obſerved, that this was a caſe in which the law of *England* allowed the aſſignment of a choſe in action. The debt payable to *B.* is aſſigned to *D.* The conſequence is, that the aſſignment relates to the original debt, and the aſſignee ſtands in his place. That the indorſee always came in under the commiſſion, becauſe the indorſement relates to the original debt. That it ſtood thus upon principle, and the caſes are clear, explicit, and poſitive, and of the higheſt nature. The caſe in the *Common Pleas* (*a*) is a ſolemn opinion of the whole court. They therefore held the commiſſion valid.

(*a*) 2 Wilſ. 135. But ſee De Golls v. Ward. Ca. Temp. Talb. 243.

Notwithſtanding the above *ſtat.* 5. *G.* 2. has provided a remedy againſt maliciouſly ſuing out commiſſions of bankrupt, yet it is holden not to take away the common law remedy by an action for damages, but that the party may proceed at law to obtain ſuch redreſs for the injury he has ſuſtained, as a jury think he is entitled to. Where a party elects to abide by the remedy afforded by the ſtatute, he muſt petition the lord chancellor to have the bond aſſigned to him. It is however in the breaſt of the court where the bankruptcy is a doubtful caſe, and the commiſſion ſuperſeded, either to direct an inquiry before a maſter of the damages ſuſtained by the bankrupt, or *a quantum damnificatus* upon an iſſue at law; and after the damages are ſettled, the court may, for the better recovery thereof, order the bond to be aſſigned. But where the caſe is attended with any flagrant circumſtances, the bond will be immediately aſſigned without further inquiry.]

Brown v. Chapman, 3 Burr. 1418. Bonham's caſe, 8 Rep. 121.

Ex parte Gayter, 1 Atk. 144.

By § 22. it is enacted, "That perſons who have bills, bonds, "promiſſory notes, or other perſonal ſecurity for their money, "payable

" payable at a future day, who, by the 7th *Geo.* 1. *cap.* 31., are " enabled to come in as creditors, and allowed to diſcount ſuch " debts, allowing 5 *l. per cent. &c.*, may (though diſabled by " that ſtatute from taking out a commiſſion) petition for, or join " with others in petitioning for any commiſſion of bankrupt."

Alſo by § 25. it is enacted, " That the creditor or creditors " who ſhall petition for and obtain any commiſſion of bankrupt, " ſhall be, and is and are hereby obliged, at his, her, or their " own coſts and expences, to ſue forth and proſecute the ſame, " until an aſſignee or aſſignees ſhall be choſen of ſuch bankrupt's " eſtate and effects; and the commiſſioners to be named in any " ſuch commiſſion ſhall, at the ſame meeting which ſhall be " appointed for the choice of the aſſignees, aſcertain ſuch " coſts (*a*), and by writing under their hands ſhall direct and " order the aſſignee or aſſignees of ſuch bankrupt's eſtate, who is " and are hereby required to pay and reimburſe ſuch petitioning " creditor or creditors, ſuch his, her, or their coſts and charges " as aforeſaid, out of the firſt monies or effects of the bankrupt " that ſhall be got in and received under the ſaid commiſſion; and " every creditor of the ſaid bankrupt ſhall be at liberty to prove " his, her, or their debt or debts under the ſaid commiſſion, " without paying any contribution or ſum of money whatſoever " for or on account of ſuch debt or debts."

[(*a*) This direction, that the commiſſioners ſhall ſettle the bill, does not prevent the chancellor, upon petition, from referring it to a maſter in chancery to tax it, if, upon the hearing, there ſhould appear to be reaſonable objections againſt the allowances made by the commiſſioners. *Ex parte* Vincent, 24th March 1786. *Ex parte* Clarke and Coghlan, 29th May 1789; 22d March 1790; 26th November 1791. Co. *Bankrupt Laws*, 10.]

(C) Of the Commiſſioners, their Duty; and herein of the Power they may exerciſe over the Bankrupt, and others, in diſcovering his Eſtate.

" THE commiſſioners, by the 5 *Geo.* 2. *cap.* 30. *ſect.* 43., before " they proceed in the execution of any commiſſion of bank- " rupt to them directed, ſhall each of them take the following " oath. *I* A. B. *do ſwear, that I will faithfully, impartially, and* " *honeſtly, according to the beſt of my ſkill and knowledge, execute the* " *ſeveral powers and truſts, repoſed in me as a commiſſioner in a com-* " *miſſion of bankrupt againſt* ——, *and that without favour or af-* " *fection, prejudice or malice.* Which oath any two or more of " the ſaid commiſſioners are empowered and required to ad- " miniſter to each in the ſame commiſſion named and authorized, " of which they are to enter a memorial ſigned by them reſpect- " ively, among their other proceedings."

Their commiſſion and power is by force of the ſeveral acts of parliament which ought to be purſued, elſe they are ſubject to the action of the party grieved; for he hath no other remedy. 4 Inſt. 277.

[If ſufficient evidence is given to ſatisfy the commiſſioners (for they are not bound to believe all that is ſworn,) that the party is a bankrupt, they declare him a bankrupt *generally*, to prevent diſputes about the time when he became ſuch.] 119. De Golls v. Ward, Ca. Temp. Talb. 243.]

Ex parte Simpſon, 1 Atk. 72. *Ex parte* Groome, *id.*

By the 13 *Eliz. cap.* 7. *ſect.* 5. "The commiſſioners may call "before them, by ſuch proceſs, ways, or means as they think "proper, any perſon ſuſpected to have any of the bankrupt's "eſtate, &c., in his cuſtody, or to be indebted to him, and upon "oath, or (*a*) otherwiſe, examine ſuch perſons of the certainty "thereof; and by the ſaid ſtatute, if ſuch perſon refuſe to ſwear, "or, being ſworn, (*b*) diſcloſe not the whole truth, he ſhall for-"feit double the value of the goods, to be levied by the ſame "ſtatute. He that fraudulently demands or detains any of the "bankrupt's goods, *&c.* ſhall forfeit double the value.'

(*a*) Though ſuch perſons have been examined by the commiſſioners, yet a bill for diſcovery of the ſame matters may be filed againſt them in Chancery. 2 Chan. Ca. 73.

(*b*) Muſt diſcloſe and anſwer directly to the queſtion put to him. Vent. 324.

By the 1 *Jac.* 1. *cap.* 15., "They may examine the bankrupt "upon interrogatories touching his lands, *&c.*; and, by the ſaid "ſtatute, if he refuſes, *&c.*, they may commit him, *&c.*

[This act continues in force, notwithſtanding the ſubſequent ſtatutes. 2 Bur. 1224. The commiſſioners have no authority under this act to commit a

And by the 1 *Jac.* 1. *cap.* 15. "If any perſon, after warning, "refuſes, or comes not before the commiſſioners to be examined, "*&c.*, having no excuſe, to be allowed by the commiſſioners at "their meeting, or having warning of any other meeting, of the "commiſſioners, appears not before them, having no lawful im-"pediment to be allowed as aforeſaid, they may direct their "warrant, *&c.*, to apprehend and bring him before them, *&c.*; "or if being before them, he refuſes to be ſworn, or to anſwer in-"terrogatories, he ſhall be committed to ſuch priſon as the com-"miſſioners think fit, until he ſhall ſubmit and be examined, *&c.*"

perſon ſuſpected to detain effects of the bankrupt for not attending to be examined, upon their firſt ſummons. Dyer v. Miſſing, 2 Bl. Rep. 1035.]

[But the wife cannot be examined touching his bankruptcy.

By the 21 *Jac.* 1. *cap.* 19., "The wife of a bankrupt ſhall be "examined; and, for not coming or refuſing to be ſworn, *&c.*, "ſhall incur the ſame penalty as other witneſſes."

Ex parte James, 1 P. Wms. 610.]

Vide 2 Show. 247. That it is only the bankrupt's own houſe they can break open.

By the 1 *Jac.* 1. *cap.* 15., "The commiſſioners, in caſe of re-"ſiſtance, may break, or by warrant under their hands and ſeals "authorize others to break open any doors, *&c.* where the "bankrupt or his goods, *&c.* are, or are reputed to be."

Quære? [And where goods had been ſent by the bankrupt on board a ſhip to be conveyed to his correſpondents abroad, it was holden, that the commiſſioners could not ſeize and take them away, without paying the freight. Molloy, 253. Where the party refuſes obedience to the commiſſioners' warrant, it ſeems, that the chancellor will attach him as for a contempt. *Ex parte* Titner, 1 Atk. 136. *Vide* Molloy, 253. *contr.*]

[By 5 *G.* 2. *c.* 30. § 14., "Upon certificate made under the "hands and ſeals of the commiſſioners, that ſuch commiſſion is "iſſued, and ſuch perſon proved before them to become bank-"rupt, it ſhall and may be lawful, to and for all or any of the "juſtices of his majeſty's court of King's Bench, or Common "Pleas, or barons of the court of Exchequer, and to and for all "and every the juſtices of the peace within that part of the king-"dom of *Great Britain* called *England*, the dominion of *Wales*, "and town of *Berwick upon Tweed*; and they are hereby em-

"powered

" powered and required, upon application to them for that pur-
" poſe made, to grant their warrant under their hands and
" ſeals, for the taking and apprehending ſuch perſon, and him to
" commit to the common gaol of the county where he ſhall be
" ſo apprehended and taken, there to remain, until he be removed
" by order of the ſaid commiſſioners, or the major part of them,
" by warrant under their hands and ſeals. And the gaoler or
" keeper, to whoſe cuſtody ſuch perſon ſhall be committed, is
" hereby required to take and receive ſuch perſon into his cuſ-
" tody; and forthwith to give notice to one or more of the ſaid
" commiſſioners in the ſaid commiſſion named, of ſuch perſon
" being in his cuſtody, to the intent the ſaid commiſſioners may
" ſend their warrant to ſuch gaoler or keeper, (which they are
" hereby empowered and required forthwith to ſend,) for the de-
" livering ſuch bankrupt to the perſon or perſons named in ſuch
" warrant, who ſhall be thereby authoriſed to convey and bring
" ſuch perſon to the ſaid commiſſioners, in order to ſuch ex-
" amination and diſcovering as aforeſaid. And the ſaid com-
" miſſioners are hereby likewiſe authoriſed and empowered by
" ſuch their warrant, or any other warrant, to take and ſeize
" any of the goods, wares, merchandizes and effects of ſuch
" bankrupt, (the neceſſary wearing apparel of ſuch bankrupt, or
" of his wife or children, only excepted) and any of his books,
" papers, or writings which ſhall be then in the cuſtody or poſ-
" ſeſſion of ſuch bankrupt, or of any other perſon, in any priſon
" or priſons whatſoever; any cuſtom or uſage to the contrary in
" anywiſe notwithſtanding."

[The commiſſioners, if they have reaſon to apprehend that the bankrupt is making away with, and concealing his effects, or preparing to depart the kingdom to avoid ſurrendering, may ſummon him to appear before them to examine him immediately; and, upon his refuſal to attend to the ſummons, may certify to a judge under this clauſe. *Ex parte* Lingood, 1 Atk. 240.]

§ 11. " Provided, That if any ſuch perſon or perſons ſo appre-
" hended and taken ſhall, within the time or times allowed by
" this act for that purpoſe, ſubmit to be examined, and in all
" things conform, as if he, ſhe, or they had ſurrendered, as
" by this act ſuch bankrupt or bankrupts is or are required; that
" then ſuch perſon ſo ſubmitting or conforming ſhall have and
" receive the benefit of this act, to all intents, as if he, ſhe, or
" they had voluntarily come in and ſurrendered himſelf, herſelf,
" or themſelves; any thing, *&c.*"]

By the ſame ſtat. § 16. it is enacted, " That the commiſ-
" ſioners, or the major part of them, may examine, as well by
" word of mouth as on interrogatories in writing, all and every
" perſon or perſons againſt whom any commiſſion of bankrupt is
" or ſhall be awarded, touching all matters relating to the trade,
" dealings, eſtate, and effects of all and every ſuch bankrupt
" and bankrupts; and alſo to examine, in the manner aforeſaid,
" all and every other perſon duly ſummoned before, or preſent
" at, any meeting of the ſaid commiſſioners, or the major part
" of them, touching all matters relating to the perſon, trade, deal-
" ings, eſtate, and effects of all and every ſuch bankrupt and
" bankrupts; and any act or acts of bankruptcy committed by
" him, her, or them; and alſo to take down or reduce into
" writing the anſwers of verbal examinations of every ſuch bank-
" rupt or other perſon had or taken before them as aforeſaid;

[The power of the commiſſioners to examine the bankrupt is not limited, and confined within the time allowed him to ſubmit to be examined: they may compel him to make further anſwer after that time. 2 Bur. 1123, 1124.]

" which examination ſo taken down or reduced into writing, the
" party examined ſhall, and is hereby required to ſign and ſub-
" ſcribe; and in caſe any ſuch bankrupt or bankrupts, or other
" perſon or perſons ſhall refuſe to anſwer, or ſhall not fully (*a*) an-
" ſwer to the ſatisfaction of the commiſſioners, or the major
" part of them, all lawful queſtions put to him, her, or them
" by the ſaid commiſſioners, or the major part of them, as well
" by word of mouth, as by interrogatories in writing, or ſhall
" refuſe to ſign and ſubſcribe his, her, or their examination
" ſo taken down or reduced into writing as aforeſaid, (not having
" a reaſonable objection either to the wording thereof, or other-
" wiſe, to be allowed by the ſaid commiſſioners,) it ſhall and
" may be lawful to and for the ſaid commiſſioners, or the major
" part of them, by warrant under their hands and ſeals, to commit
" him, her, or them to ſuch priſon as the ſaid commiſſioners, or
" the major part of them, ſhall think fit, there to remain, with-
" out bail or mainprize, until ſuch time as ſuch perſon or per-
" ſons ſhall ſubmit him, her, or themſelves to the ſaid commiſ-
" ſioners, and full anſwer make, to the ſatisfaction of the ſaid
" commiſſioners, to all ſuch queſtions as ſhall be put to him,
" her, or them as aforeſaid, and ſign and ſubſcribe ſuch exa-
" mination as aforeſaid, according to the true intent and mean-
" ing of this act.

(*a*) If a bankrupt, in his anſwers to his examination, will ſwear fully and roundly, the commiſſioners cannot commit him, altho' they may diſbelieve it; for it is one thing, whether the anſwer be true; and another, whether it be ſufficient. *Ex parte* Pedley, Tr. 25G. 3. B.R. Co. *Bankrupt Laws*, 536. As to the ſufficiency of the anſwers, ſee Miller's caſe, 3 Wilſ. 420.; and 2 Bl. Rep. 882. Langhorn's caſe, 2 Bl. Rep. 919. Rex v. Perrot, 2 Burr. 1122.]

§ 17. " *Provided always*, That in caſe any perſon or perſons ſhall be
" committed by the ſaid commiſſioners for refuſing to anſwer,
" or not fully anſwering, any queſtion or queſtions put to him,
" her, or them by the ſaid commiſſioners, by word of mouth
" or on interrogatories, that the ſaid commiſſioners ſhall in
" their warrant of commitment ſpecify ſuch queſtion or queſ-
" tions.

§ 18. " *Provided alſo*, That in caſe any perſon or perſons committed
" by the commiſſioners' warrant, by virtue of this or any other
" acts now in force concerning bankrupts, ſhall bring any *habeas*
" *corpus* in order to be diſcharged from any ſuch commitment,
" and on the return of any ſuch *habeas corpus* there ſhall appear
" any ſuch inſufficiency whatſoever in the form of the warrant,
" whereby ſuch perſon was committed, by reaſon whereof the
" party might be diſcharged of ſuch commitment, that then it
" ſhall and may be lawful for the court, or judge, before whom
" ſuch party ſhall be brought by *habeas corpus* as aforeſaid, and
" ſuch court or judge ſhall, and is hereby required, by rule, or-
" der, or warrant, to commit ſuch perſon or perſons to the
" ſame priſon, there to remain as aforeſaid, unleſs it ſhall be
" made appear to ſuch court or judge, by the party committed,
" that he, ſhe, or they have fully anſwered all lawful queſtions
" put to him, her, or them by the ſaid commiſſioners; or in caſe
" ſuch perſon was committed for not ſigning his, her, or their
" examination, unleſs it ſhall appear to ſuch court or judge,
" that the party ſo committed had a good and ſufficient reaſon

" for

" for refuſing to ſign the ſame; and in caſe any gaoler or keeper " of any priſon, to whom any ſuch bankrupt or bankrupts, per- " ſon or perſons ſhall be committed as aforeſaid, ſhall wilfully " ſuffer ſuch bankrupt or bankrupts, perſon or perſons to eſcape " from ſuch priſon, or to go without the walls or doors of the " ſaid priſon, until he, ſhe, or they ſhall be duly diſcharged as " aforeſaid, ſuch gaoler or keeper ſhall for ſuch his offence, " being duly convicted by indictment or information, forfeit " 500*l.*, for the uſe of the creditors of ſuch bankrupt or bank- " rupts."

By the ſaid ſtatute, a gaoler refuſing to ſhew or produce ſuch priſoner to a creditor, forfeits 100*l.*

[The commiſſioners may examine the bankrupt to all matters that are requiſite to a full diſcloſure of his eſtate and effects, and the manner he has diſpoſed of them, notwithſtanding ſuch examination ſhould ſubject him to penalties, as in the caſe of ſmuggling or gambling, for that is no reaſon why the commiſſion ſhould not proceed; and if the bankrupt has any objection to the queſtion, he muſt demur to the interrogatories, and the Lord *Chancellor* will judge of the queſtion upon a petition; or if the bankrupt refuſe to anſwer any queſtion, and the commiſſioners commit him, and the delinquent bring an *habeas corpus*, the queſtion muſt be ſet forth particularly in the return to the *habeas corpus*, that the judges may judge whether it was a lawful queſtion or not.

Ex parte Meymot, 1 Atk. 200. *Ex parte* Burr. 1793, Co. *Bankrupt Laws*, 526.

As the commiſſioners in the commitment of the bankrupt and others have but a ſpecial authority, they muſt be careful not to exceed it; for an action will lie againſt them, in caſe of an illegal commitment.

1 Salk. 348. Miller v. Seare, 2 Black. 1144.

The commitment, therefore, muſt purſue the words of the act of parliament, and in this the ſuperior courts have been very ſtrict in their conſtruction. A commitment of a bankrupt by commiſſioners to priſon, there to remain *till he conformed to their authority*, was holden ill, becauſe the ſtatute empowers them to commit in that caſe, till he ſubmit himſelf to be by them examined. And the court ſaid, the word *conform*, inſtead of the word *ſubmit*, was well enough, becauſe it was of the ſame ſenſe; but, as the commiſſioners had other authorities beſides that of examining, and it did not appear but it might require a ſubmiſſion to them in other reſpects, and for that, all powers given in reſtraint of liberty muſt be ſtrictly purſued, the commitment was bad.

2 Stra. 880. Bracy's caſe, 1 Salk. 348.

So where a bankrupt was committed for refuſing to be examined, and the concluſion of the warrant was, *or otherwiſe diſcharged by due courſe of law*, it was holden bad.

Hollingſhed's caſe, 1 Salk. 351. 2 Ld. Raym. 851. S. C.

Again, a warrant reciting that the bankrupt had been examined before the commiſſioners, upon his oath, upon which examination he had notoriouſly prevaricated, and therefore that they had committed him without bail or mainprize, until he ſhould make a full and true diſcloſure of his eſtate and effects, *or be otherwiſe delivered, by due courſe of law*, was holden ill; becauſe the commitment did not purſue the words of the ſtatute.

Rex v. Nathan, 2 Stra. 880.

Miller's caſe, 2 Bl. 882. 1144.

And, upon the ſame principle, a commitment till the bankrupt ſhall *full anſwer make to all ſuch queſtions as ſhall be put to him as aforeſaid*, was conſidered as clearly bad.

5 Mod. 309.

It has been holden, that a perſon examined before commiſſioners of bankrupt is not bound to anſwer any thing which tends to

Comb. 391.

accuſe himſelf; he is not to anſwer any thing criminal.

Sed quære? and *vide ex parte* Bland, 1 Atk. 205.

The lord chancellor has power to limit the commiſſioners of bankrupts, to make particular inquiries.

Ex parte Parſons, 1 Atk. 204.

Thus the lord chancellor, upon a petition, limited the examination of a mother to her ſon's trading, but would not reſtrain the commiſſioners from aſking any queſtion that might be relevant thereto.

Bracy's caſe, 1 Ld. Raym. 153.

The depoſitions taken before comiſſioners of bankrupts are not of a public nature, but taken by commiſſioners to defend themſelves; therefore the court will not order a copy of them.

The court has refuſed depoſitions.

perſons ſummoned before the commiſſioners, a copy of the interrogatories, or their former *Ex parte* Bland, 1 Atk. 205. Bowden v. Dellow. *Id.* 289.

Ex parte Dick, 2 Bl. 1142.

A queſtion was raiſed, whether a bankrupt, under examination, was protected from arreſts at the time, and *eundo et redeundo?* The fact was, that the bankrupt was arreſted upon an extent. Lord *Hardwicke* held, that the king was not bound by the bankrupt acts; therefore that it was merely a queſtion at common law: And certainly, at common law, the commiſſioners have no authority; and that their authority is not judicial, but miniſterial.

Ex parte Stow, 2 Bl. 1142. And ſee acc. *ex parte* Kerney, 1 Atk. 55. But ſee Kinder v. Williams, 4 Term Rep. 376. *contr.*

In a ſubſequent caſe, Lord *Henley* ſaid, that the commiſſioners are a court of juſtice, ſufficient for the purpoſe of having their witneſſes protected, at leaſt by the court of Chancery, if not by themſelves; elſe witneſſes would be in a ſtrange dilemma. If they do not appear, they are liable to be committed by the court for their contempt; if they do, they are liable to arreſts, which would be abſurd, and therefore impoſſible.]

By § 20. it is enacted, "That all and every perſon and perſons who ſhall, at any time after the time allowed to the "bankrupt to ſurrender and conform himſelf as the act directs, "voluntarily come and make diſcovery of any part of ſuch bankrupt's eſtate, not before come to the knowledge of the aſſignees, either to the ſaid aſſignees or to the commiſſioners, or "the major part of them, ſhall be allowed 5 *per cent.*, and ſuch "further and other reward as the aſſignees, and the major part "of the creditors, ſhall think fit to be paid out of the neat proceed of ſuch bankrupt's eſtate, and the aſſignee or aſſignees "ſhall be allowed the ſame in their accounts."

Alſo by § 21. "*For the better diſcovery of the eſtate of a bankrupt*, "it is enacted, That all and every perſon and perſons who ſhall "have accepted of any truſt or truſts, and ſhall wilfully protect "or conceal any eſtate, real or perſonal, of any perſon or perſons "becoming bankrupt, from his, her, or their creditors, and

"ſhall

" ſhall not within forty-two days next after ſuch commiſſion ſhall " iſſue forth, and notice thereof be given in the *London Gazette*, " diſcover and diſcloſe ſuch truſt and eſtate, in writing, to one " or more of the commiſſioners or aſſignees of ſuch bankrupt or " bankrupt's eſtate, and likewiſe ſubmit him or herſelf to be ex- " amined by the commiſſioners, in and by the commiſſion au- " thorized, or the major part of them, if thereunto required, " and truly diſcover the ſame, ſhall forfeit the ſum of 100*l.*, " and double the value of the eſtate, either real or perſonal, ſo " concealed, to and for the uſe and benefit of the ſaid creditors, " to be recovered by action of debt, in any of his majeſty's " courts of record at *Weſtminſter*, in the name of the aſſignee " or aſſignees of the ſaid commiſſioners; in which caſe full coſts " ſhall be allowed to either party."

(D) Of the Aſſignees; and herein of the Manner and Time of chooſing them, and Nature of their Truſt.

BY the 5 *Geo.* 2. *cap.* 30. § 26. it is enacted, " That where any commiſſion of bankrupt ſhall iſſue out, the commiſſioners " therein named, or the major part of them thereby authorized, " ſhall forthwith, after they have declared the perſon or perſons, " againſt whom ſuch commiſſion ſhall iſſue, a bankrupt or bank- " rupts, cauſe notice thereof to be given in the *London Gazette*, " and ſhall appoint a time and place for the creditors to meet, " (which meeting for the city of *London*, and all places within " the bills of mortality, ſhall be at the *Guildhall* of the ſaid city,) " in order to chooſe an aſſignee or aſſignees of the ſaid bank- " rupt's eſtate and effects, at which meeting the commiſſioners " ſhall admit the proof of any creditor's debt that ſhall live " remote from the place of ſuch meeting of the commiſſioners, " by affidavit, or (being of the people called Quakers) by ſolemn " affirmation; and alſo permit any perſon duly authorized by " letter of attorney from ſuch creditor, (oath or affirmation " being made of the due execution thereof, either by an affidavit " ſworn, or affirmation made, before a maſter in chancery, or- " dinary or extraordinary, or before the commiſſioners *vivâ voce*, " (which oath or affirmation they are hereby reſpectively au- " thorized to adminiſter,) and, in caſe of creditors reſiding in fo- " reign parts, ſuch affidavits or ſolemn affirmations to be made " before a magiſtrate where the party ſhall be reſiding, and " ſhall, together with ſuch creditor's letter of attorney, be at- " teſted by a notary publick,) to vote in the choice of an aſſignee " or aſſignees of ſuch bankrupt's eſtate and effects, in the place " and ſtead of ſuch creditor; and the commiſſioners, or the " major part of them authorized, ſhall aſſign over ſuch bank- " rupt's eſtate and effects unto ſuch perſon or perſons as the

By 5 Geo. 2. c. 30. § 27, no creditor, or any on his behalf, to have a vote in the choice of an aſſignee, unleſs his debt amounts to 10*l.*—— Commiſſioners upon the day for chooſing aſſignees are not to examine critically into the debt, but to admit creditors for what they ſwear is due to them, as they are liable to an account afterwards. 1 Atk. 68. [But if any obvious objection appears to the debt, it is the conſtant practice to ſuffer the

creditor only to claim till he makes out his demand to the satisfaction of the commissioners. *Id.* 71. (*a*) Therefore one creditor, if his debt be sufficiently large, may choose himself assignee.]

" major part (*a*) in value of such creditors, according to the several debts then proved, shall choose as aforesaid, and the assignee or assignees so chosen shall be obliged to keep one or more distinct book or books of account, wherein he or they shall duly enter all sum and sums of money, or other effects which he or they shall have got in or received out of the said bankrupt's estate; to which book or books of account every creditor, who shall have proved his or her debt, shall at all seasonable times have free resort, and inspect the same as often as he or she shall think fit."

By § 30. it is further enacted, " That it shall and may be " lawful for the commissioners, or the major part of them, as " often as they shall see cause, for the better preserving and " securing the bankrupt's estate, immediately to appoint one or " more assignee or assignees of the estate and effects, or any part " thereof, which assignee or assignees, or any of them, shall or " may be removed or displaced at the meeting of the creditors, " so to be appointed as aforesaid, for choice of assignees, if they, " or the major part in value of them (whose debts respectively " amount to 10*l.* or upwards) then present, and of such persons " duly authorized, shall think fit; and such assignee or assignees " as be so removed and displaced, shall deliver up and assign all " the estate and effects of such bankrupt which shall have come " to his or their hands or possession, or which shall have been " assigned by the said commissioners, as aforesaid, unto such " other assignee or assignees who shall be so chosen by the " creditors as aforesaid; and all the estate and effects of the " bankrupt which shall be delivered up or assigned shall be, to all " intents and purposes, as effectually and legally vested in such " new assignee or assignees, as if the first assignment had been " made to him or them by the said commissioners; and if such " first assignee or assignees shall refuse or neglect, by the space of " ten days next after notice given of the said choice of such new " assignee or assignees, and of his and their consent to accept of " such assignment, signified to the first assignee or assignees, by " writing under his or their hand or hands, to make such assign- " ment and delivery as aforesaid, every such first assignee or as- " signees shall respectively forfeit the sum of 200*l.*, to be divided " and distributed amongst the creditors, towards satisfaction of " their debts, in such manner as the estate of the bankrupt is or " ought to be divided and distributed; and to be recovered by " action of debt, bill, plaint, or information, in any of his " majesty's courts of record at *Westminster*, by such person or " persons, as such the major part of the commissioners autho- " rised as aforesaid shall appoint to sue for the same, with full " costs of suit, wherein no privilege, protection, or wager in " law, or more than one imparlance shall be allowed.

[It is no ground for removing

" And (§ 31.) whereas it may be found necessary, that as well " assignments of bankrupts' estates already made by commissioners,

" as

" as aſſignments hereafter to be made purſuant to the choice of " creditors, ſhould be vacated, and a new aſſignment or aſſign- " ments be made of the debts and effects received and not diſ- " poſed of, by the then aſſignees, to other perſons to be choſen " by the creditors, as aforeſaid, it is enacted, That it ſhall and " may be lawful to and for the lord chancellor, lord keeper, or " commiſſioners of the great ſeal, upon petition of any creditors, " to make ſuch order therein as he or they ſhall think juſt and " reaſonable; and in caſe a new aſſignment ſhall be ordered to be " made, as aforeſaid, that then ſuch debts, effects, and eſtate of " ſuch bankrupt ſhall be thereby effectually and legally veſted in " ſuch new aſſignee or aſſignees; and it ſhall and may be lawful " for him and them to ſue for the ſame, in his or their name or " names, and to diſcharge any action or ſuit, or to give any ac- " quittance for ſuch debts, as effectually, to all intents and pur- " poſes, as the aſſignee or aſſignees in the former aſſignment " might have done in caſe no new aſſignment had been made; " and that the ſaid commiſſioners ſhall cauſe publick notice to be " given in the two *London Gazettes* that ſhall immediately follow " the removal of ſuch aſſignee or aſſignees, and the appointment " of ſuch other aſſignee or aſſignees as aforeſaid, that ſuch aſſig- " nee or aſſignees is or are removed, and ſuch other aſſignee or " aſſignees appointed in his or their ſtead; and that ſuch perſons " as are indebted to the ſaid bankrupt's eſtate, do not pay ſuch " debt or debts to ſuch aſſignee or aſſignees as ſhall be removed as " aforeſaid."

aſſignees, that ſome of the creditors lived at a diſtance, and had not an opportunity of being preſent at their election: a want of ſubſtance or integrity is the true ground on which to make ſuch an application. *Ex parte* Gregnier, 1 Atk. 91. If the aſſignee becomes bankrupt, he may be removed. *Ex parte* Newton, 1 Atk. 97. Or if the commiſſioners act improperly at the time of chooſing him. Vin. Abr. tit. *Creditor and Bankrupt*, (O), pl. 3. When an aſſignee is removed, he muſt join with the old aſſignee, and the commiſſioners in making an aſſignment to the new aſſignee. *Ibid.* And where an aſſignee is removed on account of his own bankruptcy, Lord Hardwicke was of opinion, that he and his aſſignees muſt join with the commiſſioners in executing an aſſignment to the new aſſignee. 1 Atk. 97.]

[§ 32. " Before the creditors ſhall proceed to the choice of aſ- " ſignees of any bankrupt's eſtates, the major part in value of the " ſaid bankrupt's creditors then preſent ſhall, if they think fit, " direct in what manner, how, and with whom, and where " the monies ariſing by, and to be received from time to time, " out of the bankrupt's eſtate, ſhall be paid in and remain until " the ſame ſhall be divided amongſt all the creditors as by this " act is directed; to which rule and direction, every ſuch aſſig- " nee and aſſignees aforeſaid to be choſen ſhall conform, as often " as 100*l.* ſhall be got in and received from ſuch bankrupt's " eſtate, and ſhall be and are hereby indemnified for what they " ſhall do, in purſuance of ſuch direction of the ſaid creditors."

Aſſignees are in the nature of truſtees; and where they employ an agent to receive or pay money, who abuſes their confidence, they muſt, like other truſtees, anſwer over to the *ceſtuy que truſts*. But (*a*) when they employ an agent, either from neceſſity, or conformably to the common uſage of mankind, they have been holden not liable, provided they have uſed due precaution in the choice of the perſon employed.

Inre Earl of Litchfield, 1 Atk. 88. (*a*) *Ex parte* Belchier, Ambl. 218.

From their being conſidered as mere truſtees, it follows, that each is ſeparately anſwerable only for what he receives; and the

1 Atk. 89.

negligence of (*a*) one ſhall not hurt any of the others, provided they be not at all privy to any private and perſonal agreement entered into by their co-aſſignee.

(*a*) But Ld. Hardwicke recommends the inſertion of the words "*jointly and ſeverally*" in the aſſignment, for the ſecurity of each aſſignee. 1 Atk. 90.

Can v. Read, 3 Atk. 695. Another conſequence is, that payment of a debt to one aſſignee will not be good.

Primroſe v. Bromley, 1 Atk. 89. If an aſſignee becomes inſolvent, and has applied any of the money received by him in that capacity to his own uſe, the commiſſioners are to be conſidered as ſpecialty creditors, becauſe the commiſſioners executed a counterpart of the aſſignment to them; and the agreement, being under hand and ſeal, makes it in the nature of a ſpecialty debt, and therefore they may come upon his real eſtate.

Ex parte Goreing, 22th June 1790, Co. *Bankrupt Laws*, 325. It is the duty of the aſſignees to ſell all the bankrupt's property as ſoon as it can be done with advantage; and, if they neglect to diſpoſe of it, the chancellor, upon petition of a creditor, will order a ſale, notwithſtanding the aſſignees ſhould be deſirous of keeping the eſtate, as conceiving it to be more beneficial for the creditors than a ſale.

Brown v. Jones, 1 Atk. 188. Tyrrell v. Hope, 2 Atk. 562. Row v. Dawſon, 1 Vez. 331. Pope v. Onſlow, 2 Vern. 286. Co. *Bankrupt Laws*, 326. The creditors and aſſignees ſtand in the place of the bankrupt, and are ſubject to the ſame equity, and bound by all acts fairly done by him; for although the court will favour creditors as much as they can, it muſt be where they have a ſuperior right to other perſons.

If a ſettlement is made before marriage, though without a portion, it will be good againſt the aſſignees; for marriage itſelf is a conſideration, and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional ſum of money, or even an agreement to pay money, if the money be afterwards paid purſuant to the agreement.

Ex parte Cottrell, Cowp. 742. So if a perſon give a bond for a ſum of money as a marriage portion, and the marriage take effect, it is a good conſideration for the bond, and the aſſignees cannot be relieved againſt it.

Tyrrell v. Hope, 2 Atk. 558. *Ex parte* Byas, 1 Atk. 124. Where the bankrupt himſelf, from the circumſtances of the caſe, would be conſidered as truſtee for another, his aſſignees will be looked upon in the ſame light.

Ex parte Coyegame, Co. *Bankrupt Laws*, 330. 1 Atk. 192. S. C. Grey v. Kentiſh, 1 Atk. 280. Worrall v. Marlar, Buſhnan v. Pell, 1 Cox's P. Wms 458. If the wife of a bankrupt prior to her marriage was entitled to a truſt eſtate, the aſſignees of the huſband are not entitled to the property without making a ſettlement on the wife.

Milner v. Colmer, 2 P. W. 639. Adams v. Pierce, 3 P. W. 11. Willats v. Cay, 2 Atk. 67. Jewſon v. Moulſon, 2 Atk. 420. But if the huſband, or his general aſſignees, (who ſtand exactly in the ſame ſituation,) can get poſſeſſion of the wife's property without the aid of equity, it ſeems doubtful, whether the court will interfere to aſſiſt the wife.

Ruſſel v. Ruſſell, 1 Brown, Ch. Rep. 269. Taylor v. Wheeler, 2 Vern. 564. Where a mortgage is made on a leaſe pledged by a bankrupt, equity will ſupply a defect in the conveyance againſt the aſſignees.

If

If there is a cuſtom in the country that half-a-year's rent ſhould become due on the day the tenant enters upon the premiſes, the aſſignees are bound by it, notwithſtanding the tenant had committed an act of bankruptcy before he took the premiſes, and made the agreement to pay half-a-year's rent in advance. Buckley v. Taylor, 2 Term. Rep. 600.

If a leſſor covenants with his leſſee and his aſſigns to renew his leaſe, and the leſſee becomes a bankrupt, equity will not compel the leſſor to renew in favour of the aſſignees. Drake v. The Mayor of *Exeter*, 1 Ch. Ca 71.

The ſtatute of limitations will run againſt the aſſignees from the time of the original promiſe to the bankrupt. Aſhbrooke v. Manley, Comb. 70.

So where in an action brought againſt the defendant by an aſſignee, he pleaded the ſtatute of limitations; the court reolved that the ſtatutes of bankrupts transfer the right to the aſſignee, but it is no more than the old right which the bankrupt had before he had committed any act of bankruptcy, and therefore the aſſignee muſt take it in the ſame plight and condition as the bankrupt himſelf had it; and that the ſtatute of limitations was a bar. Grey v. Bendiſh, Caſes in Equity, 171. 3 P. W. 144.

Where a creditor before bankruptcy agrees to take leſs than his debt, ſo that it be paid preciſely at the day, and the debtor fails of payment, he cannot be relieved; and if the debtor becomes bankrupt, the aſſignees will not be entitled to bind the creditor by his compoſition, but he has a right to prove his whole debt. *Ex parte* Bennet, 2 Atk. 528.

It is the duty of the aſſignees to make a dividend as early as poſſible after the time given by the ſtatute, for creditors to come in and prove their debts: And if they neglect making a dividend, and keep the money in their own hands, they will be liable to intereſt for it.] *Ex parte* Lane, 1 Atk. 90. Treves v. Townſhend. In Canc. Nov. 17, 1783. Co. *Bankrupt Laws*, 344.

(E) Of the Creditors, who are ſuch; and herein of proving their Debts.

BY the 21 *Jac. cap.* 19. § 9. "The commiſſioners may examine upon oath, or by other ways, any perſon for the diſcovery of the truth of debts owing to ſuch creditors as ſeek relief; and creditors by judgment, ſtatute, recognizance, ſpecialty, or other ſecurity, or having no ſecurity, and having made attachments in *London*, or other place, by cuſtom, of the goods of the bankrupt, whereof there is no execution or extent ſerved upon any lands, &c. before he become a bankrupt, ſhall be relieved for no more than a (*a*) ratable part of their juſt debts, without reſpect to any penalty in any judgment, ſtatute, &c."

(*a*) Creditors, upon what ſecurity ſoever they be, come in all equal, unleſs ſuch as have obtained actual execution before the bankruptcy, or have taken pledges for their juſt debts; and the reaſon is, becauſe, from the act of bankruptcy, all the bankrupt's eſtate is veſted in the commiſſioners, who are eſtabliſhed as courts of juſtice touching the bankrupt's eſtate, and before whom the creditors muſt authenticate their debts, in order to receive their dividends; and therefore they muſt equally admit all perſons to make proof of their debts; but ſuch as have pawns or mortgages have a property in the thing ſo pledged, precedent to the tranſlation of the property to the commiſſioners;

miſſioners; in which caſe they have only an equity of redemption, and are in no better condition than the bankrupt himſelf. [When a creditor comes to prove his debt, he is obliged to ſwear, whether he has a ſecurity or not; and if he has, and inſiſts upon proving, he muſt deliver it up for the benefit of his creditors; 1 Atk. 105.; unleſs it be a joint ſecurity from the bankrupt and another perſon; in which caſe he may come in for his whole debt under the commiſſion, without being compelled to deliver up the joint-ſecurity, as he is entitled to recover what he can from the co-ſecurity, and take his dividend upon the whole of his demand upon the bankrupt's eſtate, provided he does not receive more than 20 *s.* in the pound on the whole. *Ex parte* Bennet, 2 Atk. 528. When, therefore, a creditor has a mortgage, or other pledge, which he apprehends is not equal to the payment of his debt, he muſt apply to the Chancellor to have the pledge ſold, and that he may be admitted a creditor for the reſidue; and the commiſſioners may direct the ſale to be before them, or by publick auction. *Ex parte* Coming, 20th April 1790. Co. *Bankrupt Laws*, 149. Bonds, bills of exchange, and other perſonal ſecurities, pledged or depoſited with a creditor, may be directed to be ſold before the commiſſioners in the ſame manner as an eſtate. *Ex parte* Hillier, 19th July 1788. *Ibid.* If a debtor, by way of collateral ſecurity, deliver a bill of exchange or promiſſory note to his creditor, without his name appearing on the paper, it muſt be diſpoſed of as a pledge, and the produce applied to reduce the debt, the reſidue only of the demand being proveable under the commiſſion. *Ex parte* Smith, 19th Dec. 1784. *Ibid.* Where, indeed, a perſon takes a bill without the name of the party from whom he receives it, it may be a pledge, or a purchaſe, according to the agreement of the parties. If it is taken as a pledge, it muſt be ſold; but if as a purchaſe, it liquidates the debt to the full amount of the bill. *Ex parte* Whitter, 6th Feb. 1790. *Ex parte* Roberts, 21ſt June 1789. *Ex parte* Smith, 18th Nov. 1789. *Id.* 150. Bank of *England* v. Newman, 1 Ld. Raym. 442. Where a creditor has two demands, one proveable under the commiſſion, the other not; he may apply his ſecurity, in the firſt place, to reduce that demand which is not proveable. *Ex parte* Howard, 14th June, 1790. *Ex parte* Arkley, 26th Nov. 1791. Co. *Bankrupt Laws*, 150. 153.]

Chapman v. Turner, 1 Vern. 267.

If *A.* ſells lands to *B.*, who afterwards becomes a bankrupt, and part of the purchaſe-money is not paid, *A.* ſhall not be obliged to come in as a creditor under the ſtatute of bankrupt, but the land ſhall ſtand charged with the money unpaid, though there be no agreement for that purpoſe.

Co. *Bankrupt Laws*, 155.

Corporations uſually appoint a clerk or treaſurer, who is the perſon to prove debts due to them; he muſt, however, produce his appointment under ſeal to the commiſſioners.

Ex parte Child, 1 Atk. 111. If there are two collectors, who divide the money received between them, and one of them becomes bankrupt, the other ſhall prove, on behalf of the pariſh, the whole ſum remaining in their hands not paid over. *Ex parte* Moggeridge and Clarke, 4th Feb. 1790. Co. *Bankrupt Laws*, 156.

If the bankrupt's eſtate is in arrear for taxes, the collector ſeems the proper perſon to prove the debts, and he ought to produce his appointment, that the commiſſioners may judge of the legality of it: But if the collector himſelf ſhould become bankrupt, having received the taxes from the inhabitants, but not paid the money over, one of the inhabitants may prove for himſelf and the reſt.

Ex parte Groom, 1 Atk. 119. *Ex parte* Williamſon, 1 Atk. 83.

The privilege of creditors to come in and prove their debts, and bankrupts to be diſcharged therefrom, is ſaid to be co-extenſive and commenſurate. However, the court will not abſolutely ſtop a creditor from bringing an action, but put him to his election; and ſhould he elect to proceed at law, he will ſtill be allowed to prove his debt, for the purpoſe of aſſenting to or diſſenting from the certificate, which permiſſion is abſolutely requiſite to make his remedy at law of any avail; for ſhould the bankrupt procure his certificate, he will be thereby diſcharged from that action, as well as from all debts contracted before the act of bankruptcy.

Ex parte Capot, 1 Atk. 220.

Ex parte Williamſon, 1 Atk. 83. Some doubts

Where a creditor has proceeded at law, before he applies to prove his debt under the commiſſion, he ought not to be permitted to prove without relinquiſhing his proceedings at law, unleſs by order

order from the Great Seal, for the purpose of signifying his assent to, or dissent from, the certificate.

have been entertained of this; but

see *ex parte* Botteril, 1 Atk. 109.; where the commissioners refused.

But the circumstance of a creditor proving his debts previously to proceeding at law against the bankrupt, does not amount to a conclusive election to take under the commission, for a creditor has been suffered to make his election of proceeding at law, against the *bankrupt himself*, after having proved his debt, and received two dividends, upon condition of refunding what he had received. But the case, perhaps, might be different, if the creditor had in view the charging *a third person*, as the security, or the bail of the bankrupt.

Ex parte Dorvilliers, 1 Atk. 221. *Ex parte* Lindsay, 1 Atk. 220. *Ex parte* Capot, 1 Atk. 219.

Therefore, where a creditor had proved his debt, and *signed an agreement to permit the bankrupt to keep his house still open for trade, and to make him an annual allowance;* and the bankrupt afterwards deserted his house and absconded; upon which the creditor proceeded to fix the bail, and served execution upon them: The court said, there were some instances, in which the court of Chancery permits a creditor to do certain acts, such as proving his debt, and voting for assignees, without binding him to come in under the commission, and renounce his legal remedy. But the creditor here has gone much farther, *he has made his election*, has acquiesced under the commission, and shall not, on a subsequent unforeseen event, at the distance of a twelvemonth, desert the commission, and come upon the bail by surprize.

Aylett v. Harford, 2 Bl. Rep. 1317.

The being chosen *assignee*, will not prevent the creditor from suing the bankrupt at law if he has not proved his debt, for in that case, he can only be considered as a creditor at large; and even if he has proved his debt, and chosen himself assignee, he *may still elect to proceed at law*, and be discharged as a creditor under the commission.

Ex parte Ward, 1 Atk. 153. *Ex parte* Dorvilliers, 1 Atk. 221.

If a creditor, *at the time the commission issues*, has the bankrupt in execution, he may prove his debt under the commission, and elect to discharge the bankrupt. But if, *after* the commission has issued, a creditor proceeds at law against the bankrupt, and takes his body in execution, it is a conclusive election, and he will not be entitled to prove so as to receive a dividend, although he should afterwards discharge the bankrupt out of custody.

Ex parte Hinklin, 2d Feb. 1775. *Ex parte* Warder, 22d Dec. 1790. *Ex parte* Caton, 21st Dec. 1790. *Ex parte* Rattray, 10th August 1791. *Ex parte* Bisson, 23d March 1792. Creditor having taken bankrupt in execution, subsequent to the commission, afterwards released him, and was permitted to prove: Debt expunged. So *ex parte* Hewitt, 21st Jan. 1789. Co. *Bankrupt Laws*, 160, 1, 2, 3.

If a creditor is proceeding at law, the bankrupt is entitled by petition to put the creditor to his election, either to abide by the commission and wave the proceedings at law, or relinquish all benefit under it; but whether the creditor can be compelled to elect *before* a dividend, seems to be somewhat unsettled: though the modern determinations, supported by some of an earlier date, have mostly put him to his election before a dividend, provided the application was not made before he had a reasonable time of examining into the bankrupt's affairs.

Ex parte Hopkinson, 3d June 1790. 1 Ves. jun. 159. *Vide* Co. *Bankrupt Laws*, 163, 4, 5.

If

Ex parte Crinſoz, 1 Bro. 270.

Ex parte Botteril, 1 Atk. 109.

If a creditor has demands upon the bankrupt of diſtinct natures, or in different rights, he is at liberty to prove one under the commiſſion, and proceed at law for the recovery of the other. Therefore, where a bankrupt had borrowed 100*l.* upon bond of a near relation, who had arreſted him upon the bond and charged him in execution; and had another demand for a year's rent, which he offered to prove under the commiſſion, but would not wave his execution upon the bond debt; and the commiſſioners, therefore, refuſed to admit him to prove: Lord *Hardwicke* ſaid, that though it was a hard caſe upon the bankrupt, yet, as the debts were entirely diſtinct, he ſhould be allowed to prove.

Ex parte Matthews, 3 Atk. 817.

So, on a petition *ex parte Matthews*, where it appeared that Mr. *Gary* had proved a debt under the commiſſion in right of his wife, amounting to 5000*l.*, being her fortune under a marriage ſettlement, and alſo brought an action at law in his own right for a debt due to him for goods ſold and delivered; the Lord Chancellor obſerved, the court would never ſuffer a creditor to ſplit a demand, and prove part under the commiſſion, and proſecute at the ſame time a bankrupt for the remainder at law. But that in this caſe there are two remedies and different rights; and he even thought he might have done it, if the debts had been both in his own right. Suppoſe, one debt had been due to Mr. *Gary* by bond, and another upon an account current, and he had brought a bill here for the account, and an action at law upon the bond; theſe are two diſtinct things, and therefore the court will let him go on, both in law and equity. If indeed, he was to bring a bill in equity for an account current, and an action at law for a particular *item* in that account, the court would, in that caſe, oblige the plaintiff to make an election.

Ex parte Ellis, 1 Atk. 101. *Ex parte* Llewellyn, in the matter of William Moſeley, a bankrupt, Aug. 10, 1784.

If an executor becomes bankrupt, as he acts in *auter droit*, his bankruptcy does not take away the legal right of executorſhip, nor does the commiſſioners' aſſignment affect the teſtator's aſſets, except as to ſuch beneficial intereſt, as the bankrupt may himſelf be entitled to. But though a bankrupt executor may ſtrictly be the proper hand to receive the aſſets, yet if his aſſignees have received any of the property, a court of equity will for the benefit of creditors and legatees appoint a receiver, with whom the aſſignees ſhall account. And the court will do ſo upon petition.

Ex parte Leeke, 2 Br. Ch. Rep. 596. *Ex parte* Brooke, 1ſt June 1793, like order. If the property be conſiderable, Lord Thurlow ſaid, he would not proceed without bill.

As bankruptcy does not affect the right of an executor, in ſtrictneſs, he is himſelf the proper perſon to be admitted to prove againſt his own eſtate; which is not incongruous, as he does it in *auter droit*, and the danger of embezzlement may be prevented by ordering the dividend to be paid into court: and this was done in a caſe where the petitioner was a creditor of the bankrupt's teſtator to the amount of 286*l.*: part of the effects of the deceaſed, to the amount of 432*l.*, were in the bankrupt's hands; and, on petition to be permitted to prove this demand againſt the bankrupt's eſtate, Lord *Thurlow* ordered that the bankrupt, as executor, ſhould be admitted a creditor under the commiſſion iſſued

againſt

againſt him for the ſum of 432*l.* 7*s.* 1 ½ *d.*, in the petition mentioned, and that the aſſignees ſhould pay the dividends into the bank, in the name, and with the privity of the accountant-general, in truſt in the matter of *A. B.* the bankrupt, ſubject to further order. 2 P. Wms. 547.

A creditor by an annuity, where the annuity is *merely perſonal*, is entitled to come in under the commiſſion, provided the penalty of the bond be forfeited (*a*) *prior* to the bankruptcy. In order to prevent, on the one hand, the injuſtice of admitting him to prove only the arrears accrued due before the bankruptcy, and, on the other, the great inconvenience that would enſue if the annuity ſhould be received from time to time as an accruing debt on the eſtate, a value is ſet upon the annuity, and he is admitted a creditor for the ſum at which it is valued. *Ex parte* Artis, 2 Vez. 490. *Ex parte* Le Compte, 1 Atk. 251. Perkins v. Kempland, 2 Bl. Rep. 1106.

(*a*) If a forfeiture has been incurred, no act of the annuitant ſhall amount to a waver of it, for it is for the benefit of both parties that it ſhould be ſo. Wyllir v. Wilkes, Dougl. 523.

If the annuity is ſecured by a deed of covenant, and a bond is likewiſe given as an additional ſecurity, which is forfeited for non-payment before the bankruptcy the creditor, in that caſe, is not obliged to prove under the commiſſion, but may proceed at law for the breach of covenant, notwithſtanding the bankrupt has obtained his certificate. Fletcher v. Bathurſt, Vin. Abr. tit. *Creditor and Bankrupt* (I), pl. 4. 4 Burr. 2446. Cottrel v. Hooke, Dougl. 93.

An apprentice can come in as a creditor only for the ſum remaining due, after deducting for the time he has lived with the bankrupt. It is uſual, indeed, for the commiſſioners to recommend it to the creditors to allow him a groſs ſum out of the eſtate, for the purpoſe of binding him to another maſter; but this, though equitable and juſt, is not what he is entitled to *de jure*, nor, of courſe, what the court can order. *Ex parte* Sandby, 1 Atk. 149. Barwell v. Ward, 1 Atk. 261.

A petition was preferred on the part of a daughter, to be let in as a creditor on the eſtate of her father, a bankrupt, for the money he had received from the managers of the theatre on her account, offering an allowance thereout for living with, and being maintained by him, during her acting on the ſtage. It was alleged on her part, that the court is ſo far from giving the father all the earnings of the child, that it will not ſuffer the father to be eaſed of the maintenance of a child who has a fortune; but will let the whole intereſt accumulate, and the father maintain the child, unleſs unable to do ſo. *Ex parte* Macklin, 2 Vez. 675.

Lord Chancellor ſaid, he was under ſome difficulty for the ſake of the precedent; for it is true that this queſtion is the ſame as it would have been between the daughter and the father, if he had not been a bankrupt, and could anſwer to an action for himſelf; Whether after all this tranſaction the daughter could in an action have recovered againſt the father all this money, as money had and received to her uſe? He ſaid, it might be dangerous in *London* to lay it down as a general rule, that if a father having ſeveral children, who earn money which he receives, becomes bankrupt, every child can come in and claim his debt for that money ſo had and received while they lived together, and were part of his

family. A father frequently ſends out his ſon to work as journeyman, and his earnings are taken to be the father's. Here, ſaid his lordſhip, the father, mother, and daughter were all actors, and lived together; the father received the whole. It is extraordinary to ſay, that after a length of time this ſhall be all called back, becauſe of an act of bankruptcy. He referred it therefore to the commiſſioners to inquire, how much the father received to the child's uſe, unleſs as to ſo much as was a covenant with the daughter herſelf. But, to avoid the expence of an account, it was agreed that the petitioner ſhould be admitted as a creditor for a particular ſum; but no allowance to be made for maintenance.

1 Atk. 102, 103, 104.

A landlord having a legal right to diſtrain goods while they remain on the premiſes, the iſſuing of a commiſſion of bankrupt againſt the tenant, and the meſſenger's poſſeſſion of the goods of the tenant, will not hinder him from diſtraining for the whole rent in arrear; for it is not ſuch a *cuſtodia legis* as an execution; and even there the law allows the landlord a year's rent. And though, by the aſſignment by the commiſſioners of the bankrupt's eſtate and effects, the property of the goods is changed, yet the aſſignees take them ſubject to every thing which they are ſubject to in the hands of the bankrupt; and while upon the premiſes they remain liable to be diſtrained.

1 Atk. 102.

But if the landlord neglects to diſtrain, and ſuffers the goods to be ſold by the aſſignees, he can only come in with the reſt of the creditors *pro ratâ*.

Ex parte Grove, 1 Atk. 103.

A commiſſion iſſued againſt *A.* who was a tenant of *B.*, and owed him twelve year's rent. *B.*, the landlord, came in and proved his debt under the commiſſion, and the aſſignees ſold the whole goods to *Grove* the petitioner, who lived in the tenant's houſe. The landlord three years after proving his debt, diſtrained upon thoſe goods as being ſtill upon the premiſes.

See *Ex parte* Devine, and Mary his wife, 13th Jan. 1776. Co. *Bankrupt Laws*, 221.

Lord *Hardwicke*, upon the ſecond hearing of the petition, determined, that the vendee of the goods under the aſſignees was entitled to the goods; and ordered, that the proceedings of the landlord ſhould be reſtrained, and confined him to his remedy under the commiſſion.

Bradyll v. Ball, 1 Br. Ch. Rep. 427. S. P.

Co. *Bankrupt Laws*, 225.

It is ſtated in 1 *Atk.* 103., that a mortgagee of a bankrupt's eſtate, although he pays the arrears of rent that is due to the bankrupt's landlord, ſhall not be preferred to the creditors under the commiſſion, unleſs he applies to the court for an order that he may ſtand in the place of the landlord; but, from the caſes above referred to, it rather ſeems that no ſuch order could be obtained, becauſe, unleſs the landlord *actually* diſtrains, he has himſelf no lien upon the goods.

Ex parte Dobſon, 7 Vin. Abr. 74.

On a diſtreſs for rent, goods were ſold, and 77*l.* 3*s.* remained in the conſtable's hands, who became a bankrupt. The tenant dies, and his executor prays to be paid this money by the aſſignees, in preference to the other creditors.

It was argued, that this comes to the hands of the conſtable by due courſe of law; and the caſe of *Wright* v. *Dixon* was cited, where

where goods were taken in execution by *Wilcox*, bailiff of *Weſtminſter*, who died; and the judgment and execution being afterwards ſet aſide, the court ruled, that the widow and executrix of *Wilcox* ſhould refund the money, though ſhe alleged ſhe had not aſſets to pay ſpecialties.

But the Lord Chancellor ſaid, that caſe was againſt an executrix; and, though the law makes a difference between one creditor and another, yet in caſe of bankruptcy all creditors are upon an equal footing. If any thing *remained in ſpecie*, it might be different; but here the money is embezzled by the conſtable. He therefore ordered the petitioner to come in as a creditor with the reſt.

Commiſſioners, after a man becomes a bankrupt, compute intereſt upon debts no lower than the date of the commiſſion, becauſe it is a dead fund; and in ſuch a ſhipwreck, if there is a ſalvage of part to each perſon, it is as much as can be expected. But there is no direction in the act for that purpoſe, and it has been uſed only as the beſt method of ſettling the proportion among the creditors, that they may have a rate-like ſatisfaction; nor does the certificate operate as a diſcharge of the fund before veſted in the aſſignees, thereby to deprive the creditors of ſubſequent intereſt, but extends only to any remedy to be taken againſt the perſon of the bankrupt, or his future effects.

Ex parte Bennet, 2 Atk. 528.

Bromley v. Goodere, 1 Atk. 79.

Ex parte Rooke, 1 Atk. 244.

If an eſtate mortgaged is not adequate to the payment of principal and intereſt, the intereſt is only to be calculated to the date of the commiſſion.

Ex parte Wardell, 29th March 1787, cited and confirmed. *Ex parte* Hevcy, 10th Nov. 1792. Co. *Bankrupt Laws*, 227.

But, if it is ſufficient for that purpoſe, the aſſignees cannot redeem without paying intereſt to the time of redemption.

7 Vin. Abr. 110.

A ſpecialty creditor cannot have intereſt beyond the penalty contained in his ſecurity, but a creditor by note carrying intereſt may receive the full amount: However, if the bearing of intereſt is not ſpecified in the note, it will not of itſelf entitle the holder to claim any; but he may prove the whole ſum ſpecified in the note, notwithſtanding he deducted the diſcount at the time of receiving it.

1 Atk. 75.

Ex parte Marlar, 1 Atk. 151.

There is a difference between debts that carry intereſt and a ſpecial depoſit of goods and ſtock; for in the former, the intereſt ſhall be continued down to the date of the commiſſion, but in the latter it is otherwiſe, for the intereſt ſtops from the time of the depoſit, and a calculation ſhall be made of the value of the whole entire thing depoſited, both principal and intereſt, be it ſtock or goods, according to the market price at the time of the depoſit.

Bromley v. Child, 1 Atk. 259.

Where a joint commiſſion is taken out, and the uſual order obtained, for keeping diſtinct accounts of the ſeparate eſtates of each partner, the creditors of the ſeparate eſtates are not entitled to intereſt upon their debts after the payment of twenty ſhillings in the pound, unleſs the joint creditors have alſo received twenty ſhillings in the pound; but the overplus of the ſeparate eſtate muſt be applied to increaſe the joint fund.

Ex parte Boardman, 2d Auguſt 1786.

Thus, upon a petition by ſeparate creditors to be allowed intereſt on their debts carrying intereſt, before the ſurplus of the ſeparate eſtate ſhould be carried over to the joint account, it appeared that a joint commiſſion had been taken out againſt two bankrupts, and an order obtained for keeping diſtinct accounts, and that there was a ſurplus of the ſeparate eſtate of one of them, after paying his ſeparate creditors twenty ſhillings in the pound; but the Lord Chancellor was of opinion, that ſuch ſeparate creditors were not entitled to intereſt, unleſs the joint eſtate had alſo paid twenty ſhillings in the pound, and therefore diſmiſſed the petition.

Aylett v. Harford, 2 Bl. Rep. 1317. *Ex parte* Talbot, 4 Burr. 2445. Langford v. Ellis, Eaſter Term, 1785, B. R. Co. *Bankrupt Laws*, 232. *Ex parte* Simpſon, 3 Br. Ch. Rep. 46. Lewis v. Piercy, 1 H. Bl. Rep. 29.

On actions, whether of debt, *aſſumpſit*, or for a *tort*, the judgment, when ſigned, relates to the verdict; and the coſts *de incremento*, when taxed, are annexed to thoſe aſſeſſed by the jury, and become conſolidated with them by a fair and equitable relation of law, and therefore they may be proved as a debt, if the verdict is prior to the bankruptcy.

Co. *Bankrupt Laws*, 182.

A bond, though it is not aſſignable at law, may be proved by the aſſignee under the commiſſion; but the aſſignor muſt join in the depoſition that he hath not received the debt, or any part thereof, or any ſecurity or ſatisfaction for the ſame.

Touſſaint v. Martinnant, 2 Term Rep. 100.

If a perſon gives an abſolute bond to another who became ſurety for him, or who accepted bills of exchange drawn upon him by the obligor, not having effects in his own hand to anſwer them, it is a good conſideration for the bond, and he is entitled to prove it as a debt under the commiſſion, although he has not himſelf paid the money at the time.

Ex parte Cockſhot, in Can. 23d March 1792. Co. *Bankrupt Laws*, 187.

If a bond, given by a trader to indemnify another who has become ſurety for him, be forfeited before bankruptcy, the ſurety may prove payments made by him, ſubſequent as well as prior to the bankruptcy.

Cooper v. Pepys, 1 Atk. 107. *Ex parte* Wildman, 1 Atk. 109. and 2 Vez. 113. *contra*. *Ex parte* Lefebre, 2 P. Wms. 407. *Ex parte* Walton, 1 Atk. 123. *Ex parte* Ryſwicke, 2 P. Wms. 89.

The holder of a bill of exchange is entitled to prove his debt under a commiſſion againſt the drawer, acceptor, and indorſer, and to receive a dividend from each upon his whole debt, provided he does not in the whole receive more than twenty ſhillings in the pound. But there is a diſtinction in this caſe, where the creditor applies to prove his debt after having received a part, and where he applies to prove previouſly to having received any payment or compoſition; for if the creditor at the time of proving has received any part of the bill, he can only prove for ſo much as remains; but if, after having proved for the whole, he receives a part of the bill from any of the perſons liable to pay it, he is entitled to a dividend upon the whole, provided it does not exceed twenty ſhillings in the pound upon ſuch part as remains due.

In bills of exchange and promiſſory notes there is a double contract, the firſt between the principal debtor and creditor, and alſo an implied contract, that the principal debtor will indemnify the ſurety; ſo that if the creditor the indorſee comes upon the ſurety the indorſer, the indorſer or his aſſignees may come in againſt

againſt the original or principal debtor. But this, as before obſerved, muſt depend upon the time when the ſurety paid the debt; however, if the holder of the bill prove it under the commiſſion againſt the perſon who ultimately ought to pay it, before the ſurety is called upon, the ſurety ſeems to have an equitable right to ſtand in the place of the holder, and receive the dividends upon his debt. *Ex parte* Marſhal, 1 Atk. 129.

If a perſon diſcounts ſeveral bills for another who afterwards becomes a bankrupt, and the holder proves the aggregate amount of the bills, excepting them as a ſecurity; and any of the bills are afterwards paid in full; the amount of the bills paid muſt be deducted from the proof, and the future dividends be paid upon the reſidue of the debt only. In the ſame manner, where bills of exchange have been given as a ſecurity for a general balance, or for a debt exceeding their amount, and upon a bankruptcy the creditor has proved the whole amount of his debt, excepting ſuch bills; if any of them are duly honoured, or by any means fully ſatisfied, they muſt be taken as a payment *pro tanto*, and the future dividends made on the reſidue of the debt. Co. *Bankrupt Laws*, 195. *Ex parte* Smith, *in re* Lewis and Potter, 10th Nov. and 21ſt Dec. 1789.

One *Lee*, a bankrupt, was indebted to *Welch* and Company, bankers and partners, in 159*l.* 15*s.* 2*d.* for money by them advanced to him, and intereſt thereon, for ſecuring which he indorſed to them two promiſſory notes and a bill of exchange. This debt they proved under the commiſſion. After the proof *Welch* and Co. were fully paid one of the notes, amounting to 58*l.* 12*s.*, by the drawer, and they delivered up the note to him; by which means the debt from the bankrupt was reduced to 101*l.* 3*s.* 2*d.* *Welch* and Co. inſiſted upon receiving their dividends upon the whole 159*l.* 15*s.* 2*d.* proved by them, notwithſtanding the payment of the ſaid note; upon which the aſſignees preſented a petition to expunge or deduct the ſum of 58*l.* 12*s.*, the amount of the note, from their debt, which, after hearing counſel, was ordered: and it was directed that *Welch* and Co. ſhould be paid dividends only on the ſum of 101*l.* 3*s.* 2*d.*, reſidue of the ſaid ſum of 159*l.* 15*s.* 2*d.*, ratably, and in equal proportions, with the reſt of the creditors of the bankrupt. *Ex parte* Wallace, 24th Dec. 1788.

If a bill of exchange or promiſſory note is drawn by way of accommodation, yet the party holding it for a valuable conſideration is entitled to prove to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than twenty ſhillings in the pound, on the conſideration which he gave. Co. *Bankrupt Laws*, 196, 7, 8. *Ex parte* King, 10th Nov. 1786. *Ex parte* Croſsley, 3 Br. Ch. Rep. 237.

The liability to pay money is a good conſideration for a bill of exchange, and will entitle the party to prove it, although the payment is to be made in future, or depends upon contingency.—And this does not at all militate againſt the rule that contingent debts are not proveable; becauſe the claim under the commiſſion is upon an inſtrument creating an abſolute debt at law, for which the ſubjecting one-ſelf as a ſurety, or the delivering of counter-notes is a good conſideration. Touſſaint v. Martinnant, *ſupra*. *Ex parte* Maydwell, 16th April 1785, in Can. *Ex parte* Beaufoy, 22d Jan. 1787. *Ex parte* Lord Clanricarde, 27th July 1787. Co. *Bankrupt Laws*, 199, 200, 1, 2, 3.

If the indorſer of a bill is compelled to pay it on account of the failure of the acceptor, he may prove upon the bill under the commiſſion againſt the acceptor, although he did not take it up till after the commiſſion iſſued.

Ex parte Brymer, 30th May 1788.

The houſe of *Scott* and *Pearſon* having had frequent occaſions to get their bills diſcounted by perſons at *Briſtol*, and continuing to require a negotiation of paper, they applied to *Wilkins*, the bankrupt, and to one *Forſyth*, to aſſiſt them by lending their names to bills, which were to be diſcounted by *Samuel Span* of *Briſtol*, for the uſe of *Scott* and *Pearſon*, whoſe names were not to appear thereon. Accordingly (amongſt others) three bills were drawn by *Forſyth* upon *Wilkins*, dated 28th of *May* 1787, for 800*l.* each, payable three months after date. Two to the order of *Samuel Span*, and the third to the order of the drawer; which laſt was endorſed in blank by the drawer. They were all accepted by *Wilkins* about the time of their being drawn. The three bills were put into the poſſeſſion of *Scott* and *Pearſon*, and were by them ſent down to *Span* at *Briſtol*, who endorſed them, and procured them to be diſcounted by other perſons, and remitted the value to *Scott* and *Pearſon*, in *Briſtol* bank bills. Before the bills became due, both *Scott* and *Wilkins* became bankrupts; and afterwards *Span*, as the endorſer, was obliged to take them up.

Under theſe circumſtances *Span* was admitted to prove the bills under *Wilkins*'s commiſſion. And this petition was preferred to have the proof of the debt expunged.

The Lord Chancellor conſidered it as a very clear point, that a bill of exchange negotiated after the bankruptcy of the acceptor, might be proved under his commiſſion, although the party was not poſſeſſed of it at the time of the bankruptcy, for the debt accrued by the acceptance; and that, as to the conſideration, there was a clear conſideration paid in this caſe, though not to *Wilkins*; and that *Span* became the holder of theſe bills in a fair manner; his Lordſhip therefore diſmiſſed the petition.

See *ex parte* Thomas, 1 Atk. 73. Bingley v. Maddiſon, Co. *Bankrupt Laws*, 24.

18th July 1788.

A new petition was preferred, praying that the former petition might be reheard and the debt expunged.

See Brooks v. Rogers, 1 H. Bl. Rep. 640.

The Lord Chancellor, after hearing counſel, expreſſed himſelf to be very clearly of the ſame opinion.

Howis v. Wiggins, 4 Term Rep. 714.

Ex parte Smith, 3Br. Ch. Rep. 1. *Ex parte* Smith and others, 21ſt Dec. 1789. Co. *Bankrupt Laws*, 214.

Where the acceptor of a bill of exchange becomes bankrupt, the holder may prove the amount of the bill under his commiſſion, and alſo maintain an action againſt the other parties: but if the acceptor of a bill, or maker of a note, become inſolvent, or offer to compound their debts, the holder of a bill or note, according to ſuch compoſition, thereby diſcharges the poſterior parties, unleſs they have previouſly aſſented to his executing the compoſition-deed.

Anon. 1 Atk. 140. *Ex parte* Moore, 2Br. Ch. Rep. 597.

The coſts and charges of proteſting bills *before* an act of bankruptcy may be proved: but ſuch coſts accrued by proteſting bills *after* an act of bankruptcy cannot.

See Francis v. Rucker, Ambl. 672.

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The 7 *G.* 1. *c.* 31. reciting "Whereas merchants, and other "traders in goods, have been very often obliged, and more eſ- "pecially of late years, to ſell and diſpoſe of their goods and mer- "chandizes to ſuch perſons as have occaſion for the ſame, upon "truſt or credit, and to take bills, bonds, promiſſory notes, or "other perſons' ſecurities for their monies, payable at the end "of three, four, or ſix months, or other future days of payment; "and the buyers of ſuch goods becoming bankrupts, and com- "miſſions of bankruptcy being taken out againſt them before "the money upon ſuch bonds, notes, or other ſecurities became "payable; it hath been a queſtion, Whether ſuch perſons giving "ſuch credit on ſuch ſecurities ſhould be let in to prove their "debts, or be admitted to have any dividend or other benefit by "the commiſſion, before ſuch time as ſuch ſecurities became "payable? which hath been a great diſcouragement to trade, "and great prejudice to credit within this realm:" Therefore enacts, "That every perſon who ſhall give credit on ſuch ſecu- "rities as aforeſaid, to any perſon who ſhall become bankrupt "upon a good and valuable conſideration *bonâ fide* for any ſum of "money or other matter or thing whatſoever, which ſhall not be "due or payable at or before the time of ſuch perſon's becoming "bankrupts, ſhall be admitted to prove his bills, bonds, notes, "or other ſecurities, promiſe or agreement for the ſame, in like "manner as if they were made payable preſently, and not at a "future day; and ſhall be entitled unto, and ſhall have and re- "ceive a proportionable part, ſhare, and dividend of ſuch bank- "rupt's eſtate, in proportion to the other creditors of ſuch bank- "rupts, deducting only thereout a rebate of intereſt, and diſ- "counting ſuch ſecurities payable at future times, after the rate of "five pounds *per centum per annum*, for what he ſhall ſo receive, "to be computed from the actual payment thereof to the time "ſuch debt, duty, or ſum of money ſhould or would have be- "come due and payable in and by ſuch ſecurities as aforeſaid."

2 Ld. Raym. 1549. 2 P. Wms. 395. 2 Str. 867. Notwithſtanding the preamble makes mention only of "ſecurities for the ſale of goods and merchandize," yet it is holden to extend to all ſorts of bonds for the payment of money; and that the words "ſuch ſecurity," do not mean ſecurity for ſuch a ſort of debt, but ſecurity by bonds, bills, notes, &c. Pattiſon v. Bankes, Cowp. 540. Brooks v. Lloyd, 1 Term Rep. 17. 3 Wilſ. 17.

"And every perſon who ſhall become bankrupt ſhall be diſ- "charged of and from all and every ſuch bond, note, or other "ſecurity as aforeſaid, and ſhall have the benefit of the ſeveral "ſtatutes now in force againſt bankrupts, in like manner to all "intents and purpoſes as if ſuch ſum of money had been due "and payable before the time of his becoming bankrupt."

By 19 G. 2. c. 32. § 2. Demands on policies of inſurance, *bottomree* and *reſpondentia* bonds

may be claimed before the loſs happens, and proved when it does happen: and theſe debts ſhall in like manner be diſcharged by the certificate. And it hath been holden, that inſurance upon lives are within this ſtatute, though not mentioned in the preamble. Cox v. Liotard, Dougl. 166.

A bill drawn before the bankruptcy, though not proteſted till after, is a debt that may be proved under the commiſſion, for the debt accrues immediately upon the drawing.

Macarty v. Barrow, 2 Str. 949. 3 Wilſ. 16.

A. having contracted with the *Eaſt-India* Company at one of their ſales for the purchaſe of a parcel of goods, to be paid for at a future day, before that day became a bankrupt. Ld. *King* held this caſe not within the above ſtatute, becauſe the goods were not delivered, nor was the contract ſigned by the party.

Ex parte E. I. Company, 2 P. Wms. 395.

Tully v. Sparks, 2 Ld. Raym. 1546.

Contingent debts are ſaid not be included in the ſtatute 7 G. 1.; becauſe, it being uncertain whether they will ever become due or not, it is impoſſible to make ſuch abatement of 5*l. per cent.* as the act directs. And this doctrine is now conſtantly followed, and admitted. Lord Chancellor *King*, indeed, declared, that though a debt be contingent, when the obligor becomes a bankrupt, yet if the contingency happens before the diſtribution made, ſuch contingent creditor may come in for his debt; or if the contingency happen before a ſecond dividend, the creditor may come in for his proportion thereof. But this has been ſince over-ruled, and the contrary poſition eſtabliſhed, for Lord *Hardwicke* ſaid, that Lord *King*'s was barely an *obiter* opinion, and that Lord *Talbot* afterwards doubted of Lord *King's* aſſertion, and that he himſelf had differed from him entirely on a former occaſion, and that he ſtill adhered to his opinion.

Ex parte Caſwell, 2 P. Wms. 497.

Ex parte Groome, 1 Atk. 118.

One having only a cauſe of action, cannot come in and prove it as a debt; becauſe the damages that may be given are conſidered merely as contingent.

3 Wilſ. 270.

Therefore if a leſſee ploughs up meadow ground, for which he is bound to pay the leſſor a certain ſum of money, as a penalty, that penalty cannot be proved as a debt under the commiſſion: nor, if a man be bound in an obligation, in a certain ſum to perform covenants, and the obligor, before he becomes a bankrupt, breaks thoſe covenants, can the obligee prove this as debt under the commiſſion.

Ex parte Todd, 3 Wilſ. 270.

So where in an ejectment, a verdict was given for the plaintiff with nominal damages, but, before the judgment could be entered, the defendant became a bankrupt, and in the term following the plaintiff ſigned judgment, and had coſts *de incremento* then taxed and allowed to him: Lord *Henley* held theſe coſts did not become a debt till the judgment, and were connected therewith, and that the plaintiff could not be permitted to prove the ſame as a debt under the commiſſion.

Walter v. Sherlock, 3 Wilſ. 272.

And where, in a caſe of aſſault and battery before bankruptcy, during the bankruptcy the plaintiff had a verdict with damages, but had not judgment till after the certificate; the court were of opinion the plaintiff could not come in under the commiſſion, that it was not a proveable debt, or a debt due at the time of the bankruptcy.

Ex parte Sneaps, March 4, 1782.

And upon the ſame principle, where one *Sneaps* was committed for a contempt in non-payment of coſts, which were taxed ſubſequent to his bankruptcy, but the order for the taxation was made before it; upon a motion for his diſcharge, upon the ground of the debt being diſcharged by his certificate, it became a queſtion, Whether this was to be conſidered as a debt ariſing *anterior* or *poſterior* to the bankruptcy? It was argued, that all proceedings under an order of court were to have relation in point of time to that order; and conſequently that, as the order was made before the bankruptcy, the debt was to be conſidered as having originated in that order, and ought to be diſcharged by the certificate.

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The Lord Chancellor obſerved, it is generally true, that, where ſeveral diſtinct acts are neceſſary for the completion of any buſineſs, the completion refers to the inchoation. But the queſtion is, Whether the making an order can be conſidered as ſuch inchoation? And he ſaid, he thought it clearly could not. That it might as well be ſaid, the damages aſſeſſed in treſpaſs are to have reference to the treſpaſs, which they certainly have not, for they have their origin in the judgment. He took it to be clear, that in all inſtances in the court of Chancery, the *taxation* conſtitutes the demand; and as the taxation was ſubſequent to the bankruptcy, the debt is therefore ſo, and conſequently he could not diſcharge the bankrupt.

Where an annuity is ſecured by a deed of covenant, the growing payments are contingent; and therefore an action may be brought, notwithſtanding the bankruptcy and certificate of the covenantor.

Cottrell v. Hooke, Dougl. 93. As to covenant to pay rent. See Ludford v. Barber, 1 Term Rep. 86.; and Hornby v. Houlditch, there cited.

If a perſon lends a trader ſtock in the publick funds, to be replaced as ſtock, without naming any particular time at which it is to be inveſted; if the trader becomes bankrupt before he has been required to re-place the ſtock, it is a contingent debt, and cannot be proved.

Atterſon v. Vernon, 3 Term Rep. 539., and 4 Term Rep. 570. *Ex parte* Bartlett, 19th May 1792, S. P. Co. *Bankrupt Laws*, 245.

In collateral undertakings, if the party engaging to ſecure the debt of another, himſelf becomes bankrupt before that debt is payable to the principal, the creditor cannot prove under his commiſſion.

Alſop v. Price, Dougl. 155. *Ex parte* Adney, Cowp. 460.

Where a man becomes bail for another, it is conſidered as a contingent debt. And if the bail commit an act of bankruptcy before the judgment, it cannot be proved under the commiſſion.

Hockley v. Merry, 2 Stra. 1043.

Accordingly, where the defendant, the 9th of *May* 1734, was bail on a writ of error, and, on the 25th of *October* 1734, committed an act of bankruptcy, and after a commiſſion obtained his certificate; on the 12th of *November* 1735, the judgment was affirmed; and, in an action of debt upon the recognizance, he pleaded his diſcharge, and that the cauſe of action aroſe before his bankruptcy; Lord *Hardwicke*, Chief Juſtice, on the trial, held that the defendant was not diſcharged, according to the caſe of *Tully* v. *Sparkes*, for this was but a contingent debt, for which the plaintiff could not come in under the commiſſion.

Where a man undertakes to pay a ſum of money for another, his undertaking alone will not create a debt that he can prove under a commiſſion; and if an act of bankruptcy intervenes between the undertaking and the actual payment, it can never be proved, and the creditor can only reſort to the bankrupt perſonally. But if the party engaging to pay the debt of another is taken in execution for that debt, his impriſonment is conſidered as a payment and ſatisfaction of the debt, ſufficient to give him a right to prove under the commiſſion.

Taylor v. Mills, Cowp. 525. Crookſhank v. Thompſon, 2 Stra. 1160. 3 Wilſ. 16. Chilton v. Whiffen, 3 Wilſ. 13. Young v. Hockley, 2 Bl. Rep. 840. Heſkuyſon v. Woodbridge, Doug. 166. Taylor v. Mills, Cowp. 525. Kettier v. Raynes, in Canc. June 12, 1784. Co. *Bankrupt Laws*, 258. Paul v. Jones, 1 Term Rep. 599.

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Goddard v. Vanderheyden, 3 Wilſ. 262.

This principle alſo extends to the caſe where one man is bail for another, it having been determined that he cannot prove as a creditor under a commiſſion againſt the principal, till he has paid the debt for which he became anſwerable; and that if the act of bankruptcy committed by the principal is prior to the bail's having paid the debt, he cannot prove it under the commiſſion.

Ex parte Atkinſon, Baker, and Darling, *in re* Brigham, 28th July 1792. Co. *Bankrupt Laws*, 264.

But the hardſhip of not admitting a ſurety to prove a debt which he pays ſubſequent to the commiſſion, is in ſome meaſure relieved when the original creditor has made his proof before he calls upon the ſurety for payment; becauſe the ſurety is holden to have an equitable right to ſtand in the place of the original creditor, and receive dividends upon his proof.

Ex parte Hill, Co. *Bankrupt Laws*, 290.

Where the contingency, upon which money is made payable to a wife, is *the bankruptcy or inſolvency of the huſband*, ſuch debt cannot be proved under the commiſſion.

But the wife's own fortune may be ſettled on the huſband until he fails, and then to her ſeparate uſe. Lockyer v. Savage, 2 Str. 947.

(*a*) *Ex parte* Caſwell, 2 P. Wms. 497. *Ex parte* Jefferies, Vin. Abr. tit. *Creditor and Bankrupt*, pl. 7. *Ex parte* King, Dav. 254. *Ex parte* Smith, *ex parte* Brown, Co. *Bankrupt Laws*, 267. 271. Holland v. Calliford, 2 Vern. 662. 2 Vern. 94.

Though it be eſtabliſhed (*a*) agreeably to the general rule, that a wife ſhall not come in as a creditor on a mere contingent proviſion, yet if the aſſignees go into equity to enforce the performance of a truſt, as they require equity, they ſhall be obliged to do equity, and ſecure the ſettlement to her. One *Blanchard*, a cabinet-maker, married the ſiſter of *Calliford*, who had 500*l.* portion ſecured by land. *Blanchard*, on his marriage, gave a bond to leave his intended wife, if ſhe ſurvived him, 500*l.* or a third of his eſtate, at her election. *Blanchard* became a bankrupt. A bill was brought by the aſſignees to have the 500*l.* raiſed by a ſale, and decreed accordingly; but with this, that the wife ſhould come in as a creditor upon the 500*l.* bond, and what ſhould be paid in reſpect thereof ſhould be put out at intereſt, and received by the creditors, during the life of the huſband; and if the wife ſurvived, then the money ſhould be paid to her.

A debt contracted ſubſequent to the bankruptcy, though the creditor have no notice of it, cannot be proved.

Ex parte Skip, 2 Vez. 489. A debt on goods ſold, to be ſent to *India*, contrary to the ſtatute, cannot be proved. *Ex parte* Meggridge, 22d Dec. 1791. The petitioner admitted to prove, it appearing on a trial at law, that he did not know the deſtination of the ſhip. Co. *Bankrupt Laws*, 232.

A debt made void by the ſtatute ought not to be permitted to be proved, as a debt on an uſurious contract; and though the rule of the court of Chancery is, upon a bill to be relieved againſt demands of uſurious intereſt, not to make void the whole debt, but to make the party pay what is really due; in a commiſſion of bankruptcy the aſſignees have a right to inſiſt that the whole is void, as an uſurious contract. And unleſs the aſſignees and creditors ſubmit to pay what is really due, the Lord Chancellor has not power to order it, and applications of this nature have been frequently refuſed.

Ex parte Thompſon, 1 Atk. 125.

A. gave a note of hand without conſideration, payable to *B.* two months from the date, for 100*l.*, *B.* indorſed it over to *C.*, allowing a diſcount of a guinea and a half, being at the rate of 9*l.* per

9*l. per cent.* When the note became due, *C.* took a joint bond from the drawer and indorſer for the 100*l.*, though he paid only 98*l.* 8*s.* 6*d.* The commiſſioners had admitted him as a creditor under a commiſſion againſt the drawer; but, finding out this fact afterwards, they ordered his dividend to be ſtopped. The Lord Chancellor, upon his petition, would not direct him to be admitted to his dividend, but ordered an iſſue at law to try whether the bond was uſurious.

But whatever were the event of the iſſue directed by the court in this caſe, it ſhould ſeem, if the contract was originally uſurious, the note is void, and cannot be proved even in the hands of an innocent indorſee; for, upon an action brought *on it*, the defendant's plea of uſury would be a complete bar.

Lowe v. Waller, Doug. 716. 3 Wilſ. 271. Co. *Bankrupt Laws*, 319.

In caſe of debts uncertain in point of liquidation, as between two merchants in balancing accounts, the matter reſts upon a claim, to aſcertain the ſum that was due at the time of the bankruptcy. So where a creditor cannot aſcertain his debt with certainty ſufficient to enable him to ſwear to it, or is not able in other reſpects ſatisfactorily to ſubſtantiate it; or where the agent of a creditor cannot produce his authority, and in many other caſes where there appears a probable foundation of a demand, though not ſufficiently made out, it is uſual for the commiſſioners to ſuffer *a claim to be entered;* but that will not entitle the party to a dividend, which he cannot receive without completely proving his debt. If a claim is not ſubſtantiated in reaſonable time, the commiſſioners may ſtrike it out, and they generally do ſo before a dividend is declared, unleſs ſufficient reaſon is offered to them for prolonging the time; but the creditor is notwithſtanding afterwards at liberty to prove his debt and receive his ſhare upon any future dividends. However, in ſuch caſes where there has not been groſs laches, the Lord Chancellor will make an order that ſuch creditor ſhall be paid his proportion of the dividend out of the money in the hands of the aſſignees, upon condition that it does not break in upon any former dividend.]

By the 1 *Jac.* 1. *cap.* 15. "Any creditors within four "(*a*) months after the commiſſion ſued forth, and until diſtri- "bution made, may partake and join with thoſe who ſued out "the commiſſion; the creditors ſo coming in to (*b*) contribute to "the charges of the commiſſion; and if they come not within "(*c*) four months, then the commiſſioners to diſtribute."

[(*a*) But they may come in after four months, if diſtribution be not made. Hutt. 37. Hob. 287.; or if only a partial diſtribution. 2 Ch. Caſ. 154.] (*b*) But, by the 5 Geo. 2. c. 30. § 25., the creditor or creditors who ſue out the commiſſion ſhall be reimburſed their expence out of the firſt monies or effects that ſhall be got in and received under the commiſſion, and every creditor ſhall be at liberty to prove his debt without paying any contribution. (*c*) *Vide* of the diſtribution to be made of the bankrupt's eſtate, letter (H).

By the 5 *Geo.* 2. *cap.* 30. § 26. it is enacted, "That if any "perſon ſhall before the acting commiſſioners in any commiſſion "of bankrupt, or by affidavit or affirmation exhibited to them, "ſwear, or depoſe, or, being of the people called *Quakers*, af- "firm, that any ſum of money is due to him or her from any "bankrupt or bankrupts, which ſum of money is not really due

"or

" or owing, or ſhall ſwear or affirm that more is due than is " really due or owing, knowing the ſame to be not due or " owing, and that ſuch oath or affirmation is falſe and untrue; " and being thereof convicted by indictment or information, " ſuch perſons ſhall ſuffer the pains and penalties inflicted by the " ſeveral ſtatutes now in force againſt wilful perjury, and ſhall " moreover be liable to pay double the ſum ſo ſworn or affirmed " to be due or owing, as aforeſaid; to be recovered and levied as " other penalties and forfeitures are upon penal ſtatutes after " conviction to be levied and recovered; and ſuch double ſum " ſhall be equally divided among all the creditors ſeeking relief " under the ſaid commiſſion."

(F) Of the Bankrupt's Eſtate and Effects, to which the Commiſſioners or Aſſignees are entitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and the Actions the Aſſignees may bring for the Recovery thereof.

[Copyholds, though mentioned expreſsly only in this act, have yet been determined to be within the purview of all the acts. Cro. Car. 550.]

BY the 13 *Eliz. cap.* 7., " The commiſſioners, or the major part of them, by virtue of the act and their commiſſion, may " at their diſcretion take order and direction with the body of " the bankrupt, and his lands and tenements, as well copy as " freehold, which he had before he became a bankrupt, or hath " purchaſed for money, or other recompence, jointly with his " wife or children, to the only uſe of ſuch offender, or for ſuch " uſe, title, &c. as he may lawfully depart with; or with any " perſon of truſt, to any ſecret uſe of ſuch offender; and his " money, goods, chattels, &c. and debts wherever found, and " cauſe the ſame to be ſearched, viewed, rented, and appraiſed, " and by deed indented, enrolled in one of his majeſty's courts of " record, ſell the (*a*) lands, tenements, and hereditaments, and " all deeds touching the ſame, and all fees, annuities, offices, " goods, and chattels, or otherwiſe order the ſame for the ſatiſ- " faction of the creditors: And by the ſame ſtatute, § 8., lands, " &c. purchaſed, deſcending, reverting, or any way coming to " him after he is declared a bankrupt, ſhall be ſold."

(*a*) But may ſell goods without deed enrolled. 2 Co. 26. The enrolment operates not by relation, ſo as to paſs an eſtate *ab initio*. Perry v. Bowes, Vent. 360. Sir T. Jones, 196. S. C. Carth. 178. S. C. [As to *future* real eſtates, there muſt be a new bargain and ſale. *Ex parte* Proudfoot, 1 Atk. 253.]

The commiſſioners cannot aſſign lands which the bankrupt hath ſold by deed indented, though not enrolled till after the bankruptcy. Sir W. Jones, 203.

" Provided the act ſhall not extend to lands, tenements, or " hereditaments, free or copy, *bonâ fide* conveyed by the bank- " rupt before he became ſo, and not to the uſe of himſelf or his " heirs, or ſuch as are privy or conſenting to his fraudulent " purpoſe."

By the 1 *Jac.* 1. *cap.* 15., " If any perſon who ſhall be a bank- " rupt ſhall convey, or cauſe to be conveyed, any lands or

" goods to his children, or others, or transfer his debts into " other men's names, except upon marriage of a child (both " parties being of the age of consent), or some valuable consideration, the commissioners may sell them."

By § 13., " They may grant and assign, or otherwise order " and dispose, the debts due to the bankrupt; by which assignment " or disposal the property, right, and interest of the debt shall " be so vested in the assignees, as if to them originally made or " due; and it shall not be recovered or released by or attached " for the debt of the bankrupt, but the assignees shall have like " remedy for it in their own name, as the bankrupt had; provided that no debtor be prejudiced by payment of his debt to " the bankrupt before he shall understand or know that he is become a bankrupt."

By the 21 *Jac.* 1. *cap.* 19., " If the lands, *&c.*, after the " bankruptcy, are extended by the king's accountant, the commissioners, upon oath, may examine, Whether upon a contract, *&c.* originally made between the accountant and bankrupt? And if not, they may order and dispose of the lands."

And by § 11., " Whereas bankrupts, commonly before they " become so, convey their goods upon good consideration, and " yet continue the possession of them, and are reputed the " owners thereof, it is enacted, That if at the time of the " bankruptcy they have in their possession, order, or disposition, " as owners, the goods of others, with their consent, the commissioners may sell them, *&c.*"

By § 12., " They may sell any lands whereof the bankrupt is " seised in tail, in possession, reversion, or remainder, whereof " there is no reversion or remainder in the king, of the gift or " provision of the king, which shall bind the issue in tail, and all " others whom the bankrupt by common recovery might cut off."

By § 13., " If the bankrupt hath granted any land, *&c.* upon " condition to be void upon payment of money, or other per- " formance, the commissioners, before the time of performance, " under their hands and seals, may appoint one to tender the " money, or make other performance, and may after sell the " lands, *&c.*" The commissioners may sell an equity of redemption. Chan. Ca. 71. 2 Vern. 91.

[By § 14., " No purchaser for good and valuable consideration " shall be impeached by virtue of this or any other act hereto- " fore made against bankrupts, unless the commission be sued " forth against the bankrupt within five years after he shall become so."] Paine v. Teap, 1 Salk. 109.

In the construction of these statutes the following opinions have been holden.

If a lessor covenants with his lessee to renew his lease, and the lessee becomes a bankrupt, the commissioners cannot assign this covenant. Chan. Ca. 71. 2 Vern. 97. S. C. cited.

If a man commits an act of bankruptcy, and after continues in possession of his lands four years, and then sells, and after commits another act of bankruptcy, and two years after a commission 3 Lev. 13, 14. Keb. 11, 12, 722. 2 Sid. 69. 114. 174.

Vide Salk 109. miſſion is taken out, &c., this ſale ſhall ſtand, for the act of bankruptcy by which the ſale is to be avoided muſt be done within five years before the commiſſion ſued out.

3 Lev. 59. Skin. 22. pl. 22. If *A.*, having committed an act of bankruptcy, keeps on his trade, and four years after binds his ſon apprentice with a goldſmith, and pays with him 120*l.*, being the uſual ſum in ſuch caſes, and two years after a commiſſion is taken out againſt *A.*; this money is not aſſignable by the commiſſioners, being paid ſo long before the commiſſion, and without any fraud.

Lofft. 71. [A bankrupt having an eſtate, in right of his wife, ſettled to himſelf for life, with other intervening uſes, remainder to himſelf in fee, with power to change the uſes; it was holden, that the remainder in fee veſted in the aſſignees, and his power of revocation was gone.

Newland v. —— 1 P. W. 92. Hitchcox v. Sedgwick, 2 Vern. 156. *Sed quære* if no commiſſion had been ſued, but a ſecret act of bankruptcy committed? Collet v. De Golls, Ca. Temp. Talb. 69. The commiſſioners may aſſign lands in fee when the bankrupt owes a debt by ſtatute, if the ſtatute is not ſued and executed before the bankruptcy. And the aſſignment ſhall prevail againſt a ſecond mortgagee who purchaſes the prior mortgage, if the ſecond mortgage was made after a commiſſion ſued out, although the mortgagee had no notice of the commiſſion.

Billing. 111. Good. 89. 1 Com. Dig. 530. If there be two joint-tenants, and the one becomes bankrupt and dies, it is ſaid, the bankrupt's part ſhall be ſold, and that there ſhall be no ſurvivorſhip; becauſe the bankrupt's moiety is bound by the ſtatutes; and alſo the bankrupt had power to ſell the ſame in his life-time, and might depart with it. And, by the 1 *Jac. c.* 15., the commiſſioners, after the bankrupt's death, may proceed in execution, in and upon the commiſſion for and concerning the offender's lands, tenements, &c., in ſuch ſort as if the offender had been living; which they cannot do if the ſurvivorſhip is allowed to take place.

Beck v. Welſh, 3 Wilſ. 276. If a mortgage is made by a bankrupt tenant in tail, without ſuffering a recovery, the aſſignees ſhall take advantage of this defect, and hold the land after the death of the bankrupt clear of the mortgage.

Edwards v. Applebee, 2 Br. Ch. Rep. 652. But if the deed contains a covenant for further aſſurance, the mortgagee will be entitled to retain his ſecurity againſt the creditors under the commiſſion.

Pye v. Danbuz, 3 Br. Ch. Rep. 595.

The lord is to be compounded with for the admiſſion, by the expreſs proviſion of the ſtatute; but if the commiſſioners ſell a copyhold, and the vendee tenders to the lord a competent fine, which the lord refuſes, and will not admit the vendee, he may enter.

Stone, 127.

Parker v. Bleeke, Cro. Car. 568. Where the commiſſioners ſell the copyhold lands, the bargain and ſale binds the copyholder, and bars his eſtate and he is no copyholder after the bargain and ſale is enrolled; for the bargainee, by the ſtatute, is only barred to take the profits until admittance, which is for the lord's benefit in reſpect of the fine due to

to him; and, when the bargainee is admitted by the lord, the eſtate ſhall veſt in him, and have reference to the bargain and ſale, and ſhall deveſt the claim of any intermediate eſtate. As if the bankrupt dies between the bargain and ſale and the admittance of the bargainee, his wife (where the cuſtom of the manor is, that the wife of a copyholder dying *tenant*, ſhall be endowed) ſhall not be endowed. And if the commiſſioners aſſign the bankrupt's copyhold eſtates to the general aſſignees, they are to be conſidered as vendees; for if not, the aſſignee might continue in poſſeſſion for years before he made a ſale; and yet, by an expreſs proviſion in the act, he is reſtrained from receiving the profits till he has compounded with the lord; and therefore the aſſignee muſt, upon his admittance, pay a fine to the lord, and upon ſale of the eſtate, another fine muſt be paid: However this inconvenience may be avoided by excepting copyholds out of the deed of aſſignment of the bankrupt's eſtate, for the commiſſioners may convey to a purchaſer in the firſt inſtance; and, by leaving out the copyhold eſtate of a bankrupt in a temporary aſſignment, the creditors will run no riſk with regard to the crown, for an extent will not affect it.

Drury v. Man, 1 Atk. 96.

In caſe of a patron becoming a bankrupt, the commiſſioners may ſell the advowſon of the living; but if the church be void at the time of the ſale, the vendee ſhall not preſent to the void turn, but the bankrupt himſelf, becauſe the void turn of a church is not valuable.

1 Burn's *Eccl. Law*, 4 ed. p. 125.

The commiſſioners may ſell offices of inheritance, and for terms of years; but an office concerning the execution of juſtice (and therefore within 5 & 6 *Edw.* 6. *c.* 16.) cannot be ſold.

1 Atk. 213. *Ex parte* Lyons, Ambl. 89.

Place of Jew-broker not ſaleable.

On the other hand, a place that does not concern the execution of juſtice, but only the police, may be ſold.

Ex parte Butler, 1 Atk. 210.

215. Ambl. 73. S. C. 3 Term Rep. 681. The pay of an officer is not aſſignable. 248. 1 H. Bl. Rep. 627. Co. *Bankrupt Laws*, 355.

4 Term Rep.

The commiſſioners may aſſign a poſſibility of a right belonging to the bankrupt, but it muſt be ſuch as (*a*) can be aſſigned or releaſed, and diſcloſed upon the laſt examination.

Higden v. Williamſon, 3 P. Wms. 132. 2 Atk. 420. (*a*) Moth v. Frome, Ambl. 394.

A. being about to renew a leaſe of an eſtate, at the expence of a fine of 160*l.*, borrowed of *B.* 80*l.* (of which *B.* himſelf borrowed 50*l.*), and gave a promiſſory note to repay the money, unleſs ſhe ſhould bequeath the eſtate to ſome or one of his children; ſhe afterwards deviſed the eſtate to *B.*'s daughter; but, before the deceaſe of *A.*, *B.* had become a bankrupt. His aſſignees claimed the 80*l.* or half of the eſtate, as being purchaſed by the bankrupt for the advancement of a child under 1 *Jac.* 1. *c.* 15.; and, upon a hearing at the rolls, obtained a decree, which, upon an appeal to the Chancellor was affirmed.]

Fryer v. Brown, 1 Br. Ch. Rep. 160.

But if *A.* purchaſes a copyhold to himſelf and wife for life, remainder to his ſon and his heirs, and two years after he becomes

Cro. Car. 550. Criſp and Pratt,

comes a trader, and four years after a debtor and bankrupt; there being no fraud in this caſe, nor any intent to deceive creditors, the intereſt of the wife and heirs of the bankrupt cannot be defeated by this act of bankruptcy.

Jones, 438. S.C. March, 37. S.C. Lilly v. Oſborn, 3 P. Wms. 298. S. P.

If the father conveys to his children, to ſecure them money given by their grandfather, if it can be proved the father had effects of the grandfather's in his hands at the time of the execution of the deed, it ſhall not be avoided. Mod. 76. But, if there be no conſideration, ſettlement on his wife and children ſhall be conſtrued a ſettlement on himſelf; and ſuch an intereſt veſts in the aſſignees. Stile, 289.

Walker v. Burrows, 1 Atk. 93.

[In a caſe before the court of Chancery it appeared, that the plaintiffs were aſſignees under a commiſſion of bankruptcy againſt the father of the defendant, who, in 1739, conveyed all his ſhop, goods, &c. by bill of ſale to the defendant his ſon, and in 1740 became bankrupt. In the year 1718, he, *after marriage*, conveyed to truſtees his real eſtate in conſideration of five ſhillings, and other valuable conſiderations, in truſt for himſelf for life, to his wife for life, then to his eldeſt ſon if he ſurvived his father and mother, and ſo to the next ſon, &c.

Lord *Hardwicke* ſaid, as to the firſt part of the caſe, there was not a foundation to ſet aſide the aſſignment of the houſehold goods as fraudulent, becauſe it was made many months before the bankruptcy, and the conſideration of the aſſignment was proved, and alſo followed by the poſſeſſion of the ſon. And as to the ſecond, the truſtees under the deed muſt convey to the aſſignees under the commiſſion; for it falls directly within the clauſe 1 *J.* 1. *c.* 15. § 5.

Miles v. Williams, 1 P.W. 249. Boſvil v. Brander, 1 P.W. 460. Saddington v. Kinſman. 1 Bro. Ch. Rep. 44.

The commiſſioners may aſſign a debt or *choſe* in action due to the wife of a bankrupt, and ſo it is of a mortgage made to her *dum ſola*, for the right to the debt is plainly veſted in the aſſignees, though the legal eſtate of the inheritance of the lands in mortgage continue in the wife.]

2 Vern. 96. Vandenaker and Deſbrough. If a father agrees to pay his ſon 15 *l.* during his life, and the ſon becomes a bankrupt, equity will not enforce this agreement in favour of the creditors under the commiſſion of bankruptcy. 2 Vern. 194. But if a father deviſes a legacy of 600 *l.* payable to his ſon at twenty-one, and the ſon obtains a decree for it, and a certain ſum is reported due for principal and intereſt, the commiſſioners may aſſign this legacy and benefit of the decree. 2 Vern. 432.

But if *A.* deviſes 800 *l.* to be inveſted in land for the benefit of the wife of *J. S.* for her life, and afterwards for her children, and the intereſt of the money in the mean time to go to ſuch perſons as ought to receive the profits, and *J. S.* becomes a bankrupt, the intereſt of this 800 *l.* ſhall not be liable to the bankruptcy, this not being any truſt created by the bankrupt, but a maintenance intended the wife, and given to her by her relation.

Bennet v. Davies, 2 P. W. 316.

[*J. S.* made his will, and deviſed his eſtate to his daughter for her ſeparate uſe, excluſive of her huſband, to hold the ſame to her and her heirs, and that her huſband ſhould not be tenant by the curteſy, nor have theſe lands for his life, in caſe he ſurvived his wife, but that they ſhould upon his wife's death, go to her heirs. Soon after the teſtator died, and the huſband became a bankrupt. The commiſſioners aſſigned the lands deviſed, upon which

which the wife brought her bill againſt the aſſignees, in order to compel them to aſſign over the eſtate to her ſeparate uſe. The maſter of the rolls held it to be clear, that it was a truſt in the huſband, and that there was no difference where the truſt was created by the act of the party, and where by the act of law. And decreed a conveyance for the ſeparate uſe of the wife.

If the wife is entitled to a legacy which the huſband has not reduced into poſſeſſion during his life, it ſeems, it will not paſs by the commiſſioners' aſſignment.] Gayer v. Wilkinſon, cited in 1 Br. Ch. Rep. 50.

A man deviſes his lands which were in mortgage to be ſold, and the ſurplus of the money to be paid his daughter; the daughter married a man who ſoon after became a bankrupt, and the commiſſioners aſſigned this intereſt of the wife's; the huſband died, and the aſſignees brought their bill againſt the wife and truſtees, to have the land ſold and the ſurplus of the money paid them; but the court would not aſſiſt in ſtripping the wife (who was wholly unprovided for) of this intereſt, and diſmiſſed the bill. Abr. Eq. 54. pl. 6.

A. puts out 1000*l.* at intereſt to the *Eaſt-India* Company, and takes bond for it in the name of *J. S.* his wife's relation: *A.* becomes bankrupt: *J. S.* is ſummoned before the commiſſioners, but before examination he tells the *Eaſt-India* Company that the money was not his, but that they ſhould pay it to the perſon that brought the bond: *A.*'s wife brings the bond, and hath the money paid her: equity would not relieve againſt it. Pr. Ch. 18. Q. of this caſe?

A legacy of 1000*l.* was given to one after the death of her mother, when ſhe ſhould attain the age of twenty-one years, and the defendant was appointed truſtee for the raiſing and paying thereof out of certain lands: the legatee was drawn into an improvident match with one who ſoon afterwards became a bankrupt, and the commiſſioners aſſigned all his effects, and gave him a certificate of his conformity: the aſſignees brought a bill for this 1000*l.* againſt the truſtee, who inſiſted that the aſſignees could be in no better condition than the huſband, and that if he were plaintiff he could not prevail without making a ſuitable proviſion for the wife; and that this legacy being liable to a double contingency, *viz.* the death of the mother, and the legatee's arriving at the age of twenty-one years, was not, at the time of the bankruptcy, ſuch an intereſt as could be aſſigned: and the court held, that though both contingencies have ſince happened, yet thoſe being ſince the aſſignment of the bankrupt's eſtate, and ſince a certificate of his having conformed himſelf in every thing to the acts, he was now diſcharged as a bankrupt; and this portion could not paſs without a new aſſignment, which the commiſſioners could not make, their commiſſion being determined; and ſo diſmiſſed the bill. Jacobſon v. Williams, 1 Eq. Ca. Abr. 54. 1 P. Wms. 382. S. C. Gilb. Eq. Rep. 140. S. C.

[The commiſſioners may aſſign a leaſe granted by the bankrupt, notwithſtanding there be a proviſo in it that the leſſee, his executors, or adminiſtrators, ſhall not aſſign without the leſſor's conſent in writing. Abr. 100. Philpot v. Hoare, Ambl. 480. Seers v. Hind, 1 Ves. jun. 294. 2 Eq. Caſ.

Gerrard v. Aylmer, Palm. 505.

They may aſſign an obligation taken in another's name to the bankrupt's uſe.

Com. Dig. tit. *Bankrupt*, (D. 16.) Toulſon v. Grout, 2 Vern. 432. Tudway v. Bourne, 2 Burr. 718.

They may ſell an heriot, relief, &c. due to the bankrupt, and a legacy given to the bankrupt before his bankruptcy. So where the certificate has been ſigned by the creditors and commiſſioners, a legacy left to the bankrupt before the certificate allowed by the chancellor may be aſſigned. Many years may intervene between the ſigning and the allowance of the certificate, and large effects may, in the mean time, come to the bankrupt. And it is not like the relation of a bargain and ſale, or the ſurrender of a copyhold.

Neale v. Cottingham, in Canc. in *Ireland*, 16th Nov. 1764.

The commiſſioners here may ſell the bankrupt's good in *Ireland*, and the courts in *Ireland* will take notice of our laws ſo as to prevent a creditor, attaching property after the commiſſion, from gaining a preference over the aſſignees of the bankrupt.

1 H. Bl. Rep. 132. As to the operation of the bankrupt laws abroad, ſee the caſe of Cleve v. Mills, at the Cockpit, 27th July 1764; and the judgment of the court in the caſes of Sill v. Worſwick, and Hunter v. Potts, *infra*.

Solomons v. Roſs, 1 H. Bl. 131. Jollet v. Deponthien, 1 H. Bl. 132.

So where the laws of *Holland* have, in like manner as a commiſſion of bankrupt here, taken the adminiſtration of the property, and veſted it in perſons who are called curators of deſolate eſtates, the court of Chancery hold, that they have, immediately upon their apointment, a title to recover the debts due to the inſolvent in this country, in preference to the particular creditor ſeeking to attach thoſe debts. The principle upon which theſe deciſions proceed is, that perſonal property is governed by that law which governs the perſon of the owner.

Sill v. Worſwick, 1 H. Bl. 694. Hunter v. Potts, 4 Term Rep. 182. In the caſe of Sill v. Worſwick, the proceſs abroad was

If after an act of bankruptcy, but before the aſſignment, a creditor, reſident in this country at the time of the bankruptcy, and knowing of it, attach money of the bankrupt abroad, he is compellable to refund it to the aſſignees. But a debtor of the bankrupt before the bankruptcy, whoſe debt is afterwards *bona fide*, and by regular proceſs, attached by a creditor reſident abroad at the time of the bankruptcy, is not liable to pay it over again to the aſſignees.

founded on an act done in *England*, and under the aid of the law of *England*; a circumſtance on which that caſe immediately turned. The caſe of Hunter v. Potts was without that circumſtance; and it was propoſed to argue it on a writ of error before the twelve judges; but no ſuch argument hath taken place.

Stephens v. Sole, 1 Vez. 352. Bourne v. Dodſon, 1 Atk. 154. Ryal v. Rowles, 1 Atk. 165. 1 Vez. 348. Bamford v. Baron, 2 Term Rep. 594. Edwards v. Haben, 2 Term Rep. 587.

In mortgages of land or chattels real, the non-delivery of poſſeſſion does not amount to that ſpecies of fraud intended to be checked by the ſtatute, the title deeds, and not the poſſeſſion, being the evidence of ſuch ſpecies of property. Creditors, therefore, cannot be deceived and deluded by the poſſeſſion of property of that nature. But, where goods are pawned or mortgaged, it is very different; for poſſeſſion and a power of diſpoſal of ſuch property are the only evidences of ownerſhip to which the creditor can look: an aſſignment therefore of ſuch property, unaccompanied by poſſeſſion, is fraudulent and void.

But,

But, if the property cannot be delivered at the time of the contract, it will be ſufficient if the mortgagee has the documents and muniments delivered to him, in order to reduce it into poſſeſſion. A mortgage, therefore, of a ſhip, or goods at ſea, if the mortgagee has taken all methods in his power to get poſſeſſion, ſuch as the bill of ſale, bills of lading, &c. will be valid, for otherwiſe no ſecurity could be made of ſuch things at ſea. But if the creditor were to ſuffer the ſhip to come back and go upon an another voyage, the caſe would be very different. For the delivery of the grand bill of ſale will not be ſufficient, if there is an opportunity of taking actual poſſeſſion. Brown v. Heathcote, 1 Atk. 160. *Ex parte* Mathews, 2 Vez. 272. Hall v. Gurney, Hil. 24 G. 3. B. R. Co. *Bankrupt Laws*, 401. Atkinſon v. Maling, 2 Term Rep. 462.

By the 26 G. 3. c. 60. § 17. the bill of ſale muſt recite the certificate of the regiſtry of the ſhip, notwithſtanding it be intended only as a ſecurity for money lent, elſe it is void: and being void, the vendee, though he take poſſeſſion of the ſhip immediately upon her return, cannot retain it againſt the aſſignees of the vendor. Rolleſton v. Hibbert, 3 Term Rep. 406.

If a ſhip is in a foreign port, where the mortgagee might take poſſeſſion of her, and this be known to him, yet he is not obliged to take poſſeſſion until her arrival in *Great Britain*. *Ex parte* Batſon, 8th Aug. 1791. Co. *Bankrupt Laws*, 406.

Where a ſhare of a ſhip is mortgaged or pledged, the delivering of the bill of ſale of that ſhare is ſufficient, for the mortgagee cannot in ſuch caſe take actual poſſeſſion of the ſhip. Gilleſpy v. Coutts, Ambl. 652. *Ex parte* Standgroom, 2d Auguſt 1790. Co. *Bankrupt Laws*, 410. 1 Vez. jun. 163.

Choſes in action are holden within the ſtatute, for although they are only aſſignable in equity, equity will follow the law in ſuch caſe. Falkener v. Caſe, Co. *Bankrupt Laws*, 412. 1 Br. Ch. Rep. 125. S. C. 2 Term Rep. 491. S. C. Rowe v. Dawſon, 1 Vez. 331.

If a bond is aſſigned, the bond muſt be delivered and notice muſt be given to the debtor; but in aſſignment of book-debts notice alone is ſufficient, becauſe there can be no delivery, and ſuch acts are equal to a delivery of goods, which are capable of being delivered. Ryall v. Rowles, 1 Vez. 372. 1 Atk. 171. 177. A choſe in action may be aſſigned without deed. Howell v. M'Ivers, 4 Term Rep. 690.

The enacting part of 21 *Jac.* 1. *c.* 19. *ſ.* 11. is not reſtrained by the preamble, but it extends to other perſons' goods, as well as thoſe which were originally the bankrupt's property. Cowp. 233.

One *Mace* kept a public houſe, had a licence, and ſaid ſhe was married to *Penrice*. It was proved ſhe went to the Exciſe-office, had his name entered in the books, with a note in the margin, "married." *Penrice* had the licence, and continued in poſſeſſion of the houſe and goods from that time till he abſconded and went to *Pimlico*, which was an act of bankruptcy. *Mace*, the plaintiff, firſt claimed the goods in queſtion under a bill of ſale from *Penrice*, but afterwards as her own original property, and denied that *Penrice* and ſhe were married. Upon a queſtion, Whether this was within the ſtatute? the court held that it was. Mace v. Cadell, Cowp. 232.

In another caſe, *Bryſon* being poſſeſſed of a dyer's plant, ſold it to *Simpſon* for 165*l.* 16*s.* 6*d.*; and *Simpſon* gave *Bryſon* two promiſſory notes dated the 19th day of *January* 1780, one for the ſum Bryſon v. Wylie, Hil. 24 G. 3. B. R.

ſum of 82*l.* 13*s.* 6*d.*, payable on the 6th of *January* 1781, and the other for the ſum of 82*l.* 13*s.*, payable on the 6th *January* 1782. When the firſt note became due, *Simpſon* could not take it up, and *Bryſon* offered to take back the plant, and return the notes, and agreed that he would let him the plant at the rent of 5*l.* a-year, upon the valuation amounting to 8*l.* 5*s.* 6*d. per ann.*, for the term of three years. To this propoſal *Simpſon* very readily agreed, and a deed was accordingly executed; by which it was agreed, that *Bryſon* ſhould let the plant to *Simpſon*, and that if he ſhould make default in any of the quarterly payments, or in the performance of any of the covenants, then the term granted ſhould ceaſe, and *Simpſon* ſhould deliver up the plant, *&c.*, and it ſhould be lawful for *Bryſon* to take immediate poſſeſſion of the ſame. There was a memorandum at the foot of the deed, that *Simpſon* had put *Bryſon* in full poſſeſſion of the plant, by delivering to him one winch in the name of the whole. On the 5th of *July* 1783, a commiſſion of bankruptcy iſſued againſt *Simpſon*, and the meſſenger took poſſeſſion of the plant.

The bare leaving goods in poſſeſſion of facts for the Wms. 314.

The queſtion was, Whether this was within the *ſt.* 21 *Jac.* 1.? The court held clearly that it was.

1 Vez. 243. the bankrupt, without power to diſpoſe, will not be within the ſtatute. Weſt v. Skip, determination of a jury. Walker v. Burnell, Dougl. 303. Copeman v. Gallant, 1 P. *Ex parte* Flyn, 1 Atk. 185. The ſort of poſſeſſion, diſpoſition, &c. are, in general, Collins v. Forbes, 3 Term Rep. 316.

Haſelinton v. Gill, 3 Term Rep. 620. n. Jarman v. Woolloton, *ibid.*

Where a trader makes a ſettlement of perſonal property upon his marriage, for the ſeparate uſe of his wife, and to be by her employed in a trade, his living with the wife, if he do not intermeddle in the buſineſs, will not be a poſſeſſion of the property within the ſtatute of 21 *Jac.* 1.; for he hath not the *order and diſpoſition with the conſent of the real owner.*

Hinton's caſe, Frem. 270. Ruſt v. Cooper, Cowp. 629.

The delivery of property to a creditor in contemplation of immediate bankruptcy is conſidered as fraudulent, notwithſtanding the delivery is made in ſatisfaction of a *bonâ fide* debt, for it diſappoints the equality which the bankrupt laws aim at.

Alderſon v. Temple, 4 Burr. 2235. 1 Bl. Rep. 441. Harman v. Fiſher, Cowp. 117

Thompſon v. Freeman, 1 Term Rep. 355.

But if a trader, under an apprehenſion of legal proceſs, delivers property to his creditor, or gives him a power to receive it, ſuch act is valid, notwithſtanding the bankrupt knows himſelf to be inſolvent.

Yeats v. Grove, 1 Vez. jun. 280.

So if a debtor, upon being preſſed by his creditor, who knows him to be inſolvent, gives an order upon a perſon, having his property, to pay out of the proceeds, it hath been determined not to affect the payment.

Co. *Bankrupt Laws*, 446. Audley v. Halſey, Sir W. Jones, Rep. 202. Rex v. Pixley, Bunb. 202.

The crown is not bound by the acts relating to bankrupts, not being named in them; therefore an extent ſerved upon the property of the bankrupt will bind from the *teſte* of the writ, and till actual aſſignment by the commiſſioners; but the king is bound by an actual aſſignment, becauſe the property is then abſolutely transferred to a third perſon.

Rex v. Bewdley, in the Exch. July 1784. 2 Show. 480. Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Rorke v. Dayrell, 4 Term Rep. 408.

One

One became indebted to the crown, and a commiſſion of bankrupt was ſued out againſt him, and an aſſignment made of his effects; and an extent iſſued from the crown, teſted the day of the date of the aſſignment, and the crown was preferred. Park. Rep. 126. 2 Show. 40.

The land-tax money in the hands of collectors is a debt to the king, but the warrant of the commiſſioners of the land-tax is not equal to an extent ſo as to bind the goods from the date, but until aſſignment the property is in the bankrupt, and the land-tax commiſſioners' warrant executed before the aſſignment will create a lien upon ſuch a ſeizure, therefore all the aſſignees' right is to redeem the goods which are in the hands of the commiſſioners of the land-tax for that purpoſe. Braſſey v. Dawſon, 2 Stra. 978.

A candle-maker, in arrear for the ſingle duties, becoming bankrupt, and convicted for non-payment after the aſſignment of his effects, the double duties are a lien upon the candles, utenſils, and materials in the hands of his aſſignees, and they may be diſtrained. Senior, Rex v. Fowler, Stacy v. Hulſe, Dougl. 395. Attorney-General v. Dougl. 400.

The aſſignment will not paſs goods which the bankrupt hath poſſeſſion of as factor, though he act upon a *del credere* commiſſion. Garret v. Cullum, Bull. *Ni Pri.* 42, 5th ed. Godfrey v. Furzo, 1 P. Wms. 185. *Ex parte* Dumas, 2 Vez. 586. 1 Atk. 232. Scrimſhire v. Alderton, 2 Str. 1182. Eſcott v. Milward, Sittings after Mich. 1783. Co. *Bankrupt Laws*, 456, 7.

Nor, upon the ſame principle, will it paſs bills or goods ſent to a trader to be applied to a particular purpoſe. *Ex parte* Dumas, 2 Vez. 586. 1 Atk. 232. *Ex parte* Emery, 2 Vez. 674. Godfrey v. Furzo, 3 P. Wms. 185. D'Aquila v. Lambert, Ambl. 399. *Ex parte* Clare, and *ex parte* King, cited in Snee v. Preſcott, 1 Atk. 250. Zink v. Waller, 2 Bl. Rep. 1154. Tooke v. Hollingworth, 5 Term Rep. 215.

Neither will it paſs goods which the bankrupt may be poſſeſſed of as executor or adminiſtrator. Howard v. Jemmett, 3 Burr. 1369. *Ex parte* Ellis, 1 Atk. 101. *Ex parte* Marſh, 1 Atk. 158. But if a trader is, made executor and reſiduary legatee, and, before his bankruptcy, collects in enough of the teſtator's effects to pay debts and particular legacies, and the remainder of the aſſets is uncollected; though the *aſſignees in law* would not be entitled to get it in, becauſe the bankrupt has it in *auter droit* as executor, yet the *aſſignees under the commiſſion*, notwithſtanding the legal intereſt is not veſted in them, may, by the aid of the court of Chancery, get in the aſſets in the name of the executor. *Per* Ld. Hardwicke, in *ex parte* Butler, 1 Atk. 213. Ambl. 74. S. C. As courts of law now take notice of a truſt, *the aſſignee in law* would be entitled. Winch v. Keeley, 1 Term Rep. 619.

Nor a debt which he hath previouſly aſſigned to another perſon; for in ſuch caſe he is a mere truſtee, and the debts which are aſſignable by the ſtatute are thoſe which are for *the benefit* of the bankrupt.] Winch v. Keeley, 1 Term Rep. 619.

If *A.*, being beyond ſea, conſigns goods to *B.* then in good circumſtances in *London*, and before the goods arrive *B.* becomes a bankrupt, whereupon *A.* conſigns them to another, and the aſſignees under the commiſſion pray relief and a diſcovery, and a trial at law is directed, whether ſuch conſignment veſted a property in *B.*, and a verdict is found (*a*) for the aſſignees; yet equity will not oblige *B.* to come in as creditor, it being allowable by any means, ſhort of actual violence, to prevent the Wiſeman v. Vandeput, 2 Vern. 203. [*Vide* Snee v. Preſcot, 2 Atk. 245. and *ex parte* Walker and Woodbridge, after Trin. Term

1755. Co. *Bankrupt Laws*, 480.

goods from coming into the hands of the bankrupt (*b*) or the assignees.

(*a*) This right of the consignor to stop *in transitu* in case of bankruptcy, when the question is merely between consignor and consignee, is now established at law. Biskett v. Jenkins, cited in Cowp. 296. Solomons v. Nissen, 2 Term Rep 674. Lickbarrow v. Mason, 2 Term Rep. 63. But whether such right exist, as between the consignor and the assignee of the consignee, under an indorsement of the bill of lading for a valuable consideration, is a point as yet unsettled. The court of K. B. have negatived any such right. Lickbarrow v. Mason, 2 Term Rep. 63.; their judgment was reversed in the Exchequer-chamber, 1 H. Bl. 357.; but the House of Lords, not thinking the evidence on the record (for the question was brought forward on a demurrer to evidence) sufficient to maintain the plaintiff's action, awarded a *venire facias de novo*. Dom. Proc. 14th June 1793. (*b*) But, if they once get into the hands of either, the right is gone. Ellis v. Hunt, 3 Term Rep. 464.]

Atkin v. Barwick, 1 Str. 165. 10Mod.432. S. C. 4 Burr. 2239.

[Goods that have been delivered on a precedent consideration cannot be assigned, though the acceptance be after the bankruptcy.

Cowp. 125. As to what persons are entitled to such lien, see Ambl. 252. Cowp. 251. 1 Burr. 493. 2 Burr. 931. Pr. Ch. 580. 4 Burr. 2214. 1 Bl. Rep. 654. 4 Term Rep. 123. 1 Atk. 235. 2 Cox's P. Wms. 367. Dougl. 97. *Ex parte* Andrews, Co. *Bankrupt Laws*, 515.

The assignment doth not devest an equitable lien. By an equitable lien, however, we are not to understand a right attaching upon the property in whatsoever hands it may be; for there can be no lien distinct from possession.

Moyses v. Little, 2 Vern. 194. *Sed quære.*

The defendant on the marriage of his son settled lands on himself for life, remainder to his son for life, *&c.*; and covenanted during his own life to pay his son 15*l. per annum*; the son became a bankrupt; the plaintiff as assignee brought a bill against the father, to have the benefit of this agreement, and to compel payment of the 15*l. per annum*. *Per Cur.* An assignee, under a statute of bankruptcy, is not entitled to have the performance of an agreement made with the bankrupt; and it was so adjudged in the case of *Drake* v. The Mayor of *Exeter*, where the court held, that if a lessor covenants with his lessee and his assigns to renew his lease, and the lessee becomes a bankrupt, and the commissioners assign this covenant, the assignee cannot have any relief against the lessor.

Vandenanker v. Desbrough, 2 Vern. 96.

Drake v. The Mayor of *Exeter*, 1Ch.Ca.71.

Chippendale v. Tomlinson, Trin. 25 G. 3. B.R.

Chippendale brought an action of *assumpsit* for work and labour as an attorney. The defendant pleaded, that the plaintiff was a bankrupt, and averred, that the commission was still in force. The plaintiff replied, that the work and labour was done after the commissioners' assignment, and for the necessary support and maintenance of himself and his family. Rejoinder, that the plaintiff had not obtained his certificate; and thereupon a demurrer. Lord *Mansfield* said, the only question is, Whether the assignees of a bankrupt are entitled to the profits arising from his personal labour? The assignees cannot let out the bankrupt; they cannot contract for his labour. And Mr. Justice *Buller* observed, that when Lord *Hardwicke* said, that "all the "bankrupt's future personal estate is affected by the assignment," he evidently meant, that if the assignees claim it, the bankrupt must deliver it up; and so far the assignment affects it; but no other person can have the same plea.]

1 Atk. 253.

See *acc.* Ashley v. Kell, 2 Stra. 1207.

The

The assignees have an interest in the bankrupt's estate from the very act of bankruptcy, so as to avoid all mesne acts done by the bankrupt during that time, and the issuing out of the commission; and the privity of contract between the bankrupt and his creditors being from that time transferred to the assignees, they have the same right as an administrator, who has a property from the death of the intestate, and may declare generally *ut de bonis suis propriis*.

Sand. 239. Sid. 327. Salk. 111. pl. 8. But it has been holden, that before an actual assignment, the bankrupt has such a property for which he may maintain an action. Salk. 108. If, upon a *capias ad satisfaciendum*, the money is levied, and after the plaintiff becomes a bankrupt, and the money is assigned before the return of the writ, this assignment is void; for being in the hands of the sheriff it is *quasi in custodiâ legis*, and not the bankrupt's money before it is paid him. Cro. Car. 166. 176. If the conusor, after the *extent*, and before the *liberate*, becomes a bankrupt, and the goods are delivered upon the *liberate*, and a commission is after taken out, &c. they cannot be sold; for, by the *extent*, they were in *custodiâ legis*; and it was not in the power of the conusor, by any subsequent act, to destroy the effect of the *extent*. Cro. Car. 148. Sir W. Jones, 202. S. C. If between the act of bankruptcy, and before assignment, the goods of the bankrupt are seized, and in the officer's hands for the debt of the king, it seems, that these goods cannot be assigned; for the king's title, and that of a subject's, commencing at the same time, the king shall be preferred; besides, the king cannot come in as a creditor under the statutes. Salk. 108. pl. 2. 102. [2 Str. 978. But he is bound by an actual assignment. 2 Show. 481.]

[Where a trader commits an act of bankruptcy by lying in prison for two months, it relates to the first day of his surrender, so as to over-reach all intermediate transactions.

Barwell v. Ward, 1 Atk. 260. King v. Leith, 2 Term Rep. 141.

As this relation to the act of bankruptcy occasionally induceth very great hardship upon parties, it meeteth with but little encouragement from the courts. The legislature too hath interposed, and provided that it shall not extend (*a*) to the prejudice of any debtor of the bankrupt, who pays his debt to the bankrupt truly and *bonâ fide* before he shall understand or know that he is become a bankrupt; or to purchasers (*b*) for valuable consideration, unless the commission shall be sued out within five years after the act of bankruptcy; or to payments (*c*) for goods or bills of exchange *bonâ fide* made by the bankrupt in the course of trade, without the creditor's knowing that he is become bankrupt, or in insolvent circumstances.

Where the act of bankruptcy was committed by the bankrupt's lying in gaol two months, and in the interval, before it was completed, the sheriff paid money which he had levied under an execution against the bankrupt to the plaintiff in the action, the court would not assist the assignees upon motion. Clarke v. Ryal, 1 Bl. Rep. 642. (*a*) 1 J. 1. c. 15. § 14. (*b*) 21 J. 1. c. 19. § 14. (*c*) 19 G. 2. c. 32. § 1. There is no difference between an actual payment of money in satisfaction of a debt, and indorsing bills of exchange; provided there be no notice, and the money be received on them before the commission of bankruptcy issues. Hawkins v. Penfold, 2 Vez. 550. Payment by the acceptor of a bill, after time given him by the holder, on condition of allowing interest, is not a payment in the course of trade, and, of course, not protected against a secret act of bankruptcy. Vernon v. Hall, 2 Term Rep. 648. A banker is affected by notice equally with other persons; and if, in such case, he pays the draft of a trader keeping cash with him, he is liable to pay it over again to the assignees. Vernon v. Hankey, 2 Term Rep. 113. 3 Br. Ch. Rep. 313. But the assignees having recovered the money from the banker, cannot compel the creditor, to whom the bankrupt paid it, to refund. Vernon v. Hanson, 2 Term Rep. 287. If a person borrows money, and repays it after a secret act of bankruptcy, this, though not a payment in the course of trade, will yet be allowed; for the loan being repaid, it will be considered as never borrowed. *Ex parte* Congalton, 3 Br. Ch. Rep. 47.

The relation operates only on voluntary payments with notice; and if the debtor pays the debt in consequence of a judgment at law, the assignees cannot recover the money a second time.

Foster v. Allenson, 2 Term Rep. 479.

It will not avoid a fair act substantially complete, though defective in some formal circumstance. If therefore a trader assigns

Lempriere v. Pasley, 2 Term Rep. 485.

The like law as to an indorſement of a bill of exchange in purſuance of

ſigns goods at ſea, and at the ſame time undertakes to indorſe and deliver the bill of lading as ſoon as he receives it, the indorſement will be good, though an act of bankruptcy be committed before it is made.]

a prior agreement. Smith v. Pickering, Eſpin. *Ni. Pri.* 30.

3 Lev. 69. 191. See *acc.* 1 P. Wms. 92. 737.

If a *fieri facias* is taken out, and indorſed according to the ſtatute, and delivered to the ſheriff, and after, the ſame day, the defendant becomes a bankrupt, and the ſheriff levies 400*l.* of the goods of the defendant, and pays it to the plaintiff; yet the commiſſioners may aſſign theſe goods notwithſtanding, *&c.*; for, by the delivery of the writ to the ſheriff, the goods are bound in no other manner than before the ſtatute they were bound from the *teſte* of the writ; and by the delivery of the writ the execution is not ſerved or executed (*a*).

[(*a*) Therefore not within 21 J. 1. c. 19. §9.]

(*b*) See Baily v. Bunning, 1 Lev. 173. 1 Sid. 271. S. C. 1 Keb. 930. S. C.

[It ſeemeth to have been formerly (*b*) very much doubted, whether the aſſignees could maintain any action againſt an officer who had the goods of a bankrupt in execution after an act of bankruptcy, and before the iſſuing of the commiſſion; but it is (*c*) now ſettled, that the aſſignees may in ſuch caſe bring trover againſt him, though the relation (*d*) ſhall not operate ſo as to make him a treſpaſſer.

(*c*) Cooper v. Chitty, 1 Burr. 20. 1 Bl. Rep. 65. S. C. (*d*) Nor will he be a treſpaſſer, though he ſell after notice from the proviſional aſſignee. Smith v. Miles, 1 Term Rep. 475.

Akerry v. Williams, 1 Vern. 27. Collet v. De Golls, Ca. Temp. Talb. 65. Wilker v. Bodington, 2 Vern. 599.

A purchaſer for a valuable conſideration, without notice of an act of bankruptcy, ſhall not be obliged in equity to diſcover any thing that may tend to deprive him of a legal title; but every advantage ſhall be left him to defend himſelf. Indeed where a commiſſion is actually taken out, the caſe is very different, becauſe that is a public act, which all are bound to notice; but an act of bankruptcy may be ſo ſecret as to be impoſſible to be known.]

Cro. Car. 187. Jones, 223. Where wager of law lay againſt the bankrupt, it lies againſt the aſſignee.

Though the bankrupt's eſtate is transferred to the aſſignees, yet muſt they purſue the ſame remedies for the recovery of it as the bankrupt himſelf; therefore if a debt upon a ſimple contract due to the bankrupt is aſſigned, an action of debt will not lie againſt the executor of the debtor, but the aſſignee muſt bring his action on the caſe.

Cro. Jac. 105.

Allen, 28, 29. Stile, 62. S. C. Raym. S.C. cited.

The plaintiff declares upon an *aſſumpſit* for 43*l.* 1*s.*, and ſets forth an aſſignment of the debts of the bankrupt, *mentionat' in quadam ſchedula continen' prædict' ſummam* 43*l.* 1*s.*, and the jury find he was indebted only 41*l.* 1*s.*, which he promiſed, *&c.* and that the commiſſioners aſſigned *debita præd' in quadam ſchedula continen' præd' ſummam* 43*l.* 1*s.*, and, if this is the ſame promiſe, concludes for the plaintiff; and becauſe the iſſue and verdict were concluded to the promiſe, and the aſſignment not in queſtion, and the ſtatute giving the like remedy to the aſſignee as the bankrupt had, it was adjudged for the plaintiff *.

* This caſe is not worth attending to—aſſignees now declare *generally*, as ſuch, without mentioning any aſſignment; they ſtate the cauſe of action accruing to the bankrupt, before he became ſuch, the promiſe

promiſe in like manner; and in the breach, allege the defendant has not paid to the bankrupt before he became ſuch, nor to the aſſignees ſince; and conclude to the damage of the aſſignees.

If there be a joint bond to *A.* and *B.*, and *A.* become a bankrupt, *&c.*, the aſſignee cannot bring an action alone; but if aſſigned to *B.*, he alone may bring an action, being entitled to one moiety in his own right, and to the other for the benefit of creditors, by virtue of the aſſignment *. Lev. 17. Raym. 6, 7. Keb. 167.

* But the facts muſt appear on the record.

In *aſſumpſit*, the plaintiff declared as aſſignee under a commiſſion of bankruptcy awarded againſt *J. S.*, who became a bankrupt, *&c.*, and that the defendant was indebed to the ſaid *J. S.*, *&c.*; and on demurrer to the declaration it was objected, that it was uncertain, it not being ſhewn how *J. S.* became a bankrupt, *viz.* either by keeping cloſe within his houſe, by ſuffering himſelf to be arreſted, *&c.*; and that in pleading ſimony, the particular act muſt be ſet forth: But it was held well enough in this caſe, for the ſtatutes mention the word *bankrupt*, but in the ſtatute againſt ſimony no mention is made of the word; beſides, in this caſe the plaintiff is a ſtranger to the bankrupt, and it cannot be preſumed that it lies in his knowledge in what manner he became a bankrupt. Carth. 29. Pepys and Low, Comb. 108. S. C. [Lawſon v. Lamb, 1 Lutw. 274. S. P. 2 Ld. Raym. 1548. S. P. The aſſignee muſt lay the promiſe to be made to the bankrupt, if the contract be prior to the bankruptcy. 6 Mod. 131. Stra. 697. *Secùs*, if ſubſequent; and therefore, in ſuch caſe, they need not name themſelves aſſignees. Evans v. Mann, Cowp. 569. If the ſame perſons are aſſignees of *A.* and *B.*, who were partners, but there is no joint commiſſion; they cannot, in one action, ſue for debts due to *A.* and *B.* jointly, and alſo for debts due to each, individually. Hancock v. Hayward, 3 Term Rep. 433. Streatfield v. Halliday, *id.* 779.]

[The aſſignees may bring either *trover* or *aſſumpſit* for money received ſubſequent to the bankruptcy; but they cannot bring both; and having brought one, and proceeded to judgment in that, it will bar the other. Hutchin v. Campbell, 2 Bl. Rep. 830. 3 Wilſ. 309. They were formerly not allowed to maintain *aſſumpſit* in ſuch caſe. 1 Vez. 329. 3 Lev. 191.

It is in one caſe ſaid, that if a bond was made to *A.* in truſt for *B.*, who becomes a bankrupt, the aſſignees may bring the action in their own name, though *B.* muſt have brought it in the name of his truſtee; but this opinion has been denied to be law by Lord *Hardwicke*, who thought clearly by the manner of wording the clauſe, relating to the commiſſioners' power of aſſignment of a bankrupt's effects, 1 *Jac.* 1., that aſſignees can only have the like remedy to recover a debt as the bankrupt himſelf might have had, the words "as the party himſelf might have had," in the concluſion of that clauſe, appearing to him to be meant of the bankrupt. Miles v. Williams, 1 P.W. 249. 1 Atk. 193.

The aſſignees cannot maintain an action to recover the payment of an annuity, which the bankrupt, prior to an act of bankruptcy, had agreed ſhould be applied to ſatisfy a debt due from the bankrupt to the grantor of the annuity.] Sturdy v. Arnaud, 3 Term Rep. 592.

By the 5 *Geo.* 2. *cap.* 30. *ſect.* 38. it is enacted, "That no "ſuit in equity ſhall be commenced by any aſſignee or aſſignees, "without the conſent of the major part in value of the creditors "of [Creditors cannot give a general power to aſ-

Aſſignees to proſecute ſuits at their own diſcretion; but there muſt be a meeting of creditors upon notice in the *Gazette*, to conſider of each particular ſuit. Atk. Rep. 92. pl. 39. And a ſolicitor, who carries on ſuits for an aſſignee, without the conſent of the creditors aſſembled purſuant to this act, is not entitled to be paid out of the bankrupt's eſtate, but is left to a perſonal remedy againſt the aſſignee employing him. *Ex parte* Whitchurch, 1 Atk. 210. Actions at law may be brought without firſt calling any meeting of creditors. Huſſey v. Fidell, 3 Salk. 59.]

" of ſuch bankrupt, who ſhall be preſent at a meeting of the " creditors, purſuant to notice to be given in the *London Gazette* " for that purpoſe."

Bull. *N. P.* 37.

[In actions brought by aſſignees, it is neceſſary to prove the bankrupt a trader within the ſtatute, the act of bankruptcy, that the commiſſion was regularly granted, the aſſignment to the plaintiff, and property in the bankrupt.

Abbot v. Plumbe, Dougl. 216. But, as againſt a perſon who is party to a deed, his examination before the commiſſioners, wherein he admits the execution of it, ſuperſedes the neceſſity of calling the ſubſcribing witneſs. Bowles v. Langworthy, 5 Term Rep. 366.

It is an eſtabliſhed rule, that aſſignees muſt prove the petitioning creditor's debt, by the ſame evidence which muſt have been produced in an action againſt the bankrupt; and as it is neceſſary, in order to recover on a bond, to call the ſubſcribing witneſs, unleſs ſome reaſon can be given for his abſence, ſo the petitioning creditor's debt, if it ariſes on bond, muſt be proved in like manner.

Janſon v. Wilſon, Dougl. 257.

The depoſitions of the act of bankruptcy, when recorded according to 5 *Geo.* 2. *c.* 30. § 41., are evidence in an action at law to prove the preciſe time when the act of bankruptcy was committed, if ſpecified therein.

Field v. Curtis, 2 Strange, 829. Aſſignees of Gill v. Woodmaſs, ruled by Lee, C. J., Mich. Sittings, 1752. Bull. *N. P.* 38.

A bankrupt cannot be a witneſs to prove his own act of bankruptcy; but, if the defendant calls him, he waves all objections to the competency of his evidence, and the bankrupt may be croſs-examined by the plaintiffs to that fact.

Bull. *N. P.* 43. Cowp. 71.

The bankrupt cannot be evidence to ſwear property in himſelf, or a debt due to his eſtate, without having obtained his certificate, and given a releaſe of his ſhare in the ſurplus and the dividends, for elſe he is plainly intereſted; but he may prove property in, or a debt due to, another.

Maſters v. Drayton, 2 Term Rep. 496.

Upon the ſame principle an uncertificated bankrupt cannot be witneſs to prove uſury in a creditor, who had proved that debt under the commiſſion.

Walker v. Walker, cited Cowp. 70. Butler v. Cooke, Cowp. 70.

It is a ſettled rule, that a bankrupt may be a witneſs to diminiſh the fund, though he has not obtained his certificate; becauſe, in ſo doing, he ſpeaks manifeſtly againſt himſelf; for he may not only defeat his title to the benefit which the law allows him, if the fund is of a certain amount, but he hazards the diſpleaſure of all his other creditors.

Ruſſel v. Ruſſel, 1 Br. Ch. Rep. 269.

If a bankrupt has had his certificate, and received his allowance, his evidence will be admiſſible, for he is not bound to refund.

Chapman v. Gardner, 2 H. Bl. 279. Croſs v. Fox, and Flower v. Herbert, *ibid.*

It muſt be obſerved, however, that though a bankrupt has obtained his certificate, yet he is not a competent witneſs to prove the petitioning creditor's debt, or any other fact neceſſary to ſupport the commiſſion.

(G) Of ſetting off, ſubmitting to Arbitration, and compounding Debts due to the Bankrupt.

BY the 5 *Geo.* 2. *cap.* 30. § 28. it is enacted, " That where it " ſhall appear to the commiſſioners, or the major part of " them, that there hath been mutual credit given by the bank- " rupt, and any other perſon, or mutual debts between the " bankrupt and any other perſon, the ſaid commiſſioners, or the " major part of them, or the aſſignees of ſuch bankrupt's eſtate, " ſhall ſtate the account between them, and one debt may be ſet " off againſt another; and what ſhall appear to be due on either " ſide on the balance of ſuch account, and on ſetting off ſuch " debts againſt one another, and no more, ſhall be claimed or " paid on either ſide reſpectively.

For this, before the ſtatutes of 5 Ann. and 5 Geo. 2., which have the ſame clauſe. *Vide* 2 Bulſt. 26. Mod. 215. Eq. Ca. Abr. 8. 2 Vern. 428.

[It hath been holden in one caſe, that the ſtatutes of ſet-off could not be pleaded by a debtor to a bankrupt in an action brought againſt him by the aſſignees; for as between them there could not be mutual debts, becauſe, as the debtor could have no action againſt the aſſignees, there could not be mutual remedies. But this deciſion hath been impeached in a later caſe, and it is now ſettled, that a defendant may ſet off a debt due to him from the bankrupt; for the aſſignees are to be conſidered as the bankrupt.

Ryall v. Larkin, 1 Wilſ. 155.

Ridout v. Brough, Cowp. 135. Lock v. Bennet, 2 Atk. 49.

Contingent debts, not due at the time of the bankruptcy, cannot be ſet-off.

Ex parte Groome, 1 Atk. 119. Hancock v. Entwiſsle, 3 Term Rep. 435.

A note indorſed to a debtor of the bankrupt after the bankruptcy cannot be ſet off.

Marſh v. Chambers, 2 Str. 1234.

Where there is a plain mutual credit, one party ſhall ſet off againſt the other, and the ſtatute is not to be conſtrued of dealings in trade only, or in caſe of mutual running accounts, but in all caſes of mutual credit the balance only ſhall be paid. Therefore where *Samuel Jones* borrowed 1500*l.* of *Coggs* on mortgage, and *Coggs* owed about 1400*l.* to *Jones* upon notes, *Jones* was allowed to ſet off his demand upon the notes againſt the mortgage.

1 P.W. 326. Billon v. Hyde, 1 Atk. 126. 1 Atk. 237. 1 Vez. 375. Laneſborough v. Jones, 2 P. W. 325.

But if *A.* and *B.* are joint traders, and *J. S.* is indebted to *A.* and *B.* on their joint account 100*l.*, and *A.* owes ſaid *B.* 100*l.* on two ſeparate accounts; *J. S.* cannot deduct ſo much as *A.*'s proportion of the 100*l.* comes to out of the joint debt; becauſe the co-partnerſhip debts of *A.* and *B.* are to be firſt paid before any ſeparate debts; but if there be a ſurplus beyond what will pay the partnerſhip debts, then, out of *A.*'s ſhare of the ſurplus, *J. S.* may deduct the ſeparate debt of *A.*

Vide ex parte Edwards, 1 Atk. 100., where Ld. Hardwicke doubted, Whether a perſon, a creditor under a ſeparate commiſſion againſt *A.*, and debtor under a joint commiſſion againſt *A.* and *B.*, can ſet off the debt he owes the latter, by his demand againſt the former.

Where *A.* was a creditor of the bankrupt for 100*l.* and 10*l.*, and a debtor to him on bond for 340*l.* payable on the 4th of *March* 1756, with lawful intereſt, and applied that he might ſet

Ex parte Preſcot, 1 Atk. 231. For, though

the debt be paid *after* the bankruptcy, yet, if it be in conſequence of a liability *before*, it may be ſet off. Smith v. Hodſon, 4 Term Rep. 211. French v. Fenn, there cited. Martin v. Court, 2 Term Rep. 640. Dobſon v. Lockhart, 5 Term Rep. 133.

off his demand of 100*l.* againſt the principal and intereſt due on the bond, and not be obliged to prove his debt under the commiſſion, and take a dividend upon it only; the Lord Chancellor ſaid, though this is not in ſtrictneſs a mutual debt, yet it is a mutual credit; for the bankrupt gives credit to the party in conſideration of the bond, though payable at a future day, and he gives the bankrupt credit for the debt upon ſimple contract, and therefore it is a caſe within the equity of the 5 *G.* 2.

Grove v. Dubois, 1 Term Rep. 112. Bize v. Dickſon, *id.* 285. S. P.

A broker having a *del credere* commiſſion may, under this ſtatute, give in evidence, upon the general iſſue, a loſs upon a policy happening before the bankruptcy in an action by the aſſignees of the underwriter, for premiums upon various policies underwritten by him.

Wilſon v. Watſon, Eſpin. *Ni. Pr.* 274.

But where there is no *del credere* commiſſion, the broker is not entitled to ſet off loſſes on goods which he inſured for other perſons, the debts being properly due to them, and not to the broker.

Whitehead v. Vaughan, Tr. 25 G. 3. B. R., and Parker v. Carter, in C. P. Tr. 28 G. 3. Co. *Bankrupt Laws*, 647. 649.

A broker is entitled to deduct money due from the bankrupt to him, for premiums, out of what he collects on the policy, where it is put into his hands to receive the money from the underwriters.

Wilkins v. Carmichael, Dougl. 97.

A demand againſt a bankrupt cannot be ſet off in an action by his aſſignees for *trover* and converſion, ſubſequent to the bankruptcy, of effects belonging to the bankrupt eſtate.

Gibſon v. *Hudſon's-Bay* Company, 1 Str. 645. 1 Eq. Ca. Abr. 9.

A company incorporated by charter, or act of parliament, cannot prevent the aſſignees of a bankrupt from ſelling any ſtock he is entitled to on account of a demand they may have againſt the bankrupt, for the rule relating to mutual credit does not apply to this caſe. But, if there is an expreſs bye-law to ſubject the ſtock of each member to ſatisfy the debts they may owe to the company, they are at liberty to hold it, and to account only for the balance.

Biſhop v. Church, 3 Atk. 691.

Debts due in different rights cannot be ſet off.]

§ 34.

By the ſaid ſtatute, "Whereas aſſignees are and may ſometimes "be prevented from making ſuch ſpeedy dividends of the eſtate and "effects of bankrupts, as by this act is intended, by reaſon of "debts due, or pretended and claimed to be due, from ſuch bankrupts, upon long and intricate accounts or demands, which "are diſputed or not admitted by the commiſſioners and creditors to be juſt and fair debts, and ſuch claimants are thereby "obliged to aſcertain ſuch their demands by actions or ſuits in "law or equity; which are oftentimes many years depending, "and many other differences and difficulties do ariſe under commiſſions of bankrupts, which might be determined by arbi-

[Creditors cannot give a general power to

"tration, if aſſignees had power to ſubmit the ſame: the aſſignees with conſent of the major part in value of the bankrupt's "creditors, who ſhall have duly proved their debts under ſuch

"commiſ-

" commiſſion, and who ſhall be preſent at any meeting of the " ſaid creditors, purſuant to notice for that purpoſe to be given " in the *London Gazette*, to ſubmit any difference or diſpute " between ſuch aſſignee or aſſignees, and any perſon or perſons " whatſoever, for or on account, or by reaſon or means of any " matter, cauſe, or thing whatſoever relating to ſuch bankrupt or " bankrupts, his, her, or their eſtate or effects, to the final end " and determination of arbitrators, to be choſen by the ſaid " aſſignee or aſſignees, and the major part in value of ſuch cre- " ditors, and the party or parties with whom they ſhall have " ſuch difference, and to perform the award of ſuch arbitrators, " or otherwiſe to compound and agree the matters in difference " and diſpute between them, in ſuch manner as the aſſignees, " with ſuch conſent as aforeſaid, ſhall think fit and can agree; " and the ſame ſhall be binding to all the creditors, and the af- " ſignees are hereby indemnified for what they ſhall fairly do ac- " cording to the direction aforeſaid."

aſſignees to ſubmit matters to arbitration, at their own diſcretion; but there muſt be a meeting of creditors upon notice in *Gazette*, to conſider each particular caſe. 1 Atk. 91. pl. 39.]

And by the ſaid ſtatute it is further enacted, " That any aſſig- " nee or aſſignees, made or choſen as aforeſaid, ſhall be, and is, " and are hereby empowered, by and with the conſent of the " major part of the bankrupt's creditors in value, who ſhall be " preſent at a meeting to be had for that purpoſe, of which pub- " lick notice ſhall be given in the *London Gazette*, to make com- " poſition with any perſon or perſons, debtors or accountants to " ſuch bankrupts, where the ſame ſhall appear neceſſary and rea- " ſonable, and to take ſuch reaſonable part as can upon compo- " ſition be gotten in full diſcharge of ſuch debts and accounts." § 35.

(H) Of the Diſtribution to be made of the Bankrupt's Eſtate.

BY the 13 *Eliz. cap.* 7. " The commiſſioners are to ſell, or " otherwiſe order the bankrupt's lands, *&c.* for the ſatiſ- " faction and payment of the creditors, to every creditor a por- " tion rate-like, according to the quantity of his debt.

If the commiſſioners make a fraudulent diſtribution, it may be ſet aſide in Chancery. 2 Vern. 158. 162. For the caſes which have been on this ſtatute, *vide* 2 Co. 26. 8 Co. 98. b. Jones, 203. 2 Sid. 177. Godb. 195. How diſtribution is to be under a joint commiſſion taken out againſt partners; *vide* Chan. Ca. 139. 2 Vern. 293. 706. and *infra* (L).

By 5 *G.* 2. *c.* 30. § 33. " Every perſon choſen aſſignee, ſhall " at ſome time after the expiration of four months, and within " twelve months from the time of iſſuing ſuch commiſſion, cauſe " at leaſt twenty-one days publick notice to be given in the *London* " *Gazette*, of the time and place the commiſſioners and aſſignees " intend to meet, to make a dividend, at which time the cre- " ditors who have not before proved their debts ſhall then be at " liberty to prove the ſame; which meeting for the city of *Lon-* " *don*, and all places within the bills of mortality, ſhall be at the " *Guildhall* of the ſaid city; and upon every ſuch meeting the aſ- " ſignee or aſſignees ſhall produce to the ſaid commiſſioners and " creditors then preſent, fair and juſt accounts of all receipts " and

[The Chancellor will not interfere till the four months have elapſed. Cooper v. Pepys, 1 Atk. 111. And it ſeemeth doubtful whether he will interfere until application hath

been made to the commiſſioners. See *ex parte* Whitchurch, *id.* 91. Co. *Bankrupt Laws*, 588. Aſſignee cannot ſtop creditor's dividend on account of his own private debt due from ſuch creditor. 1 Atk. 90. But *qu.* of this? and ſee *ex parte* Nockold, 29th June 1734. Co. *Bankrupt Laws*, 590. Upon affidavit of creditor that he has not read the *Gazette*, he will be admitted ſo as not to diſturb former dividends; and commiſſioners cannot proceed to make a ſecond till

" and payments touching the bankrupt's eſtate and effects, and " of what ſhall remain outſtanding, and the particulars thereof; " and ſhall, if the creditors then preſent, or the major part of " them, require the ſame, be examined upon oath, or, being of " the people called *Quakers*, upon ſolemn affirmation, before the " ſaid commiſſioners, or the major part of them, touching the " truth of ſuch accounts; and in ſuch accounts the aſſignees " ſhall be allowed, and retain all ſuch money as they ſhall " have expended in ſuing out and proſecuting ſuch commiſſion, " and all other juſt allowances on account of their being aſſig- " nees; and the commiſſioners, or the major part of them, ſhall " order ſuch part of the neat produce of the bankrupt's eſtate, " as ſhall appear to be in the hands of the aſſignees, as they or " the major part of them ſhall think fit, to be forthwith divided " amongſt the creditors who have duly proved their debts under " ſuch commiſſion, in proportion to their ſeveral and reſpective " debts; and the commiſſioners, or the major part of them, " ſhall make ſuch their order for a dividend, in writing, under " their hands, and ſhall order one part of ſuch order to be filed " amongſt the proceedings under the ſaid commiſſion, and ſhall " deliver unto each of the aſſignees a duplicate under the hands " of the commiſſioners; which order ſhall contain an account of " the time and place of making ſuch order, and the ſum total or " *quantum* of all the debts proved under the commiſſion, and the " ſum total of the money remaining in the hands of the aſſignees " to be divided, and how much in particular in the pound, is " then ordered to be paid to every creditor; and the aſſignees in " purſuance of ſuch order, and without any deed or deeds of " diſtribution to be made for that purpoſe, ſhall forthwith make " ſuch dividend, and ſhall take receipts from each creditor; and " ſuch order and receipt ſhall be an effectual diſcharge to ſuch " aſſignee, for ſo much as he ſhall fairly pay."

he is brought up equal to the creditors under the firſt, provided he hath obtained an order for that purpoſe. 1 Atk. 209.]

By § 37. " Within eighteen months next after the iſſuing of " any commiſſion, the aſſignees ſhall make a ſecond dividend of " the bankrupt's eſtate and effects, in caſe the ſame was not " wholly divided upon the firſt dividend, and ſhall cauſe a notice " to be inſerted in the *London Gazette*, of the time and place the " commiſſioners intend to meet; and for the creditors who ſhall " not before have proved their debts, to come and prove the " ſame; and at ſuch meeting every ſuch aſſignee ſhall produce " upon oath or affirmation, &c., his, her, or their account of " the bankrupt's eſtate and effects, and what upon the balance " thereof ſhall appear to be in his, her, or their hands; and " ſhall by the like order of the commiſſioners, or the major part " of them, be forthwith divided among ſuch of the bankrupt's " creditors who ſhall have made due proof of their debts, in pro- " portion to their ſeveral and reſpective debts; which ſecond di- " vidend ſhall be final, unleſs any ſuit at law or in equity ſhall " be depending, or any part of the eſtate ſtanding out that can-

" not

" not have been diſpoſed of, or that the major part of the cre-
" ditors ſhall not have agreed to be ſold and diſpoſed of in man-
" ner aforeſaid, or unleſs ſome other future eſtate or effects of
" the ſaid bankrupt ſhall afterwards come to or veſt in the aſ-
" ſignees; in which caſe they ſhall, as ſoon as may be, convert
" ſuch future or other eſtate and effects into money, in manner
" aforeſaid; and ſhall within two months next after the ſame
" ſhall be converted into money, by the like order of the com-
" miſſioners, or the major part of them, divide the ſame amongſt
" ſuch bankrupt's creditors who ſhall have made due proof of
" their debts under ſuch commiſſion."

[If a creditor has obtained an unfair poſſeſſion of the bankrupt's property, his ſhare of the dividend may be retained, until he gives up the property of which he hath ſo poſſeſſed himſelf.] *Ex parte* Smith, 3 Br. Ch. Rep. 46.

(I) How the Bankrupt is to demean himſelf; and herein of the Crime in not appearing, and diſcovering his Eſtate, and the Privilege he is to enjoy during his Attendance.

BY the 5 *Geo.* 2. *cap.* 30. *ſect.* 1. it is enacted, " That if any " perſon who ſhall become bankrupt, within the intent and " meaning of the ſeveral ſtatutes made, and now in force, con-
" cerning bankrupts, or any of them, and againſt whom a com-
" miſſion of bankrupt hath been awarded and iſſued out, where-
" upon the perſon or perſons againſt whom ſuch commiſſion hath
" iſſued, or ſhall iſſue, hath or have been, or ſhall be declared
" bankrupt or bankrupts, ſhall not within forty-two days after
" notice thereof in writing, to be left at the uſual place of abode
" of ſuch perſon or perſons, or perſonal notice in caſe ſuch per-
" ſon or perſon, be then in priſon, and notice given in the *Lon-*
" *don Gazette*, that ſuch commiſſion or commiſſions is, are, or
" have been iſſued, and of the time and place of a meeting of
" the commiſſioners therein named, or the major part of them,
" ſurrender (*a*) him, her, or themſelves to the ſaid commiſ-
" ſioners named in the ſaid commiſſion, or the major part of
" them, and ſign or ſubſcribe ſuch ſurrender, and ſubmit to be
" examined from time to time upon oath, or (being of the
" people called Quakers) upon the ſolemn affirmation by law ap-
" pointed for ſuch people, by and before ſuch commiſſioners, or
" the major part of them, by ſuch commiſſion authorized, and in
" all things conform to the ſeveral ſtatutes already made, and
" now in force, concerning bankrupts; and alſo upon ſuch his,
" her, or their examination, fully and truly diſcloſe and diſcover
" all his, her, or their effects and eſtate real and perſonal; and
" how and in what manner, to whom, and upon what conſi-
" deration, and at what time or times he, ſhe, or they have or
" hath diſpoſed of, aſſigned or transferred any of his, her, or
" their goods, wares, merchandizes, monies, or other eſtate and
" effects

(*a*) *Alexander Thompſon, an embroiderer by trade, was convicted for not ſurrendering, though his time had never been enlarged; and was executed in the beginning of the year 1756. [On a petition to Ld. Hardwicke, that the clerk of the commiſſion might be ordered to attend at the *Old Bailey*, with the proceedings upon a proſecution againſt the bankrupt for felony in not ſurrendering; his Lordſhip ſaid, that a court of equity will not lend its

aid to such a profecution; but that the petitioner muſt go on in ſuch manner as the law preſcribes to prove him a bankrupt and a felon, within the meaning of the act of parliament. 1 Atk. 221. Lord Macclesfield, his Lordſhip added, in ſeveral inſtances, ſuperſeded the commiſſion in order to prevent ſuch a proſecution, where a bankrupt did not ſurrender himſelf in due time; and there did not appear any intention in him to defraud his creditors. *id.* 222.]

" effects (and all books, papers, and writings relating thereto), " of which he, ſhe, or they was or were poſſeſſed, or in or to " which, he, ſhe, or they was or were any ways intereſted or " entitled, or which any perſon or perſons had or hath, or have " had in truſt for him, her, or them, or for his, her, or their " uſe, at any time before or after the iſſuing of the ſaid com- " miſſion, or whereby ſuch perſon or perſons, or his or their " family or families, hath or have, or may have or expect any " profit, poſſibility of profit, benefit, or advantage whatſoever, " except only ſuch part of his, her, or their eſtate and effects as " ſhall have been really and *bonâ fide* before ſold or diſpoſed of " in the way of his, her, or their trade and dealings, and ex- " cept ſuch ſums of money as ſhall have been laid out in the or- " dinary expence of his, her, or their family or families; and " alſo upon ſuch examination deliver up unto the ſaid com- " miſſioners by the ſaid commiſſion authorized, or the major " part of them, all ſuch part of his, her, or their the ſaid bank- " rupt's goods, wares, merchandizes, money, eſtate, and effects; " and all books, papers, and writings relating thereunto, as at " the time of ſuch examination ſhall be in his, her, or their " poſſeſſion, cuſtody, or power, (his, her, or their neceſſary " wearing apparel, and the neceſſary wearing apparel of the " wife and children of ſuch bankrupt only excepted;) then he, " ſhe, or they the ſaid bankrupt or bankrupts, in caſe of any " default and wilful omiſſion in not ſurrendering and ſubmitting " to be examined as aforeſaid; or in caſe he, ſhe, or they ſhall " remove, conceal (*a*), or embezzle any part of his, her, or their " eſtate real or perſonal, to the value of twenty pounds; or any " books of account, papers, and writings relating thereto, with " an intent to defraud his, her, or their creditors, (and being " thereof lawfully convicted by indictment or information,) ſhall " be deemed and adjudged to be guilty of felony, and ſhall " ſuffer as felons, without benefit of clergy, or the benefit of " any ſtatute made in relation to felons; and in ſuch caſes " ſuch felons' goods and eſtate ſhall go and be divided among " the creditors ſeeking relief under ſuch commiſſion; any law, " uſage, *&c.*"

(*a*)*Richard Town, a tallow-chandler by trade, was convicted for concealing his effects, and was the first perſon who ſuffered capitally by the bankrupt laws; he was executed 12 Dec. 1712. John Perrott was convicted of a like concealment, and executed in Nov. 1762. *Vide* 2 Burr. 1216.

The commiſſioners may ſummon the bankrupt perſonally to attend them before the

By § 2. " The commiſſioners may appoint within the ſaid " forty-two days (ſo appointed as aforeſaid) for the bankrupt to " ſurrender and conform, not leſs than three ſeveral meetings, " for the purpoſes aforeſaid, the laſt of which ſhall be on the " forty-ſecond day hereby limited for ſuch bankrupt's appear- " ance."

firſt day appointed in the *Gazette* for his examination. 2 Eq. Caſ. Abr. 99. pl. 8. [They have alſo power to examine him, as to a farther diſcloſure of his eſtate and effects, after he has paſſed, what is uſually called, his laſt examination. 2 Burr. 1124.]

[If by a *mere innocent* default

By § 3. " The lord chancellor or lord keeper, or commiſ- " ſioners, may enlarge the time for ſurrendering, *&c.*, as the " ſaid

" ſaid lord chancellor, &c. ſhall think fit, not exceeding fifty " days, to be computed from the end of the ſaid forty-two " days, ſo as ſuch order for enlarging the time be made by the " ſaid lord chancellor, &c. ſix days at leaſt before the time on " which ſuch perſon or perſons was or were ſo to ſurrender " him, her, or themſelves, and make ſuch diſcovery as afore- " ſaid."

of the bankrupt, he has neglected to ſurrender himſelf on the day appointed, the chancellor may, upon petition, make an order, that the commiſſioners appoint a new day for taking the examination. *Ex parte* Graham, 2 Br. Ch. Rep. 48. *Ex parte* Bould, *id.* 49. *Ex parte* Smith, Co. *Bankrupt Laws*, 521. *Ex parte* Rogers, Ambl. 307. *Ex parte* Grey, 1 Vez. jun. 195. *Ex parte* White, 2 Br. Ch. Rep. 47. But ſuch order will not avoid the effect of the ſtatute; it is only declaratory of the opinion of the court, that the bankrupt had no intention of keeping out of the way fraudulently. It therefore recites the ſpecial circumſtances of the caſe. See the above authorities.]

By § 4., " Every ſuch bankrupt, after any aſſignee ſhall be " choſen and appointed, ſhall deliver upon oath, before one of " the maſters of the high court of Chancery, or before any juſ- " tice of the peace within his reſpective juriſdiction, all his, her, " or their books of accounts, papers, and writings not ſeized by " the meſſenger of the ſaid commiſſion, or not before delivered " up to the commiſſioners, or the major part of them, and then " in his, her, or their cuſtody or power, and diſcover ſuch as " are in the cuſtody or power of any other perſon or perſons " that any ways relate to or concern his, her, or their eſtate or " effects; and all and every ſuch bankrupt or bankrupts not in " priſon or cuſtody, ſhall at all times after ſuch ſurrender as " aforeſaid be at liberty, and is and are hereby required to at- " tend ſuch aſſignee or aſſignees, upon every reaſonable notice in " writing for that purpoſe given by ſuch aſſignee or aſſignees, " unto ſuch bankrupt or bankrupts, or left for him, her, or " them, at his, her, or their houſe or place of abode, in order " to aſſiſt, and ſhall aſſiſt ſuch aſſignees in making out the ac- " counts of the ſaid bankrupt's eſtate and effects."

[It ſeemeth doubtful, whether the bankrupt can be compelled to a performance of his duty after the forty-two days, or the enlarged time fixed for his ſurrender, are elapſed. *Ex parte* Turner, 1 Atk. 148.]

By § 5., " Every bankrupt, having ſurrendered as aforeſaid, " ſhall at all ſeaſonable times before the expiration of the ſaid " forty-two days, or ſuch further time as ſhall be allowed to ſuch " bankrupts to finiſh his, her, or their examination, be at li- " berty to inſpect his, her, or their books, papers, and writings " in the preſence of ſuch aſſignee or aſſignees, or ſome perſon " to be appointed by ſuch aſſignee or aſſignees for that purpoſe, " and to take and bring with him, her, or them, for his, her, " or their aſſiſtance, ſuch perſons as he, ſhe, or they ſhall think " fit, not exceeding two perſons at any one time, and to make " out ſuch extracts and copies from thence as he, ſhe, or they " ſhall think fit, the better to enable him, her, and them to " make a full and true diſcovery and diſcloſurre of his, her, or " their eſtate and effects; *and in order* (a) *thereto the ſaid bank-* " *rupt or bankrupts ſhall be free from all arreſts, reſtraint, or im-* " *priſonment of any of his, her, or their creditors in coming to ſur-* " *render, and from the actual ſurrender of ſuch bankrupt to the ſaid* " *commiſſioners, for and during the ſaid forty-two days, or ſuch* " *further time as ſhall be allowed to ſuch bankrupt or bankrupts for* " *finiſhing*

[(a) This is a particular privilege to enable the bankrupt to ſurrender; and, until actual ſurrender, confined to the act of his going *with that view*; not a *general* privilege during the whole time which the act allows him to ſurrender in. Nevertheleſs, if a bankrupt be abroad, and upon his re-

turn with an intention to surrender, be arrested on his landing, before he can conveniently make his surrender, the privilege shall extend to him; but it must appear that he was actually going to surrender. Kenyon v. Solomon, Cowp. 156. Co. *Bankrupt Laws*, 142. A bankrupt may be taken, and surrendered by his bail within the time of privilege; for this act is no protection but against the suits of creditors. *Ex parte* Gibbons, 1 Atk. 238.]

" *finishing his, her, or their examinations as aforesaid*, provided " such bankrupt was not in custody at the time of such surren- " der and submission to be examined; and in case such bankrupt " shall be arrested for debt, or on any escape warrant, coming " to surrender him or herself to the said commissioners, or " after his or her surrender shall be so arrested within the time " before-mentioned, that then on producing such summons or " notice, under the hands of the said commissioners, assignee " or assignees, to the officer who shall arrest him, her, or them, " and making it appear to such officer that such notice of sum- " mons is signed by the said commissioners, or the major part of " them, or such assignee or assignees, and giving such officer a " copy thereof, shall be immediately discharged; and in case " any officer shall detain such bankrupt or bankrupts (after he, " she, or they shall have shewn such notice or summons to him, " and made it appear that it was signed as aforesaid) in his cus- " tody, such officer shall forfeit and pay to such bankrupt, for " his own use, the sum of 5*l.* for every day such officer shall de- " tain such bankrupt, to be recovered by action of debt, in any " of his majesty's courts of record at *Westminster*, in the name " of such bankrupt, with full costs of suit."

§ 6. " *Provided*, That in case any bankrupt be in prison or in cus- " tody at the time of the issuing of the said commission as afore- " said, and is willing to surrender and submit to be examined, ac- " cording to the directions of this act, and can be brought before " the said commissioners and creditors for that purpose, the ex- " pence thereof shall be paid out of the said bankrupt's estate " and effects; but in case such bankrupt is in execution, or " cannot be brought before the commissioners, that then the " acting commissioners shall from time to time attend the said " bankrupt in prison or custody, and take his or her discovery, as " in other cases; and the assignees of the said estate shall have " power, and are hereby required to appoint one or more per- " sons to attend such bankrupt, being in prison or in custody, as " aforesaid, from time to time, and to produce to him or her, " his or her books, papers, and writings, in order to prepare " his or her last discovery and examination, according to the " directions before-mentioned, a copy whereof the assignees of " the said estate shall apply for, and the said bankrupt shall " deliver to them, or their order, ten days at least before such " examination."

By § 36., " After such bankrupt shall have obtained his certi- " ficate, and the same shall be duly confirmed, such bankrupt " shall give his attendance upon every reasonable notice in writ- " ing, to be given to or left at his usual place of abode, by the " assignees or their order, thereby requiring him to attend the " assignees, in order to make up, adjust, or settle any account " between such bankrupt and any debtor to or creditor of such " bankrupt's estate, or to attend any court of record, in order to " be

" be examined touching the ſame, or for ſuch other buſineſs " as ſuch aſſignee ſhall judge neceſſary for getting in the ſaid " bankrupt's eſtate and effects, for the benefit of his creditors; " for which attendance the bankrupt ſhall be allowed and paid " the ſum of 2*s.* 6*d. per diem*, by ſuch aſſignee out of the bank- " rupt's eſtate; and in caſe ſuch bankrupt ſhall neglect to attend, " or on ſuch attendance ſhall refuſe to aſſiſt in ſuch diſcovery, " without good and ſufficient cauſe to be ſhewn to the commiſ- " ſioners, or the major part of them, for ſuch neglect or re- " fuſal, to be by them allowed as ſufficient, ſuch aſſignee making " due proof thereof upon oath before the ſaid commiſſioners " authoriſed as aforeſaid, or the major part of them, they are " hereby empowered and required to iſſue a warrant directed to " ſuch perſon as they ſhall think proper for apprehending ſuch " bankrupt, and him to commit to the county gaol, there to re- " main in cloſe cuſtody, without bail or mainprize, until he " ſhall duly conform to the ſatisfaction of the ſaid commiſ- " ſioners authoriſed as aforeſaid; and be by the ſaid commiſ- " ſioners, or the ſpecial order of the lord chancellor, or other- " wiſe by due courſe of law, diſcharged; and ſuch gaoler, or " keeper of ſuch priſon, to which ſuch bankrupt ſhall be com- " mitted, is to keep ſuch perſon in cloſe cuſtody, within the " walls of the ſaid priſon, until duly diſcharged, *&c.*"

[The bankrupt has no right to maintenance out of his effects during his examination. Thomſon v. Councel, 1 Term Rep. 157.]

(K) Of the Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate.

BY 13 *Eliz. cap.* 7., " Upon requeſt by the bankrupt, the commiſſioners ſhall declare how they have beſtowed his " lands, *&c.*, and pay the overplus to the bankrupt, *&c.*"

[See *acc.* 1 J. 1. c. 15. § 15. If the bankrupt's eſtate is more than ſufficient to pay 20*s.* in the pound, he is entitled to the ſurplus; but all creditors by bonds, contracts, or notes carrying intereſt, are entitled to receive intereſt out of the eſtate for the principal ſum owing at the time of the commiſſion, before any ſurplus ſhall be conveyed to the bankrupt or his repreſentative. *Ex parte* Rooke, 1 Atk. 245. Bromly v. Goodere, *id.* 80. *Ex parte* Hyde, Dec. 1783. *Ex parte* Morris, 3 Br. Ch. Rep. 79. *Ex parte* Hankey, *id.* 504. *Ex parte* Champion, *id.* 438. But *qu.* of this right of the creditor to intereſt?]

By the 5 *Geo.* 2. *cap.* 30. § 7. it is enacted, " That every " bankrupt, who ſhall by the time limited in this act ſurrender " to the acting commiſſioners, and in all things conform, as in " and by this act is directed, ſhall be allowed the ſum of 5*l. per* " *cent.* out of the neat produce of all the eſtate that ſhall be re- " covered in and received, which ſhall be paid unto him by the " aſſignees, in caſe the neat produce of the ſaid eſtate, after ſuch " allowance made, ſhall be ſufficient to pay the creditors of the " ſaid bankrupt, who have proved their debts under the ſaid " commiſſion, the ſum of 10*s.* in the pound, and ſo as the ſaid " 5*l. per cent.* ſhall not amount in the whole to above the ſum " of 200*l.*; and in caſe the neat produce of the eſtate ſhall, over " and

[1 Jac. 1. c. 15. A clauſe to the ſame effect. Bankrupts are not entitled to allowance under this act, till a *final* dividend is made, and they have had their certificate. 1 Atk. 208. The allow-

ance is a veſted intereſt, and tranſmiſſible to the bankrupt's repreſentative. *Ex parte* Trap, *id. ibid.* *Ex parte* Calcot, *id.* 209. 3 Atk. 814. S. C. The ſame perſon is not entitled to a double allowance; one, in reſpect of a joint, and the other, in reſpect of a ſeparate eſtate. *Ex parte* Bate, Co. *Bankrupt Laws*, 592. Nor does the ſtatute give a diſtinct allowance of 300*l* to each partner, when joint creditors are paid 15*s*. in the pound. *Ibid.*

" and above the allowance hereafter mentioned, be ſufficient to " pay the ſaid creditors the ſum of 12*s*. 6*d*. in the pound for " their reſpective debts, that then every perſon ſo conforming " ſhall be allowed the ſum of 7*l*. 10*s*. *per cent.* out of ſuch neat " produce, to be paid by the aſſignees, ſo as ſuch 7*l*. 10*s*. *per* " *cent.* ſhall not amount in the whole to above the ſum of 250*l*. " And in caſe the neat produce of the eſtate ſhall, over and " above the allowance hereafter made, be ſufficient to pay the " ſaid creditors the ſum of 15*s*. in the pound for their reſpective " debts, that then every ſuch perſon ſo conforming, ſhall be " allowed the ſum of 10*l*. *per cent.* out of ſuch neat produce, to " be paid by the aſſignees, ſo as ſuch 10*l*. *per cent.* ſhall not " amount in the whole to above the ſum of 300*l*., and every " ſuch bankrupt ſhall be diſcharged from ſuch debts owing at the " time that he did become bankrupt; and in caſe any ſuch " bankrupt ſhall afterwards be arreſted, proſecuted, or em- " pleaded for any debt due before ſuch time as he became bank- " rupt, ſuch bankrupt ſhall be diſcharged upon (*a*) common " bail, and ſhall and may plead in general (*b*), that the cauſe of " ſuch action or ſuit did accrue before ſuch time as he, ſhe, or " they became bankrupt, and may give this act and the ſpecial " matter in evidence (*c*); and the certificate of ſuch bankrupt's " conforming, and the allowance thereof, according to the di- " rections of this act, ſhall be and ſhall be allowed to be ſuffi- " cient evidence of the trading, bankruptcy, commiſſion, and " other proceedings, precedent to the obtaining of ſuch certificate, " and a verdict ſhall thereupon paſs for the defendant, unleſs the " plaintiff in ſuch action can prove the ſaid certificate was ob- " tained unfairly and by fraud, or unleſs the plaintiff in ſuch ac- " tion can make appear any concealment by ſuch bankrupt to " the value of 10*l*.; and if a verdict paſs for the defendant, " or the plaintiff ſhall become nonſuited, or judgment be given " againſt the plaintiff, the defendant ſhall recover his full coſts.

(*a*) If there is any appearance of fraud on the part of the bankrupt, the court will not interfere in this ſummary way. Vincent v. Brady, 2 H. Bl. 1. Sowley v. Jones, 2 Bl. Rep. 725. (*b*) The defendant may plead thus generally, without ſtating that he hath conformed according to the bankrupt acts. Willan v. Geordini, Tr. 1782, B. R. The caſe of Paris v. Salkeld, 2 Wilſ. 139. *contr.* denied to be law. He muſt be careful to ſtate, that the cauſe of action accrued before the bankruptcy. Charlton v. King, 4 Term Rep. 156. As this plea concludes to the country, the plaintiff may give the ſpecial matter, on which the action is brought, in evidence, to ſhew that he is not barred by the certificate; for it opens the whole merits of the queſtion in evidence on both ſides. Alſop v. Price, Dougl. 160. This point, however, hath been queſtioned by high authority; and it hath been thought, that the plaintiff ſhould ſet out in his declaration, the matter of which he wiſhes to avail himſelf.] (*c*) Before this act, the bankrupt's certificate was no evidence of the bankruptcy. Str. 533.

§ 8. " Provided, That if the neat proceed of ſuch bankrupt's eſ- " tate, ſo to be diſcovered, recovered, and received, together " with what ſhall be otherwiſe recovered and received, ſhall not " amount to ſo much as will pay all and every the creditors of " ſuch bankrupt who ſhall have proved their debts under the " ſaid commiſſion the ſum of 10*s*. in the pound for their reſpec- " tive debts, after all charges firſt had and deducted, that then " and in ſuch caſe ſuch bankrupt ſhall not be allowed the ſum of " 5*l*. *per cent.* out of ſuch eſtate as ſhall be ſo recovered in, but " ſhall

" ſhall be allowed and paid by the aſſignees ſo much money as
" the ſaid aſſignees and commiſſioners authoriſed ſhall think fit to
" allow to ſuch bankrupt, not exceeding 3*l. per cent.*

" Provided, That in caſe any commiſſion of bankruptcy ſhall § 9.
" iſſue againſt any perſon or perſons, who after the 24th day of
" *June* 1732, ſhall have been diſcharged by virtue of this act, or
" ſhall have compounded with his creditors, or delivered to them
" his eſtate or effects, and been releaſed by them, or been diſ-
" charged by any act for the relief of inſolvent debtors, after
" the time aforeſaid, that then and in either of theſe caſes, the
" body only of ſuch perſon conforming as aforeſaid, ſhall be free
" from arreſt and impriſonment by virtue of this act, but the fu-
" ture eſtate and effects of every ſuch perſon ſhall remain liable
" to his creditors, as before the making of this act, (the tools of
" trade, the neceſſary houſehold goods and furniture, and neceſ-
" ſary wearing apparel of ſuch bankrupt and his wife and chil-
" dren, only excepted,) unleſs the eſtate of ſuch perſon ſhall pro-
" duce clear, after all charges, ſufficient to pay to every creditor
" under the ſaid commiſſion, 15*s.* in the pound for their reſpec-
" tive debts.

" Provided, That no diſcovery upon oath or ſolemn affirma- § 10.
" tion, to be made by any bankrupt of his eſtate and effects
" purſuant to this act, ſhall entitle ſuch bankrupt to the benefits
" allowed by this act, unleſs the commiſſioners, or the major
" part of them, ſhall, in writing under their hands and ſeals,
" (*a*) certify to the lord chancellor, that ſuch bankrupt hath made
" a full diſcovery of his eſtate and effects, and in all things
" conformed himſelf according to the directions of this act, and
" that there doth not appear to them any reaſon to doubt of the
" truth of ſuch diſcovery, or that the ſame is not a full diſcovery
" of all ſuch bankrupt's eſtate and effects; and unleſs four parts
" in five in number and value of the creditors of ſuch bankrupt
" who ſhall be creditors for no leſs than 20*l.* reſpectively, and
" who ſhall have duly proved their debts under ſuch commiſſion,
" or ſome other perſon by them reſpectively duly authoriſed
" thereunto, ſhall ſign ſuch certificate, and teſtify their conſent
" to ſuch allowance and certificate, and to the ſaid bankrupt's
" diſcharge, in purſuance of this act, to be alſo certified by ſuch
" commiſſioners; but the ſaid commiſſioners ſhall not certfy the
" ſame till they ſhall have proof by affidavit or affirmation in
" writing of ſuch creditors, or of the perſon by them reſpectively
" authoriſed for that purpoſe, ſigning the ſaid certificate; and
" of the power and authority by which any perſon ſhall be au-
" thoriſed by any creditor to ſign ſuch certificate for any cre-
" ditor; which affidavit or affirmation, together with ſuch war-
" rant or authority to ſign, ſhall be laid before the lord chancel-
" lor, in order for the allowing and confirming the ſame; and
" unleſs ſuch bankrupt make oath that ſuch certificate and con-
" ſent of the creditors thereunto were fairly obtained, and with-
" out fraud; and unleſs ſuch certificate ſhall, after ſuch oath or
" affirmation of the bankrupt, be allowed and confirmed by the
" lord

(*a*) Upon this clauſe of the ſtatute, it hath been ſaid, that a *mandamus* will not lie to compel the allowance of the certificate; for it is diſcretionary; firſt, in the commiſſioners, and afterwards, in the chancellor, to grant or refuſe it, according to the behaviour of the bankrupt. 1 Atk. 82. The chancellor, having then the power of granting or refuſing the certificate, can, of courſe, poſtpone it. And this he will do if creditors live at a diſtance, in order to

give them an opportunity of coming in, and proving their debts. *Ex parte* Williamson, 1 Atk. 82. 2 Vez 249. *Ex parte* Sausmerez, 1 Atk. 84. Or if the commissioners seem

" lord chancellor, lord keeper, or commissioners for the custody " of the great seal of *Great Britain* for the time being, or by " such two of the justices of the courts of *King's Bench*, *Common* " *Pleas*, or barons of the court of *Exchequer* at *Westminster*, to " whom the consideration of such certificate shall be referred by " the lord chancellor; and any of the creditors of such bankrupt " are to be allowed to be heard, if they shall think fit, before " the respective persons aforesaid, against the making such cer- " tificate, and against the confirmation thereof; nor shall any " commissioner sign such certificate till after four parts in five in " number and value of the said creditors shall have signed the " same."

to have been over-hasty in signing it. *Id. ibid.* But he will not stay it, in order to give a creditor an opportunity of proving his debt, who does not account for his delay in not applying earlier. *Ex parte* Adams, 2 Br. Ch. Rep. 48.; nor upon the application of creditors whose demands are not liquidated; but depend on an account to be taken, especially if they do not swear to a balance in their favour. *Ex parte* Johnson, 1 Atk. 81. For, unless a person proves a debt, or shews a reasonable ground for a claim, he is not competent to assent to, or dissent from, the certificate. 1 Atk. 83. A certificate, allowed in the bankrupt's life-time, may be confirmed after his death; for it deriveth its operative force from the consent of the creditors, and, when confirmed, hath relation to the time when such consent was given. 1 Atk. 77. But the relation doth not operate so as to defeat an execution, or to vest in the bankrupt effects coming to him between the signing and allowing of the certificate. Callen v. Meyrick, 1 Term Rep. 361. Tudway v. Bourn, 2 Burr. 716. An executor may sign the certificate; but a person who hath a debt in his own right, and another debt as executor, cannot sign in each distinct right; for, to this purpose, both are considered as his own particular debt. *Ex parte* Sausmerez, 1 Atk. 85. If the property of the principal creditor, upon his death, devolves upon the bankrupt, the bankrupt himself may sign the certificate; for, otherwise, his person could never be released, as no one else is or can be qualified to sign it for him. Green, 260.]

[By statute 24 *G.* 2. *c.* 57. § 9. it is enacted, " That where " any person shall fraudulently swear or depose, or, being of the " people called Quakers, affirm, before the major part of the " commissioners named in any commission of bankruptcy, or by " affidavit or affirmation exhibited to them, that a sum of money " is due and owing to him or her from any bankrupt or bank- " rupts, which shall in fact not be really and truly so due and " owing; and shall, in respect of such fictitious or pretended " debt, sign his or her consent to the certificate for such bank- " rupt's discharge from his debts; in every such case, unless such " bankrupt shall, before such time as the major part of the said " commissioners shall have signed such certificate, by writing by " him to be signed and delivered to one or more of the said " commissioners, or to one or more of the assignees of his estate " and effects under such commission, disclose the said fraud, and " object to the reality of such debt, such certificate shall be null " and void to all intents and purposes; and such bankrupt shall " not in that case be entitled to be discharged from his debts, or " to have or receive any of the benefits or allowances given or " allowed to bankrupts by the act of 5 *G.* 2. *c.* 30."

And by § 10., " Where any creditor or creditors of any " bankrupt reside in foreign parts, the letter of attorney of such " creditor, attested by a notary publick in the usual form, shall " be a sufficient evidence of the power and authority by which " any person thereby authorised shall sign any bankrupt's cer- " tificate."]

By

By the 5 *G.* 2. *c.* 30. § 11. it is enacted, "That every bond, "bill, note, contract, agreement, or other ſecurity whatſoever, "to be made and given by any bankrupt, or by any other per- "ſon, unto, or to the uſe of, or in truſt for any creditor or "creditors, or for the ſecurity of the payment of any debt or "ſum of money due from ſuch bankrupt at the time of his be- "coming bankrupt, or any part thereof, between the time of his "becoming bankrupt and ſuch bankrupt's diſcharge, as a conſi- "deration, or to the intent to perſuade him, her, or them to "conſent to or ſign any ſuch allowance or certificate, ſhall be "wholly void and of no effect, and the monies thereby ſecured "or agreed to be paid, ſhall not be recovered or recoverable; "and the party ſued on ſuch bond, bill, note, contract, or "agreement ſhall and may plead the general iſſue, and give this "act and the ſpecial matter in evidence.

[See Sumner v. Brady, 1 H. Bl. 647. Robſon v. Calze, Dougl. 228. Jones v. Berkley, *id.* 695. As it is illegal for a creditor to take, ſo it is for him to retain money given him for ſigning the certificate. Smith v. Bromley, Dougl. 696. Cockſhot v. Bennet, 2 Term Rep. 766. An agreement to pay a ſum of money to the aſſignees, if they will ſign the certificate, is within the letter and reaſon of this clauſe. Dougl. 695.]

§ 12. "Provided, That nothing in this act ſhall be conſtrued to ex- "tend, or give or grant any privilege, benefit, or advantage to "any bankrupt whatſoever againſt whom a commiſſion of bank- "rupt under the great ſeal hath iſſued, or hereafter ſhall iſſue, "who hath or ſhall, for or upon marriage of any of his or her "children, have given, advanced, or paid above the value of "100*l.*, unleſs he or ſhe ſhall prove, or by his or her books "fairly kept, or otherwiſe, upon his or her oath, or, being of "the people called *Quakers*, upon ſolemn affirmation, before "the major part of the commiſſioners in ſuch commiſſion named "and authoriſed, that he or ſhe had at the time thereof, over "and above the value ſo given, advanced or paid, remaining in "goods, wares, debts, ready money, or other eſtate real or per- "ſonal, ſufficient to pay and ſatisfy unto each and every perſon "to whom he or ſhe was any ways indebted, their full and "entire debts; or who hath or ſhall have loſt in any one day, "the ſum or value of 5*l.*, or in the whole, the ſum or value of "100*l.* within the ſpace of twelve months next preceding his, "her, or their becoming bankrupt, in playing at or with cards, "dice, tables, tennis, bows, billiards, ſhovelboard, or in or by "cock-fighting, horſe-races, dog-matches, or foot-races, or other "paſtimes, game or games whatſoever, or in or by bearing a "ſhare or part in the ſtakes, wagers, or adventures, or in or by "betting on the ſides or hands of ſuch as do or ſhall play, act, "ride, or run as aforeſaid; or that within one year before he or "ſhe became bankrupt, ſhall have loſt the ſum of 100*l.* by one "or more contracts for the purchaſe, ſale, refuſal, or delivery "of any ſtock of any company or corporation whatſoever, or any "parts or ſhares of any government or publick funds or ſecuri- "ties, where every ſuch contract was not to be performed "within one week from the time of the making ſuch contract, "or where the ſtock or other thing ſo bought or ſold, was "not

[Ld. Hardwicke ſaid, that this clauſe muſt be conſtrued ſtrictly, and not extended further than the children of the bankrupt. 1 Atk. 86. Inſuring in the lottery is not gaming within this clauſe. Lewis v. Piercy, 1 H. Bl. 29. Nor is it any ground for oppoſing the certificate, that the bankrupt kept a lottery-office, or obtained goods under falſe pretences. *Ex parte* Richardſon, 21ſt Dec. 1791. Co. *Bankrupt Laws*, 555. A creditor under 20*l.* though excluded from

assenting to or dissenting from the

" not actually transferred or delivered in pursuance of such " contract."

certificate, yet, like a creditor who elects to proceed at law, hath a right to petition against the allowance of it; and for the same reason, because he is affected by the consequences of the allowance. *Ex parte* Allen, Vin. Abr. tit. *Creditor and Bankrupt*, (S. a) pl. 18.]

§ 13. It is further enacted, " That if any bankrupt, who " shall have obtained his certificate, and such certificate shall " have been allowed and confirmed, shall be taken in execution " or detained in prison, on account of any debts due or owing " before he became bankrupt, by reason that judgment was ob- " tained before such certificate was allowed and confirmed, it " shall and may be lawful for any one or more of the judges " of the court wherein judgment has been so obtained against " such bankrupt, on such bankrupt's producing his certificate al- " lowed and confirmed, to order any sheriff or sheriffs, bailiff " or officer, gaoler, or keeper of any prison, who hath or shall " have any such bankrupt in his custody by virtue of any such " execution, to discharge such bankrupt out of custody on such " execution, without payment of any fee or reward; and such " sheriff or sheriffs, bailiff or officer, gaoler or keeper, is and are " hereby required to discharge such bankrupt out of custody ac- " cordingly, and is and are hereby indemnified from any action " for an escape for his or their so doing."

Horsey's case, 3 P. W. 23. Twiss v. Massey, 1 Atk. 67. Wickes v. Strahan, 2 Str. 1157. *Ex parte* Simpson, 1 Atk. 138. *Ex parte* Goodwyn, 2 Vern. 696. Blackhall v. Combs, 2 P. W. 70.

[As to the effect of the certificate, it discharges the bankrupt from all debts, both joint and separate, that might have been proved under the commission; therefore, it discharges a bankrupt from a debt accruing before the act of bankruptcy, though judgment is not obtained till after the certificate allowed.

As where a bankrupt had given a bail-bond to the sheriff which was forfeited before the bankruptcy for non-appearance, and an action was brought upon this bail-bond, but judgment not obtained till after the certificate allowed; the court held there was a breach, and that the penalty was forfeited, and therefore the debt was due, though execution could not be taken out for more than the damages.

Bouteflower v. Coats, Cowp. 25. 2 Str. 1042. Ca. Temp. Hardw. 267.

Bird v. Jones, Mich. 29 G. 3. B. R. Co. *Bankrupt Laws*, 566.

Again, *Jones* had employed *Bird*, who was an attorney, to recover a debt. *Bird* undertook the business and recovered the money, but, as *Jones* alleged, had not paid over to him the fair balance, and in 1788, he applied to the court of King's Bench, of which court *Bird* was an attorney, for the usual rule of reference to the master, on an undertaking to pay what should appear due. *Bird* shewed cause, but the rule was made absolute, after which, and before any proceedings upon it, *Bird* became bankrupt, and in 1788 obtained his certificate. A rule was now obtained to revive the former rules, but, on shewing cause, the court discharged that rule, saying the certificate was a clear bar to the demand. They also said, that after such lapse of time, the court would not proceed to give relief in a summary way. The party might proceed as he should be advised.

So

So if a perſon enters into a bond with a trader as a ſurety for him, and, for his own indemnity, takes a counter-bond payable the day before the firſt; though the trader become bankrupt before either of the bonds be payable, the party may yet prove his bond under the commiſſion. Martin v. Court, 2 Term Rep. 640.

A., wanting money, prevails with *B.* to lend him his name, by indorſing his note to be diſcounted at the bank; and gives him, as a ſecurity, a debenture, making it negotiable. *B.* pledges the debenture with another perſon, for money advanced to him. *A.* pays the note at the bank, and ſoon afterwards *B.* becomes a bankrupt, and then *A.* redeems the debenture by paying the money, for which it remained a pledge. This is a debt proveable by *A.* under *B.*'s commiſſion, and diſcharged by the certificate. Johnſon v. Spiller, Dougl. 167.

If an executor becomes bankrupt, a veſted legacy, though liable to be deveſted, may be proved under the commiſſion, and is, of courſe, diſcharged by the certificate. Walcot v. Hall, 2 Br. Ch. Rep. 305.

The certificate is a bar to an action brought againſt the huſband for a debt due from the wife, *dum ſola*, becauſe by the marriage it becomes a debt due from the huſband. Miles v. Williams, 1 P.W. 249.

In an action of *debt* for rent, the certificate will be a bar, becauſe the aſſignment of the leaſe by the commiſſioners is conſidered as an aſſignment by the aſſent of the leſſor, all perſons being ſuppoſed to conſent to an act of parliament, by the authority of which the commiſſioners aſſign the bankrupt's property; and therefore as the bankrupt is no longer in the enjoyment of the thing demiſed, *debt* does not lie for the rent. Cantrel v. Graham, Barnes, 69. So in *debt* on the *reddendum* of a leaſe. Wadham v. Marlow, M. 25 G. 3. B.R.

Mills v. Auriol, 1 H. Bl. 433. *Secùs* of *covenant* for non-payment of rent. *Ibid.*

If a man be attached for non-payment of money in obedience to an award, and afterwards become bankrupt, the certificate entitles him to his diſcharge; for as the act diſcharges the duty, it would be hard to detain the perſon. Baker's caſe, 2 Str. 1152.

On a motion to enter an *exoneretur* on the bail-piece, it appeared, that the defendant had been a bankrupt, and obtained a certificate under the great ſeal of *Ireland*. The original demand aroſe upon a bill of exchange drawn in *Ireland*, and payable by the defendant who reſided there. Lord *Mansfield* ſaid, it is a general principle, that where there is a diſcharge by the law of one country, it will be a diſcharge in another. That he remembered a caſe in Chancery of a *ceſſio bonorum* in *Holland*, which is held a diſcharge in that country, and it had the ſame effect here. The rule was enlarged, and was afterwards made abſolute by conſent, the counſel giving it up upon the authority of *Burrows* v. *Jemino*. Ballantine v. Golding, Mich. 24 G. 3. B.R. The bankrupt laws are now adopted in *Ireland*. *Ex parte* Burton, 1 Atk. 255. 2 Stra. 733.

A certificate obtained pending an action, but too late to be pleaded, diſcharges the bankrupt from the original debt and ſubſequent coſts. But it hath been determined, that, if after the certificate the bankrupt's goods are taken in execution, the court will not proceed in a ſummary way (*a*), but put the party to his *audita querela*. Palmby v. Maſters, Barnes, 368. Graham v. Benton, 2 Str. 1196. 1 Will. 42. Blandford v.

Foote, Cowp. 138. Lewis v. Piercy, 1 H. Bl. 29. (*a*) Calcraft v. Swan, Barnes, 204.; and qu. Whether the courts would now put the party to that expence?

A certificate

Cowp. 25. Stra. 868. 1043. 1160. 1 Atk. 119. 129. 3 Wilf. 13. 262. Rex v. Eginton, 1 Term Rep. 369., and *ſupra* (E).

A certificate does not diſcharge a bankrupt from a contingent debt which has not been reduced to a certainty, becauſe it cannot be proved under the commiſſion, and in queſtions, Whether a debt is diſcharged or not by a certificate? the point agitated has always been, whether it could be proved or not; the creditor's right to prove, and the bankrupt's right to be diſcharged by the certificate, being reciprocal and co-extenſive.

Mayor v. Steward, 4 Burr. 2443. Ludford v. Barber, 1 Term Rep. 86.

A certificate will not diſcharge the bankrupt from his own expreſs collateral covenant which doth not run with the land. Thus, on a covenant by the bankrupt to indemnify the aſſignor againſt covenants contained in a leaſe, which leaſe was aſſigned to the bankrupt before his bankruptcy, for his ſole benefit; the queſtion was, Whether the bankrupt's obtaining his certificate would bar this action of covenant? The court were clearly of opinion, that as this was not a caſe between leſſor and leſſee, but a diſtinct, detached, collateral, independent covenant and contract, and as the aſſignor could have no remedy under the commiſſion, the bankrupt was not diſcharged by his certificate.

Cockeril v. Owſton, 1 Burr. 474.

The certificate obtained after judgment upon a bail-bond againſt the bankrupt himſelf will not diſcharge the bail-bond, although it diſcharged the original debt, for it is a new and diſtinct cauſe of action.

Goodtitle v. North, Dougl. 584. Gulliver v. Drinkwater, Dougl. 168.

Bankruptcy is no plea in bar to an action of *treſpaſs for meſne profits;* for where damages are uncertain, they cannot be proved under the commiſſion.

2 Term Rep. 261. A demand in *trover*, if for a liquidated amount, may be proved. But if *A.* lend ſtock to *B.*, to be replaced as ſtock, without naming any particular day, and *B.* become a bankrupt before any requeſt by *A.* to replace the ſtock, *A.* cannot come in under *B.*'s commiſſion. Utterſon v. Vernon, 4 Term Rep. 570.

Howard v. Jemmet, 1 Bl. 400.

A bankrupt executor pleading a falſe plea, after the commiſſion iſſued, is liable to execution for the coſts, for he becomes a debtor by his falſe plea, which amounts to contracting a new debt ſubſequent to the commiſſion.

Anon. 1 Atk. 262.

The crown not being affected by the bankrupt laws, the certificate will not diſcharge the bankrupt from a commitment under an extent.

1 Atk. 84. See Taylor v. Mills, Cowp. 525. Young v. Hockley, 2 Str. 1043. 1 Atk. 84.

The allowing of the certificate of a bankrupt will not diſcharge his ſureties; and if they are forced to pay the debt after the commiſſion, the certificate will be no bar to their recovering it of the principal.

Wooley v. Cobbe, 1 Burr. 234.

But if a bankrupt obtains his certificate before his bail are fixed, it will diſcharge them. *Secùs*, if not till after they are fixed.

Tudway v. Bourn, 2 Burr. 716. Walker v. Giblet, 2 Bl. 812.

Thornton v. Dallas, Dougl. 46.

A certificate under a ſecond commiſſion will not protect future effects, unleſs fifteen ſhillings in the pound are paid under the ſecond commiſſion, notwithſtanding the firſt has been ſuperſeded.

Martin v. O'Hara, Cowp. 823.

But a certificate under a ſecond commiſſion, during the ſubſiſtence of the firſt, is a mere nullity.

Ex parte Proudfoot, 1 Atk. 252. *Ex parte* Brown, 4 Br. Ch. Rep. 210.

As

As the certificate diſchargeth only ſuch debts as are proveable under the commiſſion; as the ſtatutes leave the bankrupt at liberty to enter into new engagements, and contract new debts; and as the debts proveable under the commiſſion are, notwithſtanding the certificate, due in conſcience; a new promiſe or agreement by the bankrupt, to pay the whole, or part of ſuch debts, will, therefore, be obligatory on him. *Ex parte* Burton, 1 Atk. 255. Twiſs v. Maſſey, *id.* 67. Truman v. Fenton, Cowp. 544. The payment of intereſt by the *bankrupt himſelf* on a bond, will be ſuch an admiſſion, as will make him liable as on a new debt. Alſop v. Brown, Dougl. 192. See too, Besford v. Saunders, 2 H. Bl. 116. But if the bankrupt promiſe to pay, *when he is able, query*, Whether it be not incumbent on the plaintiff to prove his ability? *Id.*

The certificate determines the power of the commiſſioners, and, of courſe, incapacitates them from making a ſubſequent aſſignment. 1 P. Wms. 386.

The certificate may be entirely defeated by a *ſuperſedeas*. 1 Atk. 145.

And the writ of *ſuperſedeas* may be iſſued at the diſcretion of the chancellor, when the creditors, who have proved, agree to ſuperſede the commiſſion; or becauſe the party appears not to have been a trader, or was an infant, or had not committed an act of bankruptcy, or that the commiſſion was not opened till ſix months after it iſſued, or that it has not been proſecuted within fifteen days from the date of it, if executed in *London*, or within twenty-nine days, if in the country, or that he has paid all his creditors. 1 Vern. 208. 2 Ch. Ca. 292. Sel. Ch. Ca. 46. 1 Atk. 135. 146. 2 P. Wms. 545. 4 Br. Ch. Rep. 432.

So if the petitioning creditor had not a legal debt to the amount ſpecified in the ſtatute, or if his debt accrued ſubſequent to an act of bankruptcy aſcertained by a trial at law, or if it iſſued againſt an uncertificated bankrupt, or on a debt barred by the ſtatute of limitations, or if at the time it iſſued the petitioning creditor had the debtor in execution, or if it was fraudulently iſſued, in which caſe, indeed, the court will puniſh the parties concerned by commitment, and by making them pay the coſts. 2 Bl. Rep. 702. 1 Str. 653. 4 Br. Ch. Rep. 210. 3 Wilſ. 271. 1 Ves. jun. 394.

But upon an application to the lord chancellor, on the part of the bankrupt, to ſuperſede the commiſſion upon a legal objection to it, if the caſe appear unfavourable, as if a great length of time has intervened between the iſſuing of the commiſſion and the application, the chancellor will not grant an iſſue to try the bankruptcy, but leave the party to bring his action. However, if creditors apply to have the commiſſion ſuperſeded, it ſeemeth the chancellor will order the bankruptcy to be tried in an iſſue, becauſe they can have no action at law, in which the validity of the commiſſion can be conteſted, as the bankrupt's certificate is a concluſive bar againſt them, that of itſelf being evidence of the commiſſion, *&c.* 1 Atk. 102. *Ex parte* Gulſton, 1 Atk. 193. 139.

Though the uſual courſe is for the lord chancellor to order a feigned iſſue to try the bankruptcy at law; yet if the commiſſion appears plainly to have been taken out fraudulently and vexatiouſly, the court will at once ſuperſede it, and order the petitioning creditor's bond to be aſſigned. Richardſon v. Bradſhaw, 1 Atk. 128. 218. *Ex parte* Gayter, 1 Atk. 144.

But

Ex parte Goodwin, 1 Atk. 100.

But where a commiſſion is ſuperſeded merely becauſe there is a defect in form, as to the petitioning creditor's debt, and no doubt as to the act of bankruptcy, the coſts of the *ſuperſedeas* only ſhall be allowed; but it would be otherwiſe, if the act of bankruptcy was not fully proved.

(L) Of Partners.

Allan v. Hartley, M. 25 G. 3. B. R. Co. *Bankrupt Laws*, 7.

A Separate commiſſion may iſſue againſt one partner without making the reſt bankrupts. But where a joint commiſſion is proſecuted, all the partners muſt be included; for a commiſſion againſt two or more of ſeveral partners, is neither joint nor ſeparate.

But by ſtat. 10 Ann. c. 15. § 3. the certificate, under a ſeparate commiſſion, will not diſcharge any other than the bankrupt partner, from a joint debt. It was formerly the practice to take out a ſeparate commiſſion againſt each partner, and then a joint commiſſion againſt all; the chancellor, upon recent application, directing the former to be ſuperſeded, in order to give validity to the latter, under which both ſets of creditors might have their proper relief. 1 Atk. 98. 138. But it ſeemeth now to be holden, that whilſt there is a ſeparate commiſſion ſubſiſting, a joint one cannot be ſupported. Cowp. 824. 1 Atk. 252. 4 Br. Ch. Rep. 210. Co. *Bankrupt Laws*, 9.

See 15. Ves. Jun. 115. Coll. Bankr. Law 457.

Co. *Bankrupt Laws*, 297.

Ex parte Sandon, 1 Atk. 68. *Ex parte* Crowder, 2 Vern. 706. *Ex parte* Bond, 1 Atk. 98. *Ex parte* Rowlandſon, 3 P. W. 405. Goſs v. Du Freſnoy, Davies, 373. *Ex parte* Cook, 2 P. W. 501.

Joint creditors are entitled to a diſtribution of the joint or partnerſhip eſtate, without the ſeparate creditors being permitted to participate with them: but notwithſtanding ſeparate creditors are not entitled to ſhare the dividend of the joint property, until the joint creditors have received twenty ſhillings in the pound, yet they are upon petition let in to prove their reſpective ſeparate debts under the joint commiſſion, *paying contribution to the charge of it;* and as the joint or partnerſhip eſtate is in the firſt place to be applied to pay the joint or partnerſhip debts, ſo in like manner, the ſeparate eſtate ſhall be in the firſt place applied to pay all the ſeparate debts. This is ſettled as a rule of convenience, and it is reſolved, that if there be a ſurplus of the joint eſtate, beſides what will pay the joint creditors, the ſame ſhall be allotted in due proportion to the ſeparate eſtate of ſuch partner, and applied to pay the ſeparate creditors. And if there be on the other hand a ſurplus of the ſeparate eſtate, beyond what will ſatisfy the ſeparate creditors, it ſhall go to ſupply any deficiency that may remain as to the joint creditors.

Ex parte Baudier, 1 Atk. 98. *Ex parte* Oldknow, 8 May 1783, Co. *Bankrupt Laws*, 299.

This mode of adjuſting the rights of each claſs of creditors, where a joint commiſſion is taken out, ſeems at one time to have been extended by the court into a rule, to direct the proof of debts under a ſeparate commiſſion, by virtue of which the ſeparate eſtate only can be aſſigned, and therefore it was holden, that joint creditors could not prove under ſuch a commiſſion, except for the purpoſe of aſſenting to, or diſſenting from, the bankrupt's certificate.

Ex parte Hodgſon, 2 Br. Ch. Rep. 5.

But it is now fully eſtabliſhed, that joint creditors may be permitted to prove under ſeparate commiſſions, and receive a dividend in proportion with the ſeparate creditors.

Ex parte Page, *id.* 119. *Ex parte* Flintam, 1 Br. Ch. Rep. 120. *Ex parte* Hayden, 24th June 1785. *Ex parte* Copland, 24th Dec. 1787.

Where

Where the aſſignees under a ſeparate commiſſion poſſeſs themſelves of the joint property, it may frequently be to the intereſt of the joint creditors, that diſtinct accounts ſhould be kept of the joint and ſeparate eſtate, and each applied to the payment of the reſpective creditors; and an order to this purpoſe may, *with conſent*, be obtained upon petition: but as the ſolvent debtor hath an intereſt in the diſtribution of the joint property, and the demands which may be made upon it, if he do not conſent, relief cannot be had without a bill. 1793. Co. *Bankrupt Laws*, 311, 12.

Hankey v. Garrat, 3 Br. Ch. Rep. 457. *Ex parte* Lydiard, 19th May 1790. Lafabloniere v. Swinton, 18th June

Where perſons in trade have been connected in various partnerſhips, and a joint commiſſion is taken out againſt them all, an order hath been made for keeping diſtinct accounts of the different partnerſhips, as well as the ſeparate eſtates of each partner. But where there have been various partnerſhips, and a joint commiſſion is taken out againſt one firm, in which ſome of the parties were not engaged, there can be only the common order for keeping the diſtinct accounts of the joint and ſeparate eſtate.

Ex parte Marlin, 2 Br. Ch. Rep. 15.

Ex parte Parker, 22d Dec. 1791. Co. *Bankrupt Laws*, 314.

Where there is a joint and ſeveral creditor, he muſt, according to the rule of the court now firmly eſtabliſhed, make his election whether he will come in upon the joint or the ſeparate eſtate, that is, which he will come in upon in *preference*; for whichever he may elect, he will be entitled to come in upon the ſurplus of the other, if there ſhould be any. And in order (*a*) to make his election, he muſt have a reaſonable time to inquire into the ſtate of the different funds; and it hath been determined, that he is entitled to defer his election until a diviſon, 3 P. Wms. 405. (*a*) *Ex parte* Clowes, 2 Br. Ch. Rep. 595.

Ex parte Blankenhagen, June 23, 1785. *Ex parte* Banks, 1 Atk. 106. *Ex parte* Bond and Hill, 1 Atk. 98. *Ex parte* Rowland-

A. lent money upon bond to *B.* and *C.*; *B.* became bankrupt, and afterwards *A.* ſued *C.* upon the bond, and took him in execution, but conſented to his diſcharge. Upon application by *A.* to Lord *Harcourt*, to prove under *B.*'s commiſſion; his lordſhip permitted him to come in as a creditor for a moiety; and ſaid he would have admitted him for the whole, if, in fact, the whole had been lent to *B.*

Ex parte Smith, 1 P. Wms. 237.

If one truſtee ſuffer a co-truſtee to detain a ſum of money belonging to the truſt eſtate, they are both liable, and if they afterwards become bankrupt, the debt may be proved under both their commiſſions.

Keble v. Thompſon, 3 Br. Ch. Rep. 112.

Partners being joint-tenants in their ſtock and effects, both original and accruing, and therefore ſeiſed *per my et per tout*, upon an account being taken, each is entitled to be allowed againſt the other any thing he has brought in as a partnerſhip tranſaction, and to charge the other in account with what that other has not brought in, or has taken out more than he ought; and nothing is to be conſidered as his ſhare, but his proportion of the reſidue upon balance of the account. Upon this principle, where one of three partners had embezzled and waſted the joint ſtock, and contracting private debts become a bankrupt; the court ſeemed to think, that out of the produce of the goods,

Weſt v. Skipp, 1 Vez. 242. Cowp. 471. 2 Ld. Raym. 871. 1 Salk. 392. 1 Show. 173. Dougl. 650. 2 Ch. Ca. 139. 12 Mod. 446. Richardſon v. Goodwin, 2 Vern. 293.

See too, Goſs v. Dufreſnoy, Davies, 371. Hankey v. Garrat, 3 Br. Ch. Rep. 457.

goods, the debts owing by the joint trade ought to be paid in the firſt place, and that out of the bankrupt's ſhare, ſatisfaction muſt be made for what he had waſted or embezzled; and that the aſſignees could be in no better caſe than the bankrupt himſelf, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

Hague v. Rolleſton, 4 Burr. 2176. Cowp. 471.

An act of bankruptcy, if followed by a commiſſion, is a diſſolution of the partnerſhip, by virtue of the relation in the ſtatutes which avoids all the acts of the bankrupt from the day of the bankruptcy, and from the neceſſity of the thing; all his property being veſted in the aſſignees, who cannot carry on a trade.

Fox v. Hanbury, Cowp. 448.

Upon a queſtion, Whether aſſignees under a joint commiſſion againſt two partners taken out after the bankruptcy of both, could maintain an action of *trover* againſt a perſon in poſſeſſion of goods under a ſale, or conſignment, *bonâ fide*, for a valuable conſideration, and without any mixture of fraud, from one of the partners, who had not then committed any act of bankruptcy himſelf, but after an act of bankruptcy committed by the other partner; the court held, the action could not be maintained, becauſe the act of the partner, who, at the time of the conſignment, had not committed any act of bankruptcy, bound both, and alſo becauſe, ſuppoſing the conſignment avoided by the act of bankruptcy of the other party, then it is an action of *trover* by one tenant in common againſt another, which cannot be.

Smith v. De Silva, Cowp. 469.

One of three partners in a ſhip and cargo, the coſt and out-fit of which was 4,568*l.*, pays only 410*l.* in part of his third ſhare, and gives his notes for the remainder; but, before they become due, is declared a bankrupt. The other partners cannot, by voluntarily diſcharging the notes, ſtand in his place for any ſhare of the profits; but the aſſignees are entitled to a full third, both of the profits of the adventure, and the value of the ſhip.

Ex parte Hunter, 1 Atk. 227. Co. *Bankrupt Laws*, 602. *Ex parte* Batſon, 1 Vez. jun. 267.

If a partner is a creditor upon the partnerſhip-fund, he can have no ſatisfaction but out of the ſurplus which ſhall remain after the joint creditors are paid. And Lord *Hardwicke* ſaid, that where there are joint and ſeparate creditors, if one partner lends a ſum of money to the partnerſhip, the creditors of his ſeparate eſtate have a right to this in the firſt place.

Ex parte Burrell, 22d July 1783. *Ex parte* Pine, 2d of Aug. 1783. Co. *Bankrupt Laws*, 605.

But the contrary has been determined in a caſe where there was a joint commiſſion againſt two partners, and a ſeparate one againſt one of them. The petitioners, aſſignees under the ſeparate commiſſion, petition to be admitted creditors under the joint commiſſion, for a ſum of money brought by their bankrupt into the partnerſhip beyond his ſhare, and as being therefore a creditor on the partnerſhip for that ſum; but were refuſed on the principle, that he cannot be a creditor on the partnerſhip in competition with the joint creditors.

Ex parte Batſon, 20th Jan. 1791.

So where one partner hath taken more than his ſhare out of the partnerſhip-fund, the joint creditors, as the rule ſeems to be now

now ſettled, cannot be admitted to prove againſt the ſeparate eſtate of the partner who drew out the money, until his ſeparate creditors are ſatisfied, unleſs it can be ſhewn, that the partner acted fraudulently with a view to benefit his ſeparate creditors at the expence of the joint creditors.

Co. *Bankrupt Laws*, 608. In the caſe of Fordyce, who had taken property from the partnerſhip fund, and applied the ſame to his own uſe, without the knowledge of his partners, the aſſignees, on the behalf of the joint creditors, were allowed to prove againſt the ſeparate eſtate. *Ex parte* Cuſt, 29th March 1774. Co. *Bankrupt Laws*, 609.

Where there were two partners, and one had taken out more money from the partnerſhip-ſtock than his ſhare amounted to, and therefore became a debtor for ſo much; Lord *Talbot* was of opinion, that the partnerſhip creditor had a right to come upon the ſeparate eſtate of the partner who was ſo indebted.

Ex parte Drake, cited in 1 Atk. 225. Craven v. Knight, 2 Ch. Rep. 226.

If one partner is an executor or truſtee, and, *with the knowledge of his co-partner*, lends the truſt-fund to the eſtate, it becomes a debt which may be proved againſt the joint eſtate: *Secùs*, if *without* the knowledge of the co-partner.]

Ex parte Apſey, 3Br. Ch. Rep. 165.

Bargain and Sale.

BARGAIN and ſale is a contract in conſideration of money, paſſing an eſtate in lands by deed indented and enrolled: This manner of conveying lands is created and eſtabliſhed by the 27 *H.* 8. *cap.* 10., which executes all uſes raiſed; and, as this hath introduced a more ſecret way of conveyancing than was known to the policy of the common law, therefore the enrolment of the deed of bargain and ſale was made neceſſary by the 16th chapter of the ſtatute; but the learning on this head depending on ſtatutes, it is firſt proper to recite that,

2 Inſt. 672. [See further, Weſt Symb. part 1. lib. 2. § 393. Termes de la Ley, tit. *Bargain and Sale.* Cowel, tit. *Bargain and Sale.*

By the 27 *H.* 8. *cap.* 10., "Where any perſon or perſons ſtands "or is, or ſtand or are ſeiſed of or in any honours, *&c.*, lands, tene- "ments, rents, ſervices, *&c.*, to the uſe, confidence, or truſt of "any other perſon or perſons, or body politick, by reaſon of any "bargain, ſale, feoffment, *&c.*; ſuch perſon or perſons, *&c.*, that "have any ſuch uſe, ſhall be deemed and adjudged in lawful "ſeiſin, eſtate, and poſſeſſion thereof, to all intents and pur- "poſes, of or in ſuch like eſtates as they have in the uſe, *&c.*; "and the eſtate, right, and poſſeſſion of him and them ſo ſeiſed "to any uſe, *&c.*, ſhall be deemed and adjudged in him or them "which have the uſe, *&c.*, after ſuch quality, manner, *&c.* as "they had before in or to the uſe, *&c.*

Ld. Bacon's *Uſe of the Law*, Mo. 41. Touchſt. 221. 2 Bl. Comm. 338. So there is a bargain and ſale, where a man makes a contract with another for the ſale of goods or chattels, and at the ſame time makes the ſale of them. Com. Dig. tit. *Bargain and Sale*, (A). Touchſt. 221. It is ſaid, that

that a *bargain* and *ſale* is not ſo ſtrong a conveyance as a livery; for, if I have a rent-charge out of the manor of *D.*, and afterwards purchaſe the manor; and afterwards, by deed indented and enrolled, I bargain and ſell the manor, the rent-charge ſhall not paſs. 1 Leon. 6. By *feoffment* or *fine*, all uſes and poſſibilities are conveyed by reaſon of the forcible operation; but it is otherwiſe by *bargain* and *ſale*. 1 Leon. 33. A bargain and ſale doth not paſs away, or affect a *contingent* uſe in the bargainor; but a feoffment or fine would transfer it. Hardr. 416.]

[Deeds were enrolled at common law for their preſervation, though not to paſs any eſtate. Sty. 370. The eſtate paſſeth not by the ſtatute of enrolment, but by the ſtatute of uſes. Dimmock's caſe, Hob. 136. The objects of the ſtatute of enrolment

By the 27 *H.* 8. *cap.* 16., "No manors, lands, tenements, or "other hereditaments ſhall paſs from one to another, whereby "any eſtate of inheritance of freehold ſhall be made or take ef- "fect, or any uſe thereof to be made, by reaſon only of any "bargain and ſale, except by writing indented, ſealed, and en- "rolled in one of the courts at *Weſtminſter*, or elſe within the "county or counties where the lands, *&c.* ſo bargained and ſold "lie, before the *cuſtos rotulorum*, and two juſtices of peace, and "the clerk of the peace of, *&c.*, or two of them, whereof the "clerk of the peace to be one; the ſame enrolment to be "made within ſix months after the date of the ſame writing "indented.

"Provided this act extends not to any lands, *&c.* lying within "any city, borough, *&c.*, wherein the mayors, *&c.* or other officers "have uſed to enrol any evidences, deeds, or other writings "within their precinct or limits."

evidently were, firſt, to force the contracting parties to aſcertain the terms of the conveyance by reducing it into writing; ſecondly, to make the proof of it eaſy, by requiring their ſeals to it, and conſequently, the preſence of a witneſs; and, laſtly, to prevent the frauds of ſecret conveyances, by ſubſtituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this proviſion, which, if it had not been evaded, would have introduced an almoſt univerſal regiſter of conveyances of the freehold in the caſe of corporeal hereditaments, was ſoon defeated by the invention of the conveyance by leaſe and releaſe, which ſprung from the omiſſion to extend the ſtatute to bargains and ſales for terms of years; and the other parts of the ſtatute were neceſſarily ineffectual in our courts of equity, becauſe theſe were ſtill left at liberty to compel the execution of truſts of the freehold, though created without deed or writing. The inconveniencies, however, from this inſufficiency of the ſtatute, are now, in ſome meaſure, prevented, by the 29 Car. 2. c. 3. which provides againſt conveying any lands or hereditaments for more than three years, or declaring truſts of them, otherwiſe than by writing. Hargr. Co. Lit 43. a. n. 3.]

By the 5 *Eliz. cap.* 26., "Bargains and ſales of lands, *&c.* in "the county of *Lancaſter*, being within ſix months enrolled in "the Chancery at *Lancaſter*, or before the judges of aſſiſe there, "of lands, *&c.* in *Cheſhire*, in the Exchequer at *Cheſter*, or be- "fore the judges of aſſiſe there, of lands, *&c.* in the biſhoprick "of *Durham*, in the Chancery at *Durham*, or before the juſtices "of aſſiſe there, ſhall be as effectual as if enrolled in any courts "at *Weſtminſter*. Provided this act extends not to any lands "lying within any city, *&c.* wherein the mayors, *&c.*"

[By 5 *Ann. c.* 18., Bargains and ſales of any manors, lands, *&c.* within the *Weſt Riding* of the county of *York*, which ſhall be enrolled before the regiſtrar for the ſaid *Weſt Riding*, or his deputy for the time being, in the publick office at *Wakefield*, ſhall be as good and available, as if the ſame had been enrolled in one of the king's courts of record at *Weſtminſter*, or before the *cuſtos rotulorum*, and two juſtices of the peace, and the clerk of the peace of the ſaid *Weſt Riding*, or two of them, according to the ſtatute of the 27th *H.* 8.—By 6 *Anne*, *c.* 35. § 16., the like proviſion is made for enrolling bargains and ſales in *Beverley* of lands within

within the *East Riding* of the county of *York*, or the town and county of the town of *Kingston upon Hull;* and by § 30. of that ſtatute it is enacted, "That in all deeds of bargains and ſales "enrolled in purſuance of that act, whereby *any eſtate of inherit-* "*ance in fee-ſimple* is limited to the bargainee and his heirs, the "words *grant*, *bargain*, and *ſell*, ſhall amount to and be conſtrued "and adjudged in all courts of judicature, to be expreſs cove- "nants to the bargainee, his heirs and aſſigns, from the bar- "gainor, for himſelf, his heirs, executors, and adminiſtrators, "that the bargainor, notwithſtanding any act done by him, was "at the time of the execution of ſuch deed, ſeiſed of the heredi- "taments and premiſes thereby granted, bargained, and ſold, of "an indefeaſible eſtate in fee-ſimple, free from all incumbrances "(rents and ſervices due to the lord of the fee only excepted), and "for quiet enjoyment thereof againſt the bargainor, his heirs and "aſſigns, and all claiming under him, and alſo for further aſſur- "ance thereof to be made by the bargainor, his heirs and aſ- "ſigns, and all claiming under him; unleſs the ſame ſhall be re- "ſtrained and limited by expreſs particular words contained in "ſuch deed; and that the bargainee, his heirs, executors, ad- "miniſtrators, and aſſigns reſpectively, ſhall and may, in any "action to be brought, aſſign a breach or breaches thereupon, as "they might do in caſe ſuch covenants were expreſsly inſerted in "ſuch bargain and ſale."—By 8 *Geo.* 2. *c.* 6. § 21., the enrol- ment of bargains and ſales of lands in the *North Riding* of the county of *York* is authoriſed in the regiſter-office for that Riding.

By the 33 *Geo.* 2. *c.* 30. § 10., being an act for widening certain ſtreets, *&c.* in *London*, it is enacted, That all bargains and ſales made and acknowledged by any perſon or perſons whomſoever, *which ſhall be enrolled in the huſtings of the ſaid city*, of any lands, tenements, and hereditaments, purchaſed by virtue of and for the purpoſes of that act, ſhall have the force, effect, and operation in law, to all intents and purpoſes, which any fine or fines, recovery or recoveries whatſoever, would have if levied or ſuffered by the bargainor or bargainors, or any perſon or perſons ſeiſed of any eſtate in the premiſes, in truſt for, or to the uſe of, ſuch bargainor or bargainors, in any legal manner or form whatſoever.]

We ſhall now conſider,

(A) Who may bargain and ſell, and to whom.

(B) What may be bargained and ſold [and how a Bargain and Sale ſhall be taken].

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made uſe of.

(D) Of the Conſideration.

(E) Of the Enrolment.

And herein,

1. The Relation between the Enrolment and the Deed.
2. What Eſtates are to be enrolled; and herein of the Exception as to Lands in Cities, Boroughs, &c.
3. The Time of Enrolment.

(F) The Manner of pleading Bargains and Sales.

(A) Who may bargain and ſell, and to whom.

Bro. *Feoffment to Uſes*, 37. Hard. 468. Poph. 72.

THE king, and all other perſons that cannot be ſeiſed to a uſe, cannot bargain and ſell; for at common law, when a man had ſold his land for money without giving livery, the uſe only paſſed in equity, and this is now executed and becomes a bargain and ſale by the ſtatute; but antecedent to any ſuch execution there muſt be a uſe well raiſed, which cannot be without a perſon capable of being ſeiſed to a uſe, which the king is not, there being no means to compel him to perform the uſe or truſt; for the Chancery has only a delegated power from the king over the conſciences of his ſubjects; and the king, who is the univerſal judge of property, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's eſtate as a truſtee.

10 Co. 96. 98. Sand. 260, 261. Co. Lit. 359. b. [(*a*) But not an eſtate in fee ſo determinable, but only a deſcendible freehold. Anon. Carter, 208.] (*b*) And creates no forfeiture. 4 Leon. 124.

If tenant in tail bargains and ſells his land in fee, this paſſeth an eſtate determinable (*a*) upon the life of tenant in tail; for, at common law, the uſe could not be granted of any greater eſtate than the party had in him; now tenant in tail had an inheritance in him, but he could diſpoſe of it only during his own life; and therefore when he ſells the uſe in fee, *ceſtui que uſe* hath a kind of inheritance yet determining within the compaſs of a life; and the ſtatute executes it in the ſame manner as he hath the uſe, and conſequently he will have ſome properties of a tenant in fee, and ſome of a tenant for life only: but if tenant for life bargains and ſells in fee, this paſſeth only an eſtate for (*b*) life, for he could not paſs the uſe of an eſtate for life to the bargainee, and the ſtatute executes the poſſeſſion as the party hath the uſe.

If a huſband, ſeiſed of lands in right of his wife, or tenant in tail, bargains and ſells the trees growing on the lands, and dies before ſeverance, the bargainee cannot afterwards cut them down and take them away.

Kelw. 84. Co. Lit. 265. But if the ſon makes a feoffment of

If a ſon and heir bargains and ſells the inheritance of his father, this is void, becauſe he hath no right to transfer; the ſame law of a (*c*) releaſe.

the inheritance of his father, this paſſeth an eſtate during the ſon's life; for it is a *diſſeiſin* to the father; and the ſon, after the father's death, cannot avoid it; for no man can allege an injury in any voluntary act of his own. Co. Lit. 265. a. (*c*) But if the ſon releaſeth with warranty, he and his heirs are for ever hereafter barred by the rebutter. Co. Lit. 265. a.

If there be two jointenants, and one of them make a bargain and ſale of his own eſtate in fee, and the other die before enrolment, the other moiety ſhall ſurvive to the bargainor; for ſince the freehold is in the bargainor, the inheritance continues; but if ſuch jointenant had bargained and ſold (*a*) *totum ſtatum ſuum* in fee, though he died before enrolment, yet if the deed were afterwards enrolled, the moiety would not ſurvive, but would paſs to the bargainee. Cro. Jac. 53. Co. Lit. 186. Bulſt. 3.

[(*a*) This diſtinction is not warranted by the authorities referred to, nor is it to be found in any caſe-book wherein this caſe is reported. Br. tit. *Faits enroll.* p. 11. Cro. Car. 217. 569. Bac. Max. Reg. 14. Brook, in his Abridgment, uſeth the general words, "all his lands and tenements in *D.*;" and ſaith, that they will not paſs the entierty, becauſe the enrolment hath relation to the delivery of the deed; and, of courſe, can paſs no more than the bargainor had at the time of the delivery. The bargain and ſale, it hath been ſaid, occaſions, of itſelf, *before* enrolment, a ſeverance of the jointenancy. Owen, 70. *arguendo.*]

[If a mortgagor entreats a ſtranger to redeem the land at the day, and covenants by indenture, that after ſuch redemption the ſtranger ſhall have the land to him and his heirs; and that he, in conſideration of ſuch a ſum, will ſtand ſeiſed to the uſe of him and his heirs; the ſtranger redeems the land at the day the mortgagor enters, and the deed is enrolled within ſix months; yet nothing paſſeth, becauſe he had not any eſtate or intereſt therein at the time to contract for it.] Cro. El. 402. cited as adjudged in 10 Eliz. Bac. Max. Reg. 14.

If an infant bargains and ſells his land by deed indented and enrolled, he may plead non-age at any time; for, notwithſtanding the ſtatute, the bargainee claims by the deed as at common law, which was, and therefore is ſtill, defeaſible by non-age. 2 Inſt. 673.

If a wife joins with her huſband in a bargain and ſale by deed indented and enrolled of her lands, yet it ſhall not bind her; for the wife cannot be examined by any court without writ, and there is no writ allowed in this caſe, which is for the better ſecurity of wives, who are by our law entirely ſubjected to the will of the huſband. 2 Inſt. 673. 10 Co. 43. [But a fine, and recovery upon it, will bind the wife. Mo. 22. By cuſtom, the deed itſelf will bind her. Br. Abr. tit. *Faits enroll.* pl. 10.]

A man may bargain and ſell to a corporation, for they may take a uſe, though the money be given by the governors in their natural capacity. 10 Co. 24. 34. 2 Roll. Abr. 788.

A man may bargain and ſell to his ſon, but then the conſideration of money ought to be expreſſed, and it ought to have all the other circumſtances of a bargain and ſale: but this ſhall operate as a covenant to ſtand ſeiſed, if there be none but the conſideration of natural love and affection expreſſed. 7 Co. 40. 2 Co. 24. Cro. Eliz. 394. Vent. 137. Lev. 56.

(B) What may be bargained and ſold, [and how a Bargain and Sale ſhall be taken.]

ANY freehold or inheritance in poſſeſſion, reverſion, or remainder, upon an eſtate for years, or life, or in tail, may be bargained and ſold, but the deed ſhall be enrolled. 2 Co. 54. Dyer, 309. 2 Inſt. 671.

2 Inſt. 671. 2 Roll. Rep. 204. *contr.* 2 Inſt. 671.

But a man ſeiſed of a freehold may bargain and ſell it for years, and this ſhall be executed by the ſtatute of uſes; but it need not be enrolled by the ſtatute of enrolments.

2 Co. 35, 36. Poph. 76. Sir T. Jones, 217.

A man poſſeſſed of a term cannot bargain and ſell it ſo as to be executed by the ſtatute.

1 Co. 126. And. 327. Jones, 179. [Upon a bargain and ſale according to the ſtatute, a rent may be reſerved. 2 Co. 54.]

A rent *in eſſe* may be bargained and ſold, becauſe this is a freehold within the ſtatute; and before the ſtatute a rent newly created might have been bargained and ſold, becauſe when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery ſupplied them: but it ſeems, that ſince the ſtatute, a rent newly created cannot be bargained and ſold, becauſe there ought to be a freehold in ſome other perſon, to be executed in *ceſtui que uſe*; but here can be no ſeiſin of this rent in the bargainor, becauſe no man can be ſeiſed of a rent in his own land, and conſequently there can be no eſtate to be executed in the bargainee.

Cro. Jac. 189. Beaudly v. Brook.

If *A.*, by indenture enrolled, bargains and ſells lands to *B.* and his heirs, with a way over other of the lands of *A.*, this is void as to the way; for nothing but an uſe paſſes by the deed, and there can be no uſe of a thing not *in eſſe*, as a way, common, *&c.*, before they are created.

1 Co. 87. b. 100. b. Co. Lit. 10. a. Br. tit. *Contract, Bargaine, et Achate*, pl. 1.

[Before the ſtatute of *H.* 8., if a man had bargained his land for money generally, without the words "his heirs," the chancellor would oblige him, according to conſcience and the intent of the parties according to the value, to execute an eſtate in fee, for uſes were then things merely in truſt and confidence; but, ſince the ſtatute, they are transferred and made into an eſtate in the land; and therefore without the word "heirs" the bargainee hath only an eſtate for life.

Tyrrel's caſe, Dy. 155. 1 And. 37. S. C. 1 Co. 136. b. Co. Lit. 271. b. Though a uſe could not riſe as a uſe upon a uſe, whether equity would not ſupport it as a truſt? Aſh v. Gallen, 1 Ch. Ca. 114.

If one, in conſideration of ten pounds, bargain and ſell his land to *A.* and his heirs, to have and to hold to *A.* to the uſe of the bargainor for life, the remainder in tail to *A.*, the remainder to the right heirs of the bargainor; the *habendum* in this caſe is void, and *A.* and his heirs ſhall have the land for ever.]

(C) In what Manner a Bargain and Sale may be made; and herein of the Words to be made Uſe of.

2 Inſt. 675. Dyer, 229. Poph. 48. Dalt. 63. And therefore lands in cities and boroughs might, ſince this act, till the 29 Car. 2. c. 3. have been bargained and ſold by word only. 2 Inſt. 676. Yelv. 124. See *poſt*.

AT common law lands might be bargained and ſold by words only, for it was the conſideration that in equity raiſed the uſe, but, ſince the ſtatute of 27 *H.* 8. *cap.* 16. lands cannot paſs without indenture.

2 Inſt. 672. Cro. Jac. 210. Mo. 34.

It is not neceſſary to uſe the words bargain and ſale, but any words equivalent are ſufficient, and whatever words upon valuable conſideration

conſideration would have raiſed an uſe of any lands, &c. at common law, the ſame amount to a bargain and ſale within this act; as if a man by deed, &c. for a valuable conſideration covenants to ſtand ſeiſed to the uſe of another, &c. Cro. Eliz. 166.

Though the deed may be either in parchment or paper, yet the enrolment muſt be in parchment only, for that is implied when an enrolment is to be in any of the courts of record at *Weſtminſter;* and in the clauſe of enrolment by the clerk of the peace, it is particularly provided, that he ſhall ſufficiently enrol and engroſs it in parchment. 2 Inſt. 373.

A man demiſes, bargains, and ſells a manor, part in demeſne, and part in tenants' hands, for ſeventeen years, the party may chooſe either to take it by way of leaſe at common law, and then the tenants muſt attorn; or by way of bargain and ſale without attornment; and this agrees with the policy of the common law, to take every man's grant, ſo as to paſs ſuch an intereſt as ſhall be moſt advantageous for the grantee; and ſince, in this caſe, the words allow a double way of taking it, the grantee ſhall be judge which is moſt beneficial. 2 Co. 35. Hayward's caſe.

[A bargain and ſale made to one with the addition of knight, who is not ſo, is good.] Lord Ewre v. Strickland, Cro. J. 240.

(D) Of the Conſideration.

IF a man bargains and ſells lands for divers good cauſes and conſiderations, it is void, unleſs money be averred; for ſelling *ex vi termini* ſuppoſes a transferring a right of ſomething for money, the common medium of commerce; but if there be no ſuch conſideration it may be an exchange, a covenant to ſtand ſeiſed, grant, &c., but it can be no ſale within the ſtatute. 1 Co. 176. Mo. 569. 1 Leon. 170. *Vide infra*, and Plowd. 533.

If there be a conſideration of money expreſſed in the deed, no averment nor evidence can be admitted againſt it, for the affirmative (*a*) is proved by the deed, and it is impoſſible to prove the negative. Mo. 570. Dy. 90. a. Touchſt. 222. [(*a*) But ſee Thurle v. Madiſon, Sty. 462.]

If the deed ſays for a competent ſum of money, it is ſufficient, without averring the ſum, for it is a ſale if there be any money. Moor, *ibid.*

A man in conſideration of 70*l.* bargains and ſells to his daughter and *J. S.* in tail, who intermarry; it may be averred *tam in conſideratione maritagii, quam in conſid' de* 70*l.* for a man may aver any conſideration conſiſtent with that in the deed. 1 Leon. 170. 1 Co. 176. 2 Co. 76. a.

If a man in conſideration that *J. S.* was bound in a recognizance, and other bonds for him, and for divers other good cauſes and conſiderations bargains and ſells his land to him and his heirs, it is not good. Cro. Eliz. 394.

If a man in conſideration of ſo much money to be paid at a day to come bargains and ſells, the uſe paſſeth preſently, and after the day the party hath an action for the money, for it is a ſale by the money paid preſently or hereafter. Dyer, 337. a.

2 Inſt. 672. [*A.* by deed indented and enrolled, in conſideration of 100*l.* paid by *B.*, bargains and ſells land to *B.*, *C.*, and *D.*, parties to the indenture: in this caſe the land paſſeth to all; for although the valuable conſideration be expreſſed to be paid only by one, yet it muſt be intended that it was paid by all, that the land may paſs to all according to the meaning of the parties: and conſideration given by one, is ſufficient to convey the land to all.]

(E) Of the Enrolment: And herein,

1. The Relation between the Enrolment and the Deed.

Dyer, 218. Hob. 136. 2 Inſt. 674. Cro. Jac. 408. Roll. Abr. 627. Owen, 149, 150.

AT common law the uſe paſſed from the delivery or date of the deed, and by the ſtatute 27 *H.* 8. *cap.* 10. the poſſeſſion paſſed as the party had the uſe at the time of the delivery of the deed; but it was thought proper to add ſome further circumſtances, which is done by *cap.* 16. and therefore, if theſe circumſtances are obſerved, it hath the ſame effect it had before at common law, to wit, to raiſe the uſes from the delivery; for the words of the ſtatute are only to add ſome things, and not to aboliſh or ſet aſide the force it had formerly.

Cro. Jac. 52. Bellingham v. Alſop, 2 Inſt. 675. Vent. 360. [If two bargains and ſales are made of the ſame lands, to two ſeveral perſons, and the laſt deed is firſt enrolled, and afterwards the firſt deed is alſo enrolled within ſix months, the firſt buyer ſhall have the land: for when the deed is enrolled, the bargainee is ſeiſed of the land from the delivery of the deed, and the enrolment ſhall relate to it. Wood's Inſt. 259. See Mo. 41. Cro. Ja. 409. Noy, 106. If a man bargains and ſells to *A.*, and afterwards makes a bargain and ſale of the ſame land to *B.*, and the deed to *B.* is firſt enrolled, but the deed to *A.* is not enrolled within the ſix months, the bargain and ſale to *B.* is good: but if the deed to *A.* had been enrolled within the ſix months, the deed to *B.* had been void. Hob. 165.]

If *A.* bargains and ſells lands to *B.* and his heirs, and before enrolment *B.* reciting this bargain and ſale to be by indenture enrolled, bargains and ſells to *C.* and his heirs, all the eſtate which he had by the ſaid indenture enrolled, and after, the firſt, and then, the ſecond deed is enrolled; by *Daniel* and *Kingſmill*, the lands are well conveyed to *C.* for when the firſt indenture was enrolled, the eſtate was in *B.* *ab initio* to bargain, ſell, &c. and the words in the ſecond deed are apt enough to paſs the land, and the recital of the enrolment immaterial: but *Anderſon* and *Warberton cont'*; for a man cannot paſs what he hath not; and till the deed was enrolled *B.* had nothing; and he paſſed only what he had by indenture enrolled: But *Walmſly* held, the land paſſed not, by reaſon of the miſrecital, but that otherwiſe it would have paſſed; and it was adjudged for the defendant, according to the opinion of the three laſt judges.

1 Ro. Rep. ſaid to be ſo adjudged, Mo. 10. El. in Mocket's caſe. (*a*) 1 Ro. Rep. *ibid.*

[If a diſſeiſor bargain and ſell land, and the diſſeiſee releaſe to the bargainee before enrolment, it is void. But a releaſe (*a*) to the diſſeiſor before enrolment had been good; and then the enrolment ſhould paſs the eſtate to the bargainee, and he ſhould take advantage of the releaſe.]

Bulſtr. 8, 9.

If a man bargain and ſell his manor, to which there is an advowſon appendant, the bargainee can make no title to preſent before enrolment.

If

If a man bargains and ſells his land, and then ſuffers a recovery, levies a fine, or makes a feoffment to the bargainee, and then the deed is enrolled, the land paſſeth by the recovery, fine, or feoffment; for ſince the freehold and the uſe is in the bargainor till enrolment, it muſt paſs by the recovery, *&c.*; and when it hath paſſed by the recovery the uſe cannot riſe, nor poſſeſſion be executed from the date of the deed. 4Co. Hind's caſe. Mo. 681. 2And. 3. 162. 203. 4 Leon. 4. Poph. 49. Hob. 222.

If the bargainor or bargainee die before enrolment, it may, notwithſtanding, be enrolled, for here are parties to give and take the intereſt when it begins to veſt; for it veſts from the date of the deed; otherwiſe, in the caſe of an attornment. 2 Inſt. 674. Hob. 136. And. 229. 337.

If a man bargains and ſells his land, the bargainee may be tenant to the *præcipe* before enrolment, and may receive a releaſe before enrolment. Vent. 361. 2Burr. 1131.

But where the commiſſioners of a bankrupt had aſſigned the bankrupt's lands to the leſſor of the plaintiff, and the indenture was afterwards enrolled, but the declaration was upon a demiſe made after the indenture, and before the enrolment; it was adjudged, that this declaration was not ſufficient. 1 Vent. 360. 2Show. Rep. 156. S.C. 2 Jones, 196. S.C. Carth. 178. S. P. adjudged on the authority of this caſe. Show. 207. S. C. where it is ſaid, that Holt, Ch. Juſt. held, that it was not amendable.

If a man bargains and ſells a reverſion, and the rent is incurred, and afterwards the deed is enrolled, the bargainee ſhall have the rent unpaid; but if the rent be paid to the bargainor, the tenant is not only excuſed, but the bargainor is not accountable, becauſe the contract had not any effect to paſs the eſtate from the bargainor before enrolment; and the relation of a law cannot make void an act that was lawful, for it cannot be ſet aſide but by an expreſs and poſitive law. Owen, 150. Godb. 209. Sid. 310.

If a man makes a leaſe for life, reſerving rent, with clauſe of re-entry, and then bargains and ſells the reverſion, the bargainee demands the rent, and the leſſee refuſes, and then the deed is enrolled, the bargainee cannot enter for the forfeiture; for, till enrolment, he is not grantee of the reverſion within the ſtatute capable of the duty; and conſequently at the day could make no legal demand, which was precedently neceſſary to this entry. Owen, 69. 150. Godb. 156. Latch. 157. Sid. 310. Cro. Car. 217.

If a man ſeiſed in fee is bound in a recognizance, and then bargains and ſells all his lands, and then the recognizance is forfeited, and then a *ſcire facias* is ſued out againſt the land in the hands of the bargainor, and then the deed is enrolled, this *ſcire facias* is not maintainable. 2 And. 160. Owen, 69, 70. 2 Inſt. 674. Cro. Car. 217.

If before enrolment the bargainor and bargainee grant a rent, *&c.* after enrolment, by operation of the ſtatute, it ſhall be the grant of the bargainee, and confirmation of the bargainor. Co. Lit. 147. b.

If lands are bargained and ſold, and the bargainee dies before enrolment, his wife ſhall not be endowed; ſo if a man bargains and ſells lands by indenture, and then takes a wife and dies, and after, the deed is enrolled, the wife ſhall not be endowed. And. 161. Cro. Car. 569. But if lands are bargained and ſold, and a ſtranger enters, and then the deed is enrolled, the bargainee dies, his wife ſhall be endowed; but for this *vide* tit. *Dower*.

Northcott v. Underhill, 1 Ld. Raym. 388. 1 Salk. 199.

[A covenant in a bargain and ſale not enrolled, is binding.]

2. What Eſtates are to be enrolled; and herein of the Exception as to Lands in Cities, Boroughs, &c.

2 Inſt. 671.

All eſtates of freehold and inheritance muſt be enrolled; but if a man bargains and ſells his lands for any number of years, the deed need not be enrolled.

7 Co. Bedel's caſe.

If a man bargain and ſell land to his ſon in conſideration of money, the deed muſt be enrolled; but if the father, in conſideration of natural love and affection, and alſo for money, grant land to his ſon, this need not be enrolled; for covenants to ſtand ſeiſed are not within the words of the ſtatute, and where the conſideration of blood is expreſſed, it may enure as a covenant to ſtand ſeiſed; but it is only a ſale when the conſideration of money is alone expreſſed, for that excludes all other tacit conſiderations.

2 Inſt. 676. Dyer, 229. Daliſ. 63. Yelv. 124. See *ante* C.

Lands in cities, boroughs, &c. that have the privilege of enrolments, are not within the act; for though the intent of the ſtatute be, to have excepted them from enrolments in the courts of *Weſtminſter* only, yet the ſtatute is ſo worded that they are diſcharged from any enrolment at all; and therefore the poſſeſſion of ſuch lands is executed from the date of the deed.

3. The Time of Enrolment.

2 Inſt. 674. 6 Co. 62.

It muſt be enrolled within ſix months from the date, which ſhall be accounted according to the computation of twenty-eight days *per* month; for month, in its proper and original ſignification, is the ſpace of time meaſured by the complete courſe of the moon; as the year is the time meaſured by the complement of the ſun's courſe.

Hob. 410. Mo. 40. 42. 2 Inſt. 674. 5 Co. 1. b. Dyer, 218. b. 4 Leon. 4. pl. 18. 3 Lev. 438. 2 Salk. 413. pl. 1. Cowp. 718. Dougl. 463. 3 Term Rep. 623.

From the date, and from the day of the date, in this caſe, is taken as all one, as it is in all other caſes of computation, and therefore the enrolment may be on the day of the date, or on the laſt day of the ſixth month after the day of the date; for though when an intereſt paſſeth from the day of the date, the day itſelf is excluded; yet when a time is ſtinted, in which an act ought to be done, it is in order to haſten the doing of that act; and therefore the doing of it on the day from whence the period is firſt reckoned is within the time appointed, and the laſt day of the ſixth month, is within the words of the time given.

Hob. 140. 2 Inſt. 674. Mo. 42.

If the deed has no date, the ſix months are to be reckoned from the delivery, but not otherwiſe.

(F) The Manner of pleading Bargains and Sales.

A Bargain and ſale is a deed enrolled, and as ſuch muſt be pleaded; and the deed itſelf, whereby the uſe originally paſſeth, being a matter *in pais*, muſt be produced, and not the tenor of the deed, which is on the roll of *record*: for though the enrolment being on record is of undoubted veracity, being the tranſaction of the court, yet the private deed has not the ſanction of a record, though publickly acknowledged and enrolled; for it might have been falſly and fraudulently dated, or ill executed. Co. Lit. 225. b. 251. b. 2 Inſt. 673. 4 Co. 71. 5 Co. 53. 2 Roll. Rep. 119.

The party that claims by any bargain and ſale, muſt ſhew in what court the deed is enrolled, becauſe he muſt ſhew all things in certain that make out his title; otherwiſe his adverſary would be put to an infinite ſearch before he could traverſe with ſecurity. Yelv. 213. Worly and Purly. Cro. Jac. 291. S. C.

In debt for rent the plaintiff declared upon a leaſe made by a ſtranger, who after bargained and ſold the reverſion to the plaintiff *per indenturam debito modo irrotulat' in curiâ Cancellariæ;* and after verdict for the plaintiff, judgment was arreſted, becauſe it was not alleged that the enrolment was within ſix months, nor *ſecundum formam ſtatuti;* and *debito modo* will not help it, for it might be ſo at common law. Allen, 19. King and Somerland, Carter, 221. Stile, 34. S. C. and judgment arreſted accordingly;

for *debito modo* may be an enrolment at common law.

If a man makes a leaſe for years the 10th of *May*, and afterwards bargains and ſells his lands, and antedates the deed by making it the 10th of *April*, and the enrolment is alſo as of that time, the leſſee is without remedy, for he cannot aver againſt the record. For this *vide* Owen, 138. Leon. 183. 2 Leon. 121. 3 Leon. 175, 176. Savil, 91. *cont'*, and head of *Pleas and Pleadings*.

In pleading a bargain and ſale the party ought regularly to aver payment of the money. Leon. 170. *Vide* Moor, 504. But the want thereof is helped after verdict, upon *non conceſſit*; for it muſt be intended proved at the trial. Lev. 308. 2 Stra. 1269. Ld. Raym. 111. Vent. 108. T. Raym. 200. [By 10 Ann. c. 18. § 3., if a bargain and ſale enrolled, be pleaded with a *profert*, a copy examined, and proved on oath, ſigned by the proper officer, having cuſtody of ſuch enrolment, ſhall be of the ſame effect as the original.—The indorſement on the deed, by the proper officer, is always received as ſufficient evidence of the enrolment. Dougl. 56. If divers perſons ſeal a deed, and but one of them acknowlege it, and it be thereupon enrolled, this is a good enrolment within the ſtatute, and it may be given in evidence, as a deed enrolled. Thurle v. Madiſon, Sty. 462.]

Baron and Feme.

(A) Who are eſteemed Huſband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts.

(B) Of the Power given the Huſband by Law over the Perſon of his Wife; and herein of her Remedy for any Injury done her by him.

(C) Of his Intereſt in her Eſtate and Property: And herein,

1. Of the Real Eſtate in her Right.
2. Of her Chattels Real, or Leaſehold Intereſts.
3. Of her Perſonal Eſtate in Poſſeſſion, and *Choſes in Action.*

(D) Of the Huſband's Right to Things accruing to the Wife during Coverture.

(E) Of the Wife's Acts and Agreements before Marriage, in what Caſes revoked and made void by the Marriage.

(F) Where the Huſband ſhall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Adminiſtratrix. 484

(G) Where ſhe alone ſhall be puniſhed for a Criminal Offence; and where the Huſband ſhall be anſwerable for what ſhe does in a Civil Action.

(H) Of her Contracts for Neceſſaries; and how far the Huſband is bound by ſuch Contracts.

(I) What Acts done by the Huſband or Wife, alone or jointly with the Wife, will bind the Wife; and herein of her Agreement or Diſagreement to ſuch Acts after the Death of the Huſband.

(K) Where the Huſband and Wife muſt join in bringing Actions.

(L) Where they muſt be jointly ſued.

(M) Where a Wife ſhall be conſidered as a Feme Sole; [and herein of her ſeparate Eſtate.] 504.

What Right accrues to the Repreſentatives of either of them, on the Diſſolution of the Marriage, *vide* head of *Executors and Adminiſtrators.*

(A) Who are eſteemed Huſband and Wife; and herein of the Legality of the Marriage, and Marriage Contracts.

For the learning on this diviſion of the ſubject, ſee tit. "*Marriage* and *Divorce*."

(B) Of the Power given the Huſband by Law, over the Perſon of his Wife; and herein of her Remedy for any Injury done her by him.

THE huſband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may (*a*) beat her, but not in a violent or cruel manner; for, in ſuch caſe, or if he but threaten to beat her outrageouſly, or uſe her barbarouſly, ſhe may (*b*) bind him to the peace by ſuing a writ of *ſupplicavit* out of Chancery; or may apply to the Spiritual Court for a divorce *propter ſævitiam*.

(*a*) Crom. 28. 136. F. N. B. 80. F. 238. E. Hetl. 149. *cont'*. Sid. 113. 116. 1 Bl. Com. 444.
(*b*) Dalt. c. 68. Lamb. 78. Crom. 133. [Or by application to the court of K. B. or a juſtice of the peace. Foſt. 359. 1 Hawk. P. C. 253. Ca. Temp. Hardw. 74. 2 Str. 1202. 1 Burr. 621. 703. 11 Mod. 109. And the huſband may demand ſurety of the peace againſt the wife. 2 Str. 1207.]

But a wife cannot, either by herſelf or her *prochein amy*, bring a *homine replegiando* againſt her huſband; for he hath by law a right to the cuſtody of her, and may, if he think fit, confine her, but he muſt not impriſon her; if he do, it will be a good cauſe for her to apply to the Spiritual Court for a divorce *propter ſævitiam*; and the nature and proceedings in the writ *de homine replegiando*, ſhew that it cannot be maintained by the wife againſt her huſband.

Preced. in Chan. 492. *per Curiam.*

A wife ſeparated by articles, in conſideration of money received by the huſband, with covenants from him, cannot be ſeiſed by him, or forced to live with him *.

Bur. Rep. 542. 1 Str. 478.

* In caſes of unreaſonable or improper confinement, the courts will relieve the wife, on *habeas corpus*. Ld. Ferrers's caſe. 1 Bur. 634. *&c.* [If, upon the return of a *habeas corpus* ſued out by the huſband to bring up the wife, it appear that he hath uſed her ill, and ſhe exhibit articles of the peace againſt him, the court will not order her to be delivered to him. Anne Gregory's caſe, 4 Burr. 1991.]

(C) Of his Intereſt in her Eſtate and Property: And herein,

1. Of the Real Eſtate in her Right.
2. Of her Chattels Real, or Leaſehold Intereſts.
3. Of her Perſonal Eſtate in Poſſeſſion, and Choſes in Action.

1. Of

1. Of the Real Eſtate in her Right.

10 Co. 42. 2 Inſt. 510. Sid. 11. Rol. Abr. 347.

FROM the time of the intermarriage, the law looks upon the huſband and wife but as one perſon, and therefore allows of but one will between them, which is placed in the huſband, as the fitteſt and ableſt to provide for, and govern the family; and for this reaſon, the law gives the huſband an abſolute power of diſpoſing of her perſonal property, no act of her's being of any force to affect or transfer that which by the intermarriage ſhe has reſigned to him: but the freehold and inheritance of the wife is ſubject to other rules and regulations; for the huſband by the marriage does not become abſolute proprietor of the inheritance; but as the governor of the family, is ſo far maſter of it as to receive the profits of it during her life, but hath no power to make an abſolute ſale of it without her conſent.

Co. Lit. 351. a. 273. b. Dougl. 329. [The huſband may

If a man marries a woman ſeiſed in fee, he gains a freehold in right of his wife. [But it muſt be pleaded, that the huſband and wife, in right of the wife, were ſeiſed in fee, not of freehold merely.]

make a tenant of the *præcipe* of his wife's eſtate, for the purpoſe of ſuffering a common recovery of it, without the wife's joining him in a fine. Robinſon v. Cummins, Cruiſe on *Recoveries*, 52. Co. Lit. 326. b. note. Pig. 72. Ro. Abr. tit. *Recovery* (A), pl. 4.] Where the huſband or wife are attainted, and the lord by eſcheat ſhall enter, or the king have the pernancy of the profits, and how far ſuch freehold will work a *remitter* to the huſband, *vide* title *Courteſy of England*.

2. Of her Chattels Real, or Leaſehold Intereſts.

7 H. 6. 1. b. Bro. 24. Co. Lit. 46. 351. [An aſſignment of the real eſtate of the wife will bind her, though it be

The marriage is a gift in law to the huſband of all the wife's chattels real, as a term for years in right of the wife; ſo of eſtates by ſtatute-merchant, ſtatute-ſtaple, elegit, *&c.*; and of theſe he may alone diſpoſe, forfeit, or they may be extended for his debts; but if he makes no diſpoſition of them in his life-time, they (*a*) ſurvive to the wife, and therefore he cannot deviſe them.

made without a conſideration. So if the wife has a judgment, and it is extended on an *elegit*, the huſband may aſſign it without a conſideration: So if a judgment is given in truſt for a feme ſole, who marries, and, by conſent of her truſtees, is in poſſeſſion of the land extended, the huſband may aſſign over the extended intereſt: and by the ſame reaſon, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and ſhe is in poſſeſſion of the land under this decree, and marries, the huſband may aſſign it without any conſideration; for it is in nature of an extent. 3 P. Wms. 200.] (*a*) The huſband is only poſſeſſed of a term in her right, and the term or legal intereſt continues in her. 7 H. 6. 2. Rol. Abr. 342. Co. Lit. 351.

2 Roll. Abr. 495.

If a woman leſſee for years takes huſband, and he after purchaſeth a new leaſe to them both for their lives, of the ſame lands, this is a ſurrender in law of the firſt term, and ſhall bind the wife, becauſe it amounts to an actual diſpoſition thereof, which the huſband had power to make.

See 2 Wils. 348. 1 P. A. 2. 13. ed. in the notes.

If the huſband poſſeſſed of a term for ſeventy years in right of his wife, makes a leaſe of thoſe lands for twenty years, to begin after his death, this is good, and ſhall bind the wife; becauſe the term being but a chattel, he had power to diſpoſe of it wholly, and by conſequence may diſpoſe of any leſs intereſt thereout as he thinks fit; and this being a preſent diſpoſition which he cannot revoke, binds the intereſt of the lands immediately, though it takes

takes not effect in poſſeſſion till after his death; and therefore this differs from a deviſe of ſuch term, or any part thereof, by the huſband, by his will; for that not taking effect, nor binding the intereſt at all till after his death, comes too late to prevent the operation of law, which, at the inſtant of death, immediately caſts it upon the wife ſurviving, and ſo defeats and deſtroys the operation of the deviſe: but as to the reſidue of the term, whereof the huſband makes no diſpoſition in his life-time, the wife, if ſhe ſurvives, will be entitled to it; becauſe, as to that, the law is left to take place, as it would have done for the whole, if he had not prevented it by ſuch his diſpoſition of part; but if the huſband had granted away the whole term upon condition, and died, though the condition were afterwards broken, and his executors entered for breach thereof, yet would the wife be for ever barred to claim any intereſt in the ſaid term, becauſe there was a total diſpoſition thereof by the huſband in his life-time, and the breach or non-performance of the condition was perfectly contingent and uncertain: beſides, that the breach of the condition happened not till after his death, and ſo the diſpoſition continued perfect and uninterrupted during his life; for, if the condition had been broken during his life, and he himſelf had entered for breach thereof, it might be a great queſtion if the wife ſurviving ſhould not have the term after his death, becauſe, by his re-entry, for the condition broken, he is reſtored to the whole term *in ſtatu quo*; and then being poſſeſſed of it in right of his wife, as he was before, it ſeems but reaſonable the wife ſhould have it, if ſhe ſurvives the huſband, as ſhe would have had if no ſuch diſpoſition had been made, ſince that diſpoſition is now defeated and gone: alſo ſuch term, whereof the huſband is poſſeſſed in right of his wife, may be extended for the debts, or forfeited for the crimes of the huſband, for theſe are legal diſpoſitions thereof, which ſhall bind the wife; but if the huſband ſhould grant a rent, common, &c. out of ſuch term, and die, this would not bind the wife ſurviving, becauſe the term or poſſeſſion itſelf being left to come entire to the wife, all intermediate charges or grants thereout by the huſband determine with his death; for the title of the wife to ſuch term hath relation to the time of their intermarriage, and ſo is paramount to all collateral charges or grants made thereout by the huſband after: but a grant by the huſband of the herbage or veſture of ſuch land which he held in right of his wife for years, will be void after his death, becauſe they are part of the land itſelf, and not collateral to it.

If the huſband and wife be evicted of a term which he hath in right of his wife, and the huſband bring an ejectment in his own name, and have judgment to recover, this makes an alteration in the term, and veſts it in the huſband; becauſe not making his wife a party to the recovery, he takes the whole wrong to be done to himſelf; and conſequently, if he recovers, it muſt be by virtue of that right whereof he was diſpoſſeſſed.

If a term for years be granted to a feme-covert and another; or if a feme-ſole and another be jointenants of a term for years, and the feme take huſband, yet in both caſes the jointenancy ſtill continues;

Poph. 5. 97. 145. Co. Lit. 46. b. 351. a. Cro. Car. 344. Plowd. 418. Cro. Eliz. 33. 279. Co. Lit. 300. a. Bro. tit. *Charge*, 111. 8 Co. 97. Roll. Abr. 851. 343, 344. Godb. 279. 3 Keb. 299. Vent. 259. *Note*; It appears by all the above cited books, that if the huſband makes a leaſe of part of the wife's term, rendering rent, and dies, that his executors ſhall have the rent, and not the wife; though ſhe hath the reverſion, becauſe not party or privy to the leaſe; and the rent is not incident to the reverſion.

Co. Lit. 46. b. Rol. Abr. 345.

Plowd. 418 Co. Lit. 185

tinues; for the marriage makes no ſeverance or alteration of it, but gives the huſband the ſame power his wife had before, by an actual diſpoſition of her moiety to break the jointenancy, and bind his wife's intereſt therein: but without ſuch diſpoſition the jointenancy continues; and, if the huſband dies, the whole ſhall go accordingly: ſo if ſuch jointenants are ouſted of the term, the wife ſhall join with the huſband and the other jointenant in ejectment, and the wife ſhall have judgment to recover as well as the huſband; and if in ſuch caſe, before any actual diſpoſition made by the huſband, his wife die, the whole term ſhall go to the ſurviving jointenant, and no part thereof to the huſband; becauſe, though the huſband, if he ſurvives, is by law to have all chattels real and perſonal of his wife's, and this term was a chattel real, yet the title of the other jointenant, to have the whole by ſurvivorſhip, coming at the ſame inſtant, and being the elder title, ſhall prevail againſt the huſband.

Cro. Eliz. 912. Downing and Seymour. Q. In caſe of the bargain and ſale, or fine, if the term, in this caſe, would not be ſurrendered? becauſe the leaſe being made after marriage, when there are no moieties between huſband and wife, the huſband cannot be ſaid to be poſſeſſed thereof in her right, more than in his own, but both are poſſeſſed by entireties; therefore it ſhould ſeem in that caſe likewiſe, that the term would be merged.

A leaſe was made to the huſband and wife for years, they enter, and the leſſor afterwards enfeoffs the huſband, who dies ſeiſed, the wife ſurvives and claims the term; and betwixt her and the heir of the huſband the diſpute was, Whether the term was extinguiſhed? And *per totam Curiam*, by acceptance of the feoffment the huſband hath ſurrendered the term, and then it is extinguiſhed, and the wife barred of any title thereto; but they held that it would have been otherwiſe if the conveyance had been to the huſband by bargain and ſale enrolled, or by fine; for theſe meddle not with the poſſeſſion, but only carry ſuch intereſt as the reverſioner had in him, and then the huſband might have the term in right of his wife, and the inheritance in his own right; but by the feoffment he admits the leſſor to have power to come upon the poſſeſſion to make livery; which, if the term ſhould ſtand in his way, he could not do; and therefore ſuch admittance amounts to a ſurrender thereof.

Mo. pl. 304. Plowd. 423.

A huſband poſſeſſed of a term for years in right of his wife, with remainder to himſelf in fee, by deed enrolled, bargains and ſells the land for money, and dies, and his wife enters, claiming the reſidue of the term; and the opinion of the book ſeems to be, that her claim was good; for though a feoffment, in ſuch caſe, by the huſband, would have paſſed the term which he had in right of his wife by way of union and extinguiſhment; yet by bargain and ſale nothing paſſeth but a uſe; and by creation and grant of the uſe, the term which he had *in jure uxoris* ſhall not paſs; ſo that this being no diſpoſition of the legal intereſt of the term, but only of a uſe, (which, in reſpect of his inheritance in remainder, he might well create,) this was good as to the term during the life of the huſband only; and then the wife, after his death, ſhall have the leaſe diſcharged of it, as if the huſband had granted a rent, *&c.* out of the wife's term; but if there had been the words *grant*, *aſſign*, or any other word which would have

have paſſed the legal intereſt of the term, this would have barred the wife; but the words *bargain and ſell*, by 27 *H.* 8. *c.* 16., could have no operation to raiſe a uſe which ſhall be executed in poſſeſſion, but only out of the reverſion whereof the huſband was ſeiſed, as the ſtatute ſpeaks; and therefore this being a term in groſs whereof the huſband was not ſeiſed, but only poſſeſſed, the bargain and ſale paſſed only a uſe thereof at common law, and not by virtue of that ſtatute; and then not being executed in poſſeſſion, the uſe at common law, which was collateral to the land, fell off with the death of the huſband who created it, as other collateral charges of his would do; and by conſequence, the wife's title to the reſidue of the term continues good: but if the huſband had been poſſeſſed of ſuch term in groſs in his own right, without an inheritance in him, and had made a bargain and ſale thereof, though this would not have been executed by the ſtatute in poſſeſſion, for the reaſon before-mentioned; yet it would have paſſed a uſe at common law, which would have made him truſtee in equity for the bargainee.

If a man marries a woman who has a term for years ſettled on her in truſt, the huſband may as well diſpoſe of this truſt, as if the legal intereſt was in her (*a*). Roll. Abr. 343. Lane, 54, 55.

[(*a*) It is true, that the huſband is entitled to diſpoſe of the truſt of the wife's term, equally with the term itſelf; and that, whether it be the truſt of a preſent actual and veſted intereſt in the term; Pre. Ch. 418. Factor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 207.; or of a poſſible or contingent intereſt, if it is a legal intereſt, that is, ſuch an intereſt as, upon the determination of the previous eſtate, or the happening of the contingency, will immediately veſt in poſſeſſion in the wife; unleſs, perhaps, in thoſe caſes where the poſſibility or contingency is of ſuch a nature, that it cannot happen during the huſband's lifetime. Co. Lit. 46. b. 10 Co. 51. a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at leaſt in equity, that if a future, or executory intereſt, in a term or other chattel, be provided for the wife, with the conſent of the huſband, the huſband cannot diſpoſe of it from her; as it would be abſurd and unfair in the higheſt degree, that he ſhould be allowed to defeat his own agreement. But this ſuppoſeth the proviſion to be made *before* marriage; for if it be made *ſubſequent* to the marriage, it is a mere voluntary act, and void againſt an aſſignee for a valuable conſideration. Doyly v. Perſull, 1 Ch. Ca. 225. Turner's caſe, 1 Vern. 7. Pitt v. Hunt, *id.* 18. Walter v. Saunders, 1 Eq. Ca. Abr. 58. Co. Lit. 351. b. note.]

3. Of her Perſonal Eſtate in Poſſeſſion, and Choſes in Action.

All the perſonal eſtate, as money, goods, cattle, houſehold furniture, *&c.*, that were the (*b*) property, and in the poſſeſſion of the wife at the time of the marriage, are actually veſted in the huſband; ſo that of theſe he may make any diſpoſition in his life-time, without her conſent, or may by will deviſe them, and they ſhall without any ſuch diſpoſition go to the executors or adminiſtrators of the huſband, and not to the wife, though ſhe ſurvive him. Doct. and Stud. Dial. 1. c. 7. Co. Lit. 351.

(*b*) And therefore chattels perſonal which ſhe has in *auter droit* as executrix, or guardian in ſocage, *&c.* ſhall not go to the huſband. Co. Lit. 351. But a bare poſſeſſion of perſonal goods is not by the marriage given to the huſband; for if goods are bailed to a feme ſole, or if ſhe finds goods, and after marries, the action of detinue muſt be brought againſt both huſband and wife. Co. Lit. 351. The civil, or ſcarce any law, gives ſo great a power to the huſband over the eſtate of the wife, as the common law does. Sid. 111. by three Judges *arguendo*. [The wife's paraphernalia are, by the common law, excepted out of the power of the huſband, ſo that he cannot deviſe them. 1 P. Wms. 729. But by articles before marriage, expreſsly barring her of every thing ſhe can claim out of her huſband's eſtate by common law, cuſtom, or otherwiſe, the huſband is entitled to theſe. 2 Atk. 642. It ſeemeth doubtful, whether the paraphernalia are exempted from the claim of creditors. 2 Atk. 79. Ambl. 6. 2 Vez. 7. Her neceſſary apparel certainly is. 2 Bl. Comm. 436. 3 Atk. 105.]

But

Co.Lit.351. 3 Mod. 186. But where the goods of a feme ſole are in the poſſeſſion of another by trover or bailment, and ſhe marries, the property which continued in the wife is veſted in the huſband, and he alone, without his wife, may bring detinue for them. Sid. 172. Keb. 641. Moor, 25. pl. 85. Vent. 261. 2 Lev. 107. [In equity, a ſettlement made before marriage, if made in conſideration of the wife's fortune, entitles the repreſentative of the huſband dying in the wife's lifetime, to the whole of her things in action; but it hath been ſaid, that if it is not made in conſideration of her fortune, the ſurviving wife will be entitled to the things in action, the property of which hath not been reduced into poſſeſſion by the huſband in his lifetime: ſo, if it is in conſideration of a particular part of her fortune, ſuch of the things in action, as are not compriſed in that part, it hath been ſaid, ſurvive to the wife. Cleland v. Cleland, Pr. Ch. 63. 2 Vern. 502. Adams v. Cole, Ca. Temp. Talb. 168. In the caſe of Blois v. the Counteſs of Hereford, 2 Vern. 501., a ſettlement was made for the benefit of the wife, but no mention was made of her perſonal eſtate. Lord Keeper decreed, that it ſhould belong to the repreſentatives of the huſband; and ſaid, that, in all caſes where there was a ſettlement equivalent to the wife's portion, it ſhould be intended that he is to have the portion, though there be no agreement for that purpoſe. Eq. Ca. Abr. 69.]

But choſes in action, as debts due to the wife by obligation, *&c.*, which are to be demanded by action, though they are likewiſe ſo far veſted in the huſband, that he may reduce them into poſſeſſion; yet if he dies before any alteration made by him, they ſhall go to his wife, nor ſhall they, without ſuch alteration, ſurvive to the huſband upon the death of the wife, or he have any right to them, but as he is entitled as (*a*) adminiſtrator to his wife.

(*a*) Adminiſtration of right is to be granted to the huſband. 1 Rol. Abr. 910. And by the ſtatute 29 Car. 2. c. 3. ſ. 25. it is enacted, *that the ſtatute of diſtributions ſhall not extend to the eſtates of feme coverts.* [And the repreſentative of the huſband is entitled as much to this ſpecies of his wife's property as to any other; for the right of adminiſtration follows the right of eſtate; and ought, in caſe of the huſband's death, after the wife, to be granted to the huſband's next of kin. Bacon v. Bryant, Vin. Abr. tit. *Executors* (K), pl. 25. Humphry v. Bullen, *ibid.* pl. 27. Elliot v. Collier, 3 Atk. 526. 1 Vez. 15. 1 Wilſ. 168. Bouchier v. Taylor. Hargr. *Law Tracts*, 4737. Br. Rep. 414. If, therefore, adminiſtration *de bonis non* of the wife be granted to any third perſon, he is a truſtee for the repreſentative of the huſband. Squib v. Wyn, 1 P. Wms. 378. Cart v. Rees, *id.* 381.]

Boſvil v. Brander, 1 P. Wms. 4078. Bates v. Dandy, 2 Atk. 208. b.

[Money due upon mortgage is conſidered as a thing in action, and ſubject to the diſpoſal of the huſband only, whether it be a mortgage in fee or for a term: for though in the caſe of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, ſhe is but a truſtee, and the truſt of the mortgage follows the property of the debt.]

Roll. Abr. 342. Moor, 452. Goldſ. 160.

If a feme ſole obligee marries, and the huſband makes a letter of attorney to *J. S.* to receive the money, who receives it accordingly, and the feme dies, the huſband ſhall have an action of account for the money; for, by the receipt, this was become a thing in poſſeſſion.

Goldſ. 160. Roll. Abr. 342.

If a legacy be deviſed to a feme, who takes huſband, and the baron makes a letter of attorney to *J. S.* to receive the legacy, and he receives it accordingly, this, by his receipt, is become the chattel of the huſband.

Moor, 452. Roll. Abr. 342. 350. Goldſ. 159, 160.

So if the baron and feme had made a letter of attorney to *J. S.* to receive the legacy, and he had received it accordingly, by this receipt this ceaſes to be a thing in action, and is become a thing in poſſeſſion; and the huſband or his executor, after the death of the feme, may have an account upon this receipt againſt *J. S.*

(*b*) Squib v. Wyn, 1 P. Wms. 378.

In one caſe (*b*) it is ruled, that a voluntary aſſignment by the huſband of the wife's *choſes in action*, though void, as between the huſband and the aſſignee, will yet have the effect of altering the property, as between the huſband and wife. But it ſeemeth to be

be now ſettled (*a*), that the huſband's aſſignment in ſuch caſe muſt be for a valuable conſideration, and that beyond the conſideration the aſſignment will not bind the wife ſurviving.

(*a*) Bates v. Dandy, 2 Atk. 207. Jewſon v. Moulſon, *id.* 417. Saddington v. Kinſman, 1 Br. Ch. Rep. 44. Volunteers, and general aſſignees (whether by operation of law, or otherwiſe) are ſubject to the ſame equity, with reſpect to the wife's property, as the huſband is. 2 Atk. 420. 1 P. Wms. 382. 4 Br. Ch. Rep. 139. It doth not ſeem to have been yet determined, that a court of equity will interfere and interrupt the *legal* right of the huſband, or of ſuch aſſignees, where they can get poſſeſſion of the wife's property without the aid of the court. Winch v. Page, Bunb. 86. Anon. Pr. Ch. 548. Harriſon v. Buckle, 1 Str. 248. Gardner v. Walker, *id.* 503. Jewſon v. Moulſon, 2 Atk. 420.; but where the property is a ſubject of *equitable* juriſdiction, where they are obliged to go into equity in order to enable them to recover it, there the court will oblige them previouſly to make a proviſion for the wife. Jacobſon v. Williams, 1 P. Wms 382. But as againſt an aſſignee of ſome *particular* choſe in action, or truſt term of the wife, for a *full valuable conſideration*, ſuch equity, it ſeemeth, doth not ariſe. But ſee Sir Edward Turner's caſe, 1 Vern. 7. Pit v. Hunt, *id.* 18. Tudor v. Sanizne, 2 Vern. 270. Packer v. Wyndham, Pr. Ch. 412. Walter v. Saunders, 1 Eq. Ca. Abr. 58. pl. 5. Bates v. Dandy, 2 Atk. 207. Pope v. Cranaw, 4 Br. Ch. Rep. 326. *Qu.* Whether in theſe caſes of *particular* aſſignments, any diſtinction hath been made between a truſt term, and a choſe in action of the wife? Cox's note in 1 P. Wms. 459.

The intereſt of the wife's ſeparate property is always payable to the huſband if he maintains the wife. But (*b*) where he receives a great part of her fortune, and will not ſettle the reſt, a court of equity will not only ſtop the payment of the reſidue of her fortune, but will even prevent him from receiving the intereſt of the reſidue, that it may accumulate for her benefit. 2 Vez. 561. (*b*) 3 Atk. 21.

If truſtees pay the wife's ſeparate fortune to the huſband, it is irrecoverable. Pr. Ch. 414. Squire v. Dean, 4 Br. Ch. Rep. 326.

As to what things ſhall ſurvive to the wife, and what go to the huſband's executors, ſee tit. *Executors*, (H. 4.) As to the ſeparate property of the wife, *vide infra*.]

(D) Of the Huſband's Right to Things accruing to the Wife during Coverture.

HUSBAND and wife are conſidered as one perſon in law, and as having but one will between them, which is ſeated in the huſband as the head and governor of the family; and therefore the law gives him the ſame right over any real eſtate accruing to the wife during coverture, as if ſhe were ſeiſed of it before marriage; ſo of chattels real accruing to the wife: it alſo gives him an abſolute power over any perſonal eſtate or intereſt accruing to the wife by gift, deviſe, or her labour. Co. Lit. 351. Salk. 115. Carth. 251. Where they cannot take by moieties, *vide* head of *Jointenants and Tenants in Common*.

Indebitatus aſſumpſit was brought by huſband and wife againſt the defendant, in which they declared, that he was indebted to them in ſuch a ſum of money for periwig-makers' work done by the wife, *ad damnum ipſorum*; and on demurrer, judgment was given againſt the plaintiffs; for this being a general *indebitatus aſſumpſit* implied by law, the law will not (*c*) imply any promiſe made the wife, for ſhe is a ſervant to the huſband, who is at all the charges in furniſhing hair, *&c.*, and therefore the law implies Carth. 251. Salk. 114. pl. 2. S. C. 4 Mod. 156. S. C. Buckley & Ux' v. Collier. (*c*) But if a ſpecial *indebitatus aſſumpſit* had

been brought on an expreſs promiſe

that the promiſe was made to him only, for breach of which he alone ought to have ſued.

made the wife, it ſeems it would be good, though they had both joined. *Vide* Cro. Eliz. 61. 96. Cro. Jac. 77. Cro. Car. 439. 2 Sid. 128.

Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. Chamberlain and the wife of Colonel Hewſon.

If a feme covert ſues a woman in the ſpiritual court for adultery with her huſband, and obtains a ſentence againſt her and coſts, the huſband may releaſe theſe coſts, for the marriage continues, and whatever accrues to the wife during coverture belongs to the huſband: *Per Holt*, Ch. Juſt., on a motion for a prohibition.

Roll. Rep. 426. 3 Bulſt. 264. Rol. Abr. 343. 2 Roll. Abr. 293.

But if the huſband and wife be divorced *a menſâ & toro*, and the wife have her alimony and ſue for defamation or other injury, and there have coſts, and the huſband releaſe them; this ſhall not bar the wife, for theſe coſts come in lieu of what ſhe hath ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of her huſband.

Salk. 115. pl. 4. Vern. 261. Decreed in Chancery.

A legacy was given to a feme covert, who lived (*a*) ſeparate from her huſband, and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the huſband againſt the executor, he was decreed to pay it over again, with intereſt.

(*a*) Q. If ſuch ſeparation had been by agreement, and the agreement and ſeparate maintenance decreed in Chancery? If huſband and wife are divorced *a menſâ & toro*, and a legacy is left to her, the huſband may releaſe it. Roll. Abr. 343. 2 Roll. Abr. 301. Moor, 665. Cro. Eliz 908. Noy, 45. Roll. Rep. 426. 3 Bulſt. 264. Salk. 115. pl. 4. [But in an anonymous caſe, 9 Mod. 43., the huſband, though divorced *a menſâ et toro*; and though the wife had alimony, was reſtrained by injunction from ſelling a term which belonged to the wife. And in Newſome v. Bowyer, 3 P. Wms. 37., it was holden, that the huſband being attainted of felony, and pardoned on condition of tranſportation; and the wife becoming afterwards entitled to ſome perſonal eſtate, as orphan to a freeman of *London*, it belonged to her as a feme ſole.] Though a man may by deed or will give any thing in truſt for the ſeparate uſe of a feme-covert; and this ſhall be out of the power of the huſband; [yet it was formerly very much doubted, whether the feme could take an eſtate to her ſeparate uſe, unleſs truſtees were interpoſed. Harvey v. Harvey, 2 Vern. 659. 1 P. Wms. 126. S. C. Burton v. Pierpoint, 2 P. Wms. 79. But in Bennett v. Davis, 2 P. Wms. 316., it was holden, that where one deviſed lands in fee to his daughter, being a feme covert, for her ſeparate uſe, without appointing any truſtees, it ſhould be a truſt in the huſband; for that there is no difference where a truſt is created by act of the party, and where by act of law; and ſo it it was decreed in Rolfe v. Budder, Bunb. 187. Darly v. Darly, 3 Atk. 399. And equity will not only raiſe a truſt, where the object of the gift is to the ſeparate uſe of the wife, but will alſo, from the nature of ſome gifts, infer them to be to the ſeparate uſe of the wife. Graham v. Londonderry, 3 Atk. 393. As to agreements by the huſband after marriage by which the wife claims a ſeparate eſtate, it was formerly underſtood that the wife muſt take through the medium of truſtees, or others, and not immediately from her huſband; for unleſs by particular cuſtom, as by the cuſtom of *York*, (Fitz. Preſcription, 61. Br. Cuſtom, 56.) a feme covert is incapable of taking any thing by the gift of her huſband, Co. Litt. 3., except by will, Litt. § 168. See alſo Moyſe v. Giles, 2 Vern. 385. Beard v. Beard, 3 Atk. 72. But in Lucas v. Lucas, 3 Atk. 270., Lord Hardwicke obſerved, that in equity, gifts between huſband and wife had been often ſupported, though the law does not allow the property to paſs. See Slanning v. Style, 3 P. Wms. 334.; and Calmady v. Calmady, there cited. Bletſow v. Sawyer, 1 Vern. 245. Moore v. Freeman, Bunb. 205.; and Mitchell v. Mitchell, there cited. Bell v. Hyde, Pr. Ch. 328. Gilb. Eq. Rep. 83. Pybus v. Smith, 3 Br. Ch. Rep. 340. Lord Hardwicke, indeed, alluded to caſes, in which the courts would not ſupport ſuch gifts; but thoſe ſeem to be where their allowance would prejudice creditors, Slanning v. Style; and where the gift is of the whole of the huſband's eſtate, Beard v. Beard, 3 Atk. 72. But though the wife may take a ſeparate eſtate from her huſband, and even have a decree againſt her huſband in reſpect of ſuch eſtate, Cecil v. Juxon, 1 Atk. 278.; yet, if ſhe do not demand the produce during his life-time, and to maintain her, an account of ſuch ſeparate eſtate ſhall not be carried back beyond the year. Powell v. Hankey, 2 P. Wms. 82. Thomas v. Bennet. *id.* 341. Fowler v. Fowler, 3 P. Wms. 355. Lord Townſend v. Wyndham, 2 Vez. 7. Peacock v. Monk, *id.* 190. Blagrave v. Blagrave, Mich. 1730. This rule, however, proceeds on the notion of the wife's conſent: but if, during the huſband's life-time, ſhe demand ſuch account, and he promiſe to pay whatever is due to her, ſhe ſhall be allowed to come upon his eſtate, as a creditor, for the amount. Ridout v. Lewis, 1 Atk. 269. Countess of Warwick v. Edwards, 1 Eq. Ca. Abr. 140. pl. 7. Fonbl. notes on Eq. Tr. 94, 5.]

(E) Of the Wife's Acts and Agreements before Marriage; in what Caſes revoked and made void by the Marriage.

BY the marriage the huſband and wife become one perſon in law, and therefore ſuch an union works an extinguiſhment or revocation of ſeveral acts done by her before the marriage; and this not only for the benefit of the huſband, but likewiſe of the wife, who, if ſhe were allowed at her pleaſure to reſcind and break through, or confirm ſeveral acts, might be ſo far influenced by her huſband, as to do things greatly to her diſadvantage. 4 Co. 60. 5 Co. 10. Kelw. 162. Co. Lit. 55. Hetl. 72. Cro. Car. 304.

But in things which would be manifeſtly to the prejudice of both huſband and wife, the law doth not make her acts void; and therefore if a feme ſole makes a leaſe at will, or is leſſee at will, and afterwards marries, the marriage is no determination of her will, ſo as to make the leaſe void; nor can ſhe herſelf without the conſent of her huſband determine the leaſe in either caſe. 5 Co. 10. Henſtead's caſe. Kelw. 162. Co. Lit. 55. Cro. Car. 304.

So where a warrant of attorney was given to confeſs a judgment to a feme ſole; the court gave leave, notwithſtanding the marriage, to enter up judgment, for that the authority ſhall not be deemed to be revoked or countermanded, becauſe it is for the huſband's advantage; like a grant of a reverſion to a feme ſole, who marries before attornment, yet the tenant may attorn afterwards: otherwiſe, if a feme ſole gives a warrant of attorney, and marries, for that is to charge the huſband. Salk. 117. pl. 9.

But if a feme ſole makes her will, and deviſes her land to *J. S.*, and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, becauſe the marriage was a revocation of it; for as the law will not allow a woman under coverture to make a will, leſt ſhe ſhould be influenced by her huſband in the diſpoſition of her eſtate; ſo, for the ſame reaſon, a will made by a feme ſole is revoked by the marriage, leſt ſhe ſhould be influenced by her huſband (if it continued after the coverture) to revoke it, or let it ſtand, as it beſt anſwered his intereſt. 4 Co. 60. Forſe and Hembling. [Cotter v. Layer, 2 P. Wms. 624. S. P. 2 Bl. Comm. 499. S. P. It is ſo totally revoked, that it will not revive in the event of her ſurviving her huſband. Mrs. Lewis's caſe, 4 Burn's *E. L.* 48. And where the intended huſband agrees to give his wife power of making a will *after* marriage, and ſhe afterwards makes one *before* marriage, the marriage will revoke it. Hodſden v. Lloyd, 2 Br. Ch. Rep. 534. 2 Term Rep. 684.]

[A ſurrender of a copyhold eſtate by a feme ſole to the uſe of her will, if not made abſolutely void, is at leaſt ſuſpended by a ſubſequent marriage; in either of which caſes its operation is prevented.] George v. ——, Ambl. 627.

If *A.* on the one part, and *B.* and *C.*, a feme ſole, on the other part, ſubmit themſelves to the award of *J. N.*, and after *C.* takes *J. S.* to huſband, and after the arbitrator, before any notice of the marriage, makes an award that *B.* and *C.* ſhall pay 30*l.* to *A*, yet Roll. Abr. 332. Ruled on demurrer between White and Giffard.

A., yet this ſhall not bind *J. S.* and *C.* his wife, nor *B.*, for the ſubmiſſion by the marriage of *C.* is revoked as to *B.* alſo, and this without any notice.

Salk. 325. Gage v. Acton. Comb. 242. Carth. 511. S. C. Holt, 309. Freeman, 512. 515. Comyns, 67. Ld. Raym. 515. Lil. Ent. 214. 2 Vern. 480. Chan. Pre. 237. Where it is ſaid that a writ of error was brought in the Exchequer-chamber, but the plaintiff in error perceiving the court inclined to affirm the judgment, did not proceed.

A. entered into a bond with his intended wife, conditioned to leave her at his death 1000*l.* if ſhe ſurvived him, *&c.*; *A.* died inteſtate, and the wife took out adminiſtration to him; in an action of debt brought againſt her as adminiſtratrix for rent incurred due in the life-time of her huſband, ſhe pleaded this bond, and that 250*l.* only came to her hands, which ſhe retains in part of ſatisfaction, and that ſhe had not aſſets *ultra*; on demurrer the whole court agreed, that contracts and debts *in præſenti*, alſo ſuch as were contingent, and might happen during the coverture, were extinguiſhed by the marriage: but two judges in this caſe, againſt *Holt*, Ch. Juſt. held, that this bond with a condition, was like a promiſe or covenant before marriage, to leave the wife ſo much, (which were agreed to be good,) and being to be paid *in futuro*, was not extinguiſhed by the marriage, but was *in cuſtodiâ legis*, to preſerve a right, and anſwer the intention of the parties: but *Holt* held, that the bond and condition were diſtinct, and that upon the execution of the bond there was a debt *in præſenti*, which was extinguiſhed by the marriage; but the defendant had judgment.

Note: By the caſes on this head, in which there are various opinions, the better opinion ſeems to be, that ſuch a bond is extinguiſhed; but if the huſband enter into a bond with a ſtranger, conditioned to leave the wife ſo much, it will be good. 2 Vern. 290. Alſo a promiſe or covenant with the intended wife is good, not being a debt *in præſenti*. Jenk. Rep. 166. 221. Roll. Abr. 343. 2 Roll. Abr. 407. Hob. 216. Hutt. 17, 18. Noy, 26. Cro. Jac. 571. Palm. 99. 2 Roll. Rep. 162. 2 Sid. 58. Lit. Rep. 32. Hetl. 122. *Vide infra.*

2 Vern. 480. How far equity will ſupport ſuch contracts, *vide* Chan. Ca. 21. 117. 1 Vern. 408. 2 Vent. 343. Preced. in Chan. 237.

A man enters into a bond to his intended wife, conditioned to leave her 1000*l.*; he mortgages his eſtate, and dies, not leaving perſonal aſſets to diſcharge the bond: it was decreed in equity, that though the bond was void by law, being extinguiſhed by the marriage, yet it ſhould be made good in equity; and that the wife might redeem and hold the land till ſhe was ſatisfied her debt.

[2 P. Wms. 243. 2 Atk. 97. It is now ſettled, that ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourn v. Ewart, 5 Term Rep. 381. and Hayes *ex dim.* Foord v. Foord, there cited.]

For this *vide* 2 Chan. Rep. 81. 79. 2 Vern. 17. [2 Freem. 29. Gilb. *Lex Prætor*, 267. 2 P. Wms. 535, 6. *id.* 358. 674. Moſ. 177. 2 Vez. 264. 2 Br. Ch. Rep. 345. Fonbl. notes on Eq. Tr. 98, 9.]

Alſo equity will ſet aſide the intended wife's contracts, though legally executed, when they appear to have been entered into with an intent to deceive and cheat the huſband, and are in derogation of the rights of marriage; as where a widow made a deed of ſettlement of her eſtate, and married a ſecond huſband, who was not privy to ſuch ſettlement; and it appearing to the court that it was in confidence of her having ſuch eſtate that the huſband married her, the court ſet aſide the deed as fraudulent: ſo where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, and it was decreed to be delivered up.

But

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees, in trust for children by her former husband; though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000*l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. Vern. 408. Hunt and Matthews. [Newstead v. Searles, 1 Atk. 265. Doe v. Routledge, Cowp. 711.]

(F) Where the Husband shall be liable to the Wife's Debts contracted before Marriage; and herein of a Wife that is Executrix or Administratrix.

THE husband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law presumes reasonable, because by the marriage the husband acquires an absolute interest in the personal estate of the wife, and hath the receipt of the rents and profits of her real estate during coverture; and whatever accrues to her by her labour, or otherwise, during the coverture, belongs to the husband; so that in favour of creditors, and that no person's act should prejudice another, the law makes the husband liable to those debts with which he took her attached. 20 H. 6. 22. b. Moor, 468. Roll. Abr. 352. 3 Mod. 186.

But if a feme sole, indebted, marries and dies, the husband shall not be charged; for the debts must be recovered in the life-time of the wife. 10 H. 6. 10. 12. 20 H. 6. 22. Roll. Abr. 351.

So though there be a judgment in debt against a feme sole, and she marry and die, the baron shall not be charged therewith, for he is not liable to her debts before coverture, unless recovered in her life-time. 3 Mod. 186. Agreed *per* Curiam; but where a feme sole bought goods, but did not pay for them, and the goods came to her husband's hands, and the creditors, after her death, brought a bill in equity against the husband, to which he demurred; the demurrer was over-ruled; my Lord Chancellor, with earnestness, saying, he would change the law in that point. 1 Ch. Ca. 295. But *Q.* For where a man married a woman trader, who died, and at her death was indebted to several persons for wares which she had bought of them, and which were by her in *specie* at the time of her death, and came to the hands of her husband; on a bill brought against him, that he may either pay for those goods, or let the person have them again; it was holden, that he may plead that he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law. Abr. Ca. Eq. 60. [But *Qu.* A court of equity cannot make the husband liable in respect of the fortune he may have had with the wife. Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461. Heard v. Stamford, 3 P. Wms. 410. Ca. Temp. Talb. 173. S. C.]

If baron and feme are sued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the husband is liable; for the judgment hath altered the debt. Sid. 337. So if husband and wife had recovered in right of the wife, and had judgment, the husband might sue out execution after the death of the wife. Cro. Car. 208. Sid. 337. Salk. 116. pl. 7. Carth. 415. 2 Ld. Raym. 1050.

If there be judgment in debt upon a bond against a feme sole, and she marry, and after upon two *sci. fa.* against the baron and Carth. 30. Obrian and Ram,

3 Mod. 186. S. C. Ld. Raym. 1050. Com. Rep. 32. Salk. 116. pl. 7. Carth. 415. S. C. cited, and allowed to be law.

and feme, and *nihils* returned, judgment be thereupon had againſt the baron and feme, and ſo it reſt for a year and a day, and then the wife die, a *ſcire facias* will lie againſt the baron, to ſhew cauſe why execution ſhould not go againſt him upon the firſt judgment, for the award of execution was abſolute againſt the baron and feme, and ſo it became his debt, whereas before, it was only the debt of the wife.

Cro. Car. 603. King v. Hilton. For this *vide* head of *Executors and Adminiſtrators*, and Roll. Abr. 351. Moor 761. Cro. Car. 208. 227. 458. Sid. 337. *Note*, That in equity the creditors of the firſt huſband may follow the aſſets in the hands of a ſecond huſband, although the wife be dead. Chan. Ca. 80. Vern. 309. 2 Vern. 61. 118. *A.* married an adminiſtratrix to her former huſband, to a ſhare of whoſe perſonal eſtate the plaintiff was entitled; the adminiſtratrix was likewiſe entitled to a third; and before her ſecond marriage had waſted great part of the eſtate, and then died; and a bill was brought againſt her huſband, to have an account of the eſtate, and a ſatisfaction for his ſhare; an account was decreed to be taken of what eſtate had come to the hands of the adminiſtratrix before her ſecond marriage, and the plaintiff to have ſatisfaction againſt the defendant abſolutely for ſo much as came to his, or his wife's hands after marriage, and for what came to her hands before her ſecond marriage, to have ſatisfaction againſt the defendant, ſo far as he had any eſtate of his wife's. 1 Abr. Ca. Eq. 60, 61.

If a man marries an adminiſtratrix to a former huſband, who in her widowhood waſted the aſſets of her inteſtate, the huſband is liable to the debts of the inteſtate, during the life of the wife; and this ſhall be deemed a *devaſtavit* in him.

(G) Where ſhe alone ſhall be puniſhed for a criminal Offence; and where the Huſband ſhall be anſwerable for what ſhe does in a Civil Action.

Kelw. 31. S. P. C. 26. 142. H. P. C. 65. 27 Aſſ. 401. [This exemption extends to burglary, Kely. 31. Fitzh. Cor. 199. and ſeemingly to robbery, as an offence of a nature certainly not *more* heinous. The reaſon of this rule is ſaid to be, "becauſe the wife cannot know "what property her huſband may claim in the goods taken." 10 Mod. 63. If this be the true principle, the caſes of burglary and robbery are in ſome meaſure diſtinguiſhable; for in burglary, the abſence or preſence of the party is immaterial; but in robbery, preſence is an eſſential ingredient to the crime, and affords to the wife an opportunity of judging in what ſort of right the goods are taken. 1 Hawk. P. C. 4. note.] Hawk. P. C. 2. ſhe ſhall not be deemed acceſſary to a felony, for receiving her huſband who has been guilty of it, as her huſband ſhall be for receiving her. 3 Inſt. 108. H. P. C. 65. 2 Hawk. 451.—[Nor a principal, though the huſband's offence be treaſon, for ſhe is *ſub poteſtate viri*, and bound to receive him. Neither is ſhe affected by receiving, jointly with her huſband, any other offender. 1 Hale, 48. For ſhe cannot be admitted as a witneſs to diſcover, even collaterally, her huſband's guilt. Brownl. 47. Dalt. 540. 1 Hale, 301. O. B. 1785. 1 Hawk. P. C. 4. note.]

A Feme covert is ſo much favoured in reſpect of that power and authority which her huſband hath over her, that ſhe ſhall not ſuffer any puniſhment in committing a bare theft in company with, or by coercion of her huſband.

H. P. C. 65. Dalt. 104. 27 Aſſ. pl. 40. Fitz. Coron. 4 Bl. Comm. 29. 199. [Or receive ſtolen goods of her own ſeparate act, without the privity of her huſband; or if he, knowing thereof, leave the houſe and forſake her company, ſhe alone ſhall be guilty, as acceſſary, 22 Aſſ. 40. Dalt. 157.; for the coercion which is ſuppoſed to be conveyed by the command or preſence of the huſband, is only a preſumption of law, and, like other preſumptions, may be repelled. 1 Hale, 516. And though the huſband be an agent in the tranſaction, yet if he be ignorantly ſo, by the artifice of the wife, ſhe alone is puniſhable. Hammond's caſe, Leach's Caſes, 354.]

But if ſhe commit a theft of her own (*a*) voluntary act, or by the bare command of her huſband, or be guilty of treaſon, murder, or robbery, in company with, or by coercion of her huſband, ſhe is puniſhable as much as if ſhe were ſole.

(*a*) But ſhe

ſhe * is not guilty of felony in ſtealing her huſband's goods, becauſe a huſband and wife are conſidered but as one perſon in law, and the huſband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of intereſt in them, for which cauſe even a ſtranger cannot commit larceny in taking the goods of the huſband by the delivery of the wife, as he may by taking away the wife by force againſt her will. Hawk. P. C. 141.

[* It was the ſame in the *Roman* law, which gave to the huſband in ſuch a caſe the *actio rerum amotarum* againſt the wife, but allowed not the *actio furti* to be inſtituted againſt her.]

A feme covert generally ſhall anſwer as much as if ſhe were ſole, for any (*a*) offence not capital againſt the common law or ſtatute; and if it be of ſuch a nature that it may be committed by her alone, without the concurrence of the huſband, ſhe may be puniſhed for it without the huſband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the huſband ſhall not be included in it for any offence to which he is no way privy. 9 Co. 71. Hawk. P.C. 4. *Vide* Moor, 813. Hob. 93. Noy, 103. Savil, 25. Cro. Ja. 482. 11 Co. 61. That the huſband is not liable to pay the forfeiture recovered on an indictment againſt the wife; and therefore *quære* whether a conviction of a feme covert, upon an indictment, can be pleaded to an information againſt her and her huſband. Hawk. P. C. 27. (*a*) She cannot be indicted for barratry. Roll. Rep. 39. But *Qu.* Whether ſhe may be indicted for foreſtalling? *Quære* Sid. 410. 2 Keb. 634. may be indicted for a ſcold, and judgment againſt her to be ducked; but ſcolding once or twice is not ſufficient to conſtitute this offence, which lies in the frequent repetition of it, to the diſturbance of the neighbourhood. 6 Mod. 213. 239. A feme covert may be guilty of a forcible entry, by entering in perſon, and may be impriſoned for it. Hawk. P. C. 283. Where the huſband may be proceeded againſt for the recuſancy of his wife, *vide* Hawk. P. C. 25. *Qu.* If not alone? Hob. 96. She may be indicted together with her huſband, for keeping a bawdy-houſe. Hawk. P. C. 2. If a woman bring a malicious appeal for the death of her huſband, known by her to be alive, ſhe may be impriſoned for her falſe appeal, till ſhe make fine to the king, and her huſband ſhall go at large. 8 H. 4. 17. Fitz. Coron. 73. Bro. Impriſonment, 100. [She may be convicted alone, under 9 G. 2. c. 23., for ſelling gin. 2 Str. 1120. She may be committed for diſobeying an order of baſtardy. 3 Burr. 1679.]

A feme covert lent 20*l.*, to be paid at 20*s.* by the week, and 1*s.* 6*d.* intereſt; the borrower paid the intereſt, which amounted to 30*s.*, which the wife exacted and received; and this appearing on evidence, in an action brought by the huſband for the money, *Holt*, Ch. Juſt., ruled it to be an uſurious contract by the huſband, ſufficient to diſcharge and avoid the obligation *civiliter*, though not ſufficient to charge the huſband *criminaliter*. Skin. 348. pl. 17. Barnet and Tompkins.

If the wife incur the forfeiture of a penal ſtatute, the huſband may be made a party to an action or information for the ſame, as he may be generally to any ſuit for a cauſe of action given by his wife, and ſhall be liable to anſwer what ſhall be recovered thereon. *Vide* Hawk. P. C. 3., and the authorities there cited.

If a feme covert, pretending herſelf to be ſole, marries a ſecond huſband, he ſhall have no action againſt the firſt, becauſe this action is founded upon the communication and (*b*) contract of the wife, which will not bind the huſband; beſides this is felony. Sid. 375. Lev. 247. Shall be anſwerable for a treſpaſs done by her, or for ſlanderous words ſpoken by her. *Vide* 2 H. 6. 22. Kelw. 61. Roll. Abr. 251. Leon. 122. Cro. Car. 376. (*b*) Where the huſband ſhall be bound by ſome of her acts, as in ſelling goods, receiving money for him, *vide* the next head and 2 Inſt. 713. Sid. 114. Cro. Eliz. 245. 3 Leon. 267. Chan. Ca. 38. 6 Mod. 162. Comb. 450. Jenk. Rep. 4. 23. Ld. Raym. 224.

Several goods were deviſed to *A.*'s wife for life, and after her deceaſe to *J. S.* in this caſe, though *A.* and his wife were parted, and there had been great ſuits for alimony, and ſhe, during the ſeparation, had waſted the goods, yet the lord keeper thought it reaſonable that the huſband ſhould be charged for this converſion of the wife's, *A.*'s title being paramount to the feme's. Vern. 143.

(H) Of her Contracts for Neceſſaries, and how far the Huſband is bound by ſuch Contracts.

11 H. 6. 30. Fitz. Debt, 41. Brownl. 47. All. 61. Lit. Rep. 307. Hutt. 105. Jenk. Rep. 4. Roll. Abr. 350, 351. Sid. 109, 110, &c. Mod. 128. 2 Vent. 155. Keb. 69. 80. 87. 2 Vent. 42. Lev. 4, 5. Salk. 116. 118. pl. 10. 2 Ld. Raym. 1006. 6 Mod. 171. 2 Show. 283. Skin. 348. pl. 17. [1 Term Rep. 5. 1 H. Bl. 334. 348. Co. *Bankrupt Laws*, 32. 36. See 2 Br. Ch. Rep. 377. Fontbl. notes on Eq Tr. 100.

IT is clear that a huſband is obliged to maintain his wife, and may by law be compelled to find her neceſſaries, as meat, drink, clothes, phyſick, &c. ſuitable to the huſband's degree, eſtate, or circumſtances: it ſeems alſo ſettled that the wife is not to be her own carver, and that ſhe hath not an abſolute power of binding the huſband by any contract of her's, though for neceſſaries, without his aſſent, precedent, or ſubſequent: the law therefore in theſe caſes, as it ſeems eſtabliſhed by uſage and practice, is to leave it to the jury to find whether the huſband conſented or not; and though no expreſs conſent or agreement of his be proved, yet if it appears that ſhe cohabited with her huſband and bought neceſſaries (*a*) for herſelf, children, or family, the huſband ſhall be chargeable, and the jury may find, on their oaths, that they came to the huſband's uſe, he being by law obliged to provide for them: alſo if ſhe cohabits with her huſband, and is ever ſo lewd, he ſhall be liable for her neceſſaries, for he took her for better for worſe; ſo if he runs away from her, or turns her away, or forces her by cruelty or ill uſage to go away from him; but if he allows her a ſeparate maintenance (*b*), or prohibits (*c*) particular perſons from truſting her, he ſhall not be liable during the time that he pays ſuch ſeparate maintenance, nor for neceſſaries taken up of thoſe perſons particularly prohibited; for in theſe caſes no conſent, but rather the contrary, appears; but a general warning or notice in the *Gazette*, or other news-paper, not to truſt her, is not a ſufficient prohibition. Alſo the jury are to determine as to the wife's neceſſity, the huſband's degree and circumſtances, and the value of the things ſold and delivered, and give a verdict, and aſſeſs damages accordingly.

(*a*) But the contract in ſuch caſe will not avail, if made under illegal circumſtances. 2 Str. 1122. (*b*) Or if ſhe goes away with an adulterer, whether the tradeſman have notice of it, or not. 1 Str. 647. 706. 2 Str. 875. 1 Salk. 119. See 2 Bl. Rep. 1079. (*c*) But if he turns away his wife cauſeleſsly, he will be liable, notwithſtanding a particular prohibition. 2 Str. 1214.—Where the huſband claimeth to be diſcharged from liability to his wife's debts, in reſpect of her having a ſeparate maintenance, it ſeemeth, that it muſt be a proviſion proceeding from himſelf, and not from a third perſon. 4 Burr. 2177. The modern caſes, with reſpect to a ſeparate maintenance, have gone very far: for it hath been lately adjudged, that the wife may, in ſuch caſe, contract and be ſued as a feme ſole; that ſhe continues liable, though ſhe alien or exhauſt the whole of the diſtinct fund; that the huſband is not liable even for neceſſaries; and that the ſecond huſband is accountable for debts contracted during the ſtate of ſeparation from a former. 1 Term Rep. 5.]

But the learning on this head will be beſt explained by inſerting the celebrated caſe of *Scot* and *Manby*, with my Lord Chief Baron *Hale*'s argument at length.

Manby and Scot, adjudged in the Exchequer-chamber on a ſpecial verdict, by

A woman departs from her huſband without his conſent, and during her abſence the huſband prohibits ſeveral perſons, and among the reſt *J. S.* to truſt her; and after, ſhe makes a requeſt to cohabit again with her huſband, and he refuſeth to receive her; and yet *J. S.* ſells to her ſilk and velvet to the value of 40*l.* which

which is found ſuitable to the degree of her huſband: the huſband ſhall not be charged.

eight judges againſt three; but *Atkins*, one of the eight, agreed with the three if there had been no ſpecial prohibition; and *Bridgman*, Ch. Juſt., one of the eight, held, that admitting otherwiſe, *viz.* that the huſband was liable, yet he might make ſuch ſpecial prohibition to a particular perſon, and it would excuſe him. 1 Sid. 109, 110. *&c.* and 1 Mod. 128. 1 Lev. 4, 5. 1 Keb. 69. 80. *&c.* S. C.

1. I will ſay ſomething of the nature of contracts.

2. I will apply it to our caſe, in conſideration of the verdict, as it is found.

3. I will ſhew in what particulars we all agree, and where we differ, and ſo ſtate the queſtion.

4. I will ſpeak to the queſtion as it ſhall be ſo ſtated.

Lord Chief Baron *Hale's* argument in the Exchequer-chamber, in the caſe of Manby v. Scott.

1. A contract is the conſent of two or more, whereby to bring in an obligation of one to the other; and the parts requiſite to ſuch a contract, are 1ſt, parties; 2dly, conſent; 3dly, an obligation.

1ſt, It is requiſite that the parties be not diſabled to contract; and as to that, in law ſome are diſabled to contract *quoad hoc* and *ex parte*, as an infant, *non compos*, *&c.* and ſome have an abſolute diſability; as a feme covert, who can no way in our law contract.

2dly, As to the conſent, that muſt be either expreſs, or implied; expreſs muſt be either precedent, concomitant, or ſubſequent; implied is raiſed by law; as where a man is made bailiff, ſteward, or houſe-keeper, a general authority is given him; when goods come to a man's uſe, he having had notice of the contract, it is an aſſent the law will imply, and make the contract oblige him; and if either of theſe had been found in this ſpecial verdict, it had been well; for then there had been fact enough for the law to have made conſtruction upon. There is, beſides all this, evidence of a conſent in fact, which muſt induce a jury, if there be no circumſtances againſt it. As if I ſend a ſervant always with ready money, and he buys upon truſt, here is no evidence; but if I uſually ſend him upon truſt, and where he takes up goods I ſtand to his bargain, and pay for them, this is evidence that I would have all the world truſt him; and this a jury may apply to make a conſent to any particular contract; but then they muſt find the aſſent in fact; for that which is the evidence to them we cannot judge upon.

3dly, As to the obligation, it is neceſſary that this be upon the party conſenting. I know that in ſome caſes the obligation of a contract may be transferred by way of concomitancy; as to the huſband, it is carried with the chattels and perſon of the wife; and it lies upon the heir and executor when they have aſſets; but for a man to be originally bound by a contract, it is neceſſary that there be his conſent; and the conſent of no other perſon will ſerve.

2. To conſider what is in the verdict, and apply what has been ſaid to it: I find in it no aſſent of the huſband's found, nor any authority he gave his wife, but only matter of evidence. I confeſs,

confeſs, that when a wife, though not particularly appointed, contracts for neceſſaries for herſelf, her family, her huſband, or her children, this is great evidence to a jury to make them find the aſſent of the huſband; for it cannot be reaſonably thought that any man would be ſo barbarous as to deny his aſſent to have the neceſſities of his family ſupplied; and ſo it may be believed and found he did aſſent; but this only in caſe of cohabitation; for it may be well imagined, that when a wife leaves her huſband, that he may refuſe to ſupply her; and ſo in the verdict, this matter of evidence is anſwered, by finding, that ſhe departed from him: but then there is an anſwer on the other ſide, that ſhe afterwards, and before this contract, deſired to cohabit with him; to this it is replied again, with a flat bar to any evidence than can be given of an aſſent, *viz.* that the huſband did expreſsly prohibit thoſe tradeſmen to truſt her: the judges, in their directions to a jury, direct them to be guided by ſuch evidence of an aſſent when nothing appears to the contrary; becauſe it would be very hard in point of proof to ſhew expreſs evidence of aſſent to every particular; but when there is an expreſs prohibition or denial of aſſent, this takes off all the circumſtances of evidence on the other ſide.

3. I am to ſhew in what points we all agree, and where we differ.

1ſt, We all agree that it is not the contract of the wife's to bind her; for in our law ſhe hath no will, nor power to bind herſelf; the civil law, as it allows her a property diſtinct from the huſband's, ſo it gives her power to bind herſelf by contract.

2dly, It is agreed on all hands, the wife ought to be maintained; the civil law, though it allows the wife a ſeparate property, yet the huſband ought to maintain her out of her dower: it is more neceſſary for the common law that takes away all property from her, to make proviſion for her ſubſiſtence, elſe that which we pretend to be the moſt reaſonable and provident law in the world, would be the moſt barbarous; but in this we differ. It is ſaid by thoſe who argue that the huſband ſhould be charged, that ſhe may be maintained by a power the law gives her to charge her huſband by way of contract, which is altogether denied by us.

3dly, We all agree that when the wife contracts for the neceſſaries of her huſband, children, or family, that this ſhall not charge him by any inherent power in the wife, but by a reaſonable and implicit aſſent, which muſt be found by a jury, but we differ in the charging him; when ſhe contracts for the ſupply of her own neceſſities, we ſay it is not by a power ſhe has, but there muſt be his conſent, either expreſs or implied. Secondly, We confeſs, that in caſe of cohabitation, there is great evidence of his aſſent, till the contrary appears; but it is not ſo binding as will amount to a preſumption. Thirdly, Therefore we ſay it muſt be found by the jury. Fourthly, That it is countermandable by prohibition, where it is ſaid on the other ſide, and muſt be maintained, elſe they can make nothing of the caſe, that there is in the

wife,

wife, upon the intermarriage, an original, inherent, primogenial, and uncountermandable power to charge the husband for her neceſſities, which the husband can no ways repeal, though there be no cohabitation or conſent, but an expreſs prohibition, and this is the true ſtate of the queſtion betwixt us; If there be ſuch a power in the wife or no, independent upon any conſent of the husband's? I ſhall conſider,

1ſt, If there be ſuch a power during cohabitation? 2dly, If for neceſſaries? and here I ſhall make a ſecond queſtion, If there be ſuch a finding of neceſſaries as is requiſite in a verdict? 3dly, If the departure make nothing in the caſe? 4thly, Admitting all this, whether it be countermandable *quoad* one man?

1ſt, I ſhall hold there is no ſuch power in the wife; my reaſons are,

1ſt, By the law of God, of nature, of reaſon, and by the common law, the will of the wife is ſubject to the will of the husband; and therefore an indictment for being a joint-receiver with her husband was holden ill; but if the law were with thoſe who argue on the other ſide, this would be inverted, and the will of the husband would be ſubject to the will of the wife.

2dly, Becauſe no man can be originally bound in a contract, but by his own conſent.

3dly, To prove the law on their ſide lies upon them, which they have not, nor any ways can do, (there being but one ſemblance of an authority they can allege, which is 11 *H.* 6., which is the opinion of Judge *Martin*, and muſt be intended by way of evidence;) but they ſay, they prove it by reaſon and inconvenience.

1. I anſwer, *Argumentum ab inconvenienti* will not change or alter the law when it appears to be ſo; but it is only to prove and interpret the law when we are in doubt whether it be ſo or no.

2dly, I anſwer, The inconvenience of the other ſide outweighs, and is far greater, for it will bring into the law a manifold incertainty.

1. What things are neceſſary, what kind of neceſſity, and when and how often this neceſſity may happen; as if the husband ſhould give the wife clothes, and ſhe give them away the next day, ſhe is in as much neceſſity the next day as ſhe was before, and *quicquid neceſſitas cogit debetur.*

2dly, There would be great uncertainty which way ſhe ſhould ſupply her neceſſities; as this way, 1. Of taking up goods, and if ſhe can find no credit with the mercer, but has the uſurer for her friend, then the law ſure that provides againſt her neceſſities, will give her leave to take up money; and if that fails, it is reaſonable that ſhe ſhould ſell goods; for the two other ways failing, the law will not let her periſh; if there were no goods, then it were as reaſonable ſhe might receive rents, which would be againſt Sir *Paul Tracey* and *Dutton*'s caſe, *Cro. Jac.* 621.; and if there were none ſuch, ſhe might raiſe money upon the demiſe of the land; if the law will give way to her neceſſities in the firſt

caſe, it muſt yield in all the reſt, for the caſe may elſe be ſo that the proviſion of law would be defective: but I hold, that in none of theſe caſes the wife can provide for herſelf; but ſay, there muſt be a truſt ſomewhere; as a father is bound by the law of nature to provide for his ſon, and the ſon is bound to provide for the father, but the law will not give the one leave to oblige the other by way of contract; becauſe the law ſuppoſes, that they will not be ſo unnatural, and entruſts them with it, *viz.* before the 43 *Eliz.*, for the poor. If this truſt muſt be ſomewhere, the huſband knows beſt how to manage affairs, and ſo is fitter to be intruſted by the law than anybody elſe: I add, that although the law will not preſume ſo much ill as that a huſband ſhould not provide for his wife's neceſſities, yet there is a ſevere obligation on him, not only to ſupply her in caſe of exigencies and extreme neceſſity, but according to conveniency; but the law has not made her her own judge, but provided her a judicature ſufficient to reform the cloſe-handedneſs of her huſband: where ſhe is driven to an extreme neceſſity and want of ſubſiſtence, the law has appointed a judge to compel the huſband to ſupply her, I mean the Chancellor; for, upon a *ſupplicavit* he may be bound to the peace, and *bene & honeſte tractare;* which I hold not to be underſtood only, that he muſt uſe her gently, and forbear beating her, but that he muſt ſupply her exigencies. Then, for her conveniencies, the law has appointed the biſhops' courts. And whereas it is ſaid, that this is not the common law, I anſwer, that they are juriſdictions appointed by the common law; and though their coercion and proceedings are after another law, yet their derivation, as to their uſe here, was from the common law; and concerning the amplitude of their power, which is ſaid not to be able to adminiſter a remedy ſufficient for this diſeaſe; I ſay, as it is aided by the *brachium ſeculare*, the power of it falls as ſeverely upon them that diſobey it, as the common law can uſe when men will not pay their debts; for they may excommunicate, and upon that follows impriſonment, and a diſability to ſue any action.

The ſecond objection made on the other ſide, by comparing the caſe of a feme-covert with the caſe of an infant; but I anſwer, an infant is diſabled only *quoad hoc*, and may oblige himſelf for neceſſaries; but here the wife would bind her huſband alſo; in the caſe of an infant there is nobody intruſted by the law to provide for him (for guardian in ſocage is only where there is land) immediately, and therefore he muſt do it himſelf; whereas, the huſband is intruſted for the wife; ſo the caſes are not parallel.

3dly, It is objected that it comes to the uſe of the huſband; I anſwer, it would then bind the huſband in ſuperfluities, which may ſo come to his uſe; which how inconvenient, I leave any man to judge.

4thly, It is objected, that the huſband is bound by the wrongs of his wife, and may be charged in trover and converſion upon her act; I ſay, that in caſe of a wrong ſhe binds herſelf, for ſhe muſt be joined in the action, and ſo ſhe will be more careful not

to

to ſubject herſelf, than when the huſband is charged alone; but I hold, that in this caſe no trover and converſion lies; for the delivery of the party, knowing the fact, and intending a ſale and contract, tranſlates the property at the peril of him that delivers them. If a man knows one to be an infant, and ſells him goods, it is at his peril; for if they be not neceſſaries, he ſhall never charge the infant for the converſion: and ſo of a feme-covert, if there be no conſent of the huſband; for it has been holden, that what the wife eats or wears comes to the uſe of the huſband, and will maintain a converſion; and if the law ſhould not be taken thus, we ſhould let in a flood of inconveniencies, which would make all thoſe diſabilities the law has raiſed for the protection of infants and feme-coverts, mere words, and of no effect.

2dly, I ſhall lay no ſtreſs upon the imperfect finding of the verdict, leſt it might be ſaid that that was the reaſon of the judgment; but only name ſome particulars wherein it ſeems to be imperfect. 1. They ſhould have found what the ſtuffs were; for it hath been adjudged, that velvets were not neceſſary for an infant; they ought to have found the circumſtances of the neceſſity; as where manſlaughter is committed *ſe defendendo*, or in execution of an office; they ſhould have ſet forth of what kind the neceſſity was, as there is a neceſſity of clothes, of meat, of medicine, and of habitation; they have found that theſe goods were neceſſary and convenient for his degree, they ſhould have ſaid alſo for his eſtate; for a high degree may have a low eſtate, and then the wife cannot expect to be maintained according to the height of her huſband's degree; but I lay no hold on theſe defects in the verdict.

3dly, Upon her departure all evidence of any obligation of the huſband to maintain her ceaſes; it would elſe be very unreaſonable; for whilſt they are both in one houſe, the ſame proviſion will ſerve for both. In caſe of a bailiff, if he goes away, no contract of his will bind the maſter, though he had no expreſs diſcharge; and here we muſt preſume ſome unreaſonable cauſe of her departure, for a wife in no caſe ought to do it, and ſhe might have had alimony without any ſeparation. *Moor* 874.

4thly, Admitting all this, I hold that the prohibition here takes away all preſumption of any conſent of the huſband to the contract, either expreſs or implied; and though the wife ſhould be allowed ſuch a power to charge her huſband as is affirmed on the other ſide, yet it may be diſcharged as to one particular man, by the prohibition and countermand of the huſband; it would be a very hard caſe elſe, for ſhe may make him liable to the greateſt enemy he had in the world. 12 *E.* 4. 18. The king may grant to *J. S.* to be exempt of juries; but if he grants it to a whole county, hundred, or townſhip, the grant is void; and by this prohibition of the huſband here is no diſcharge of the whole power, but only it is taken of thoſe particular perſons. If a man enters into an obligation not to uſe his trade, it is againſt law, and void; but if it be not to ſet up his trade in ſuch a ſtreet or town, it is good.

Note;

Note; He added, that as to charging the husband by way of evidence, which he had restrained to cohabitation, he said, the law is the same where the husband departs from the wife; as upon going beyond sea, *&c.*

But if a woman takes up goods, and pawns them before they are made into clothes, the husband shall not pay for them, because they never came to his use; *secùs* if made up and worn and then pawned. Salk. 118. pl. 10. If she pawns her clothes, and borrows money to redeem them, husband not liable. 2 Show 283. If husband and wife by agreement live separate, and she has a separate maintenance, it will be presumed that those who deal with her trust her on her own credit. Salk. 116. pl. 6. Ld. Raym. 444. Sid. 124. 12 Mod. 245. 6 Mod. 171. *Vide* Skin. 348. pl. 18. Warning a tradesman's servant not to trust her, sufficient warning to the master. Salk. 118. pl. 10. 2 Ld. Raym. 1006. A tradesman who sold lace and silver fringes for a petticoat and side-saddle, which amounted to 94*l.*, and all within four months, to the wife of a serjeant at law, afterwards a judge, recovered against him. Skin. 349.

Since this resolution there have been several cases in which tradesmen have recovered in actions brought against the husband for goods delivered the wife; and in all these cases the judges have laid down the distinction of an implied promise, and directed it as a sufficient foundation to charge the husband; and in their directions have shewn as much favour as possible to such tradesmen as intrusted her on the credit of her husband, and were in no combination with the wife to charge him.

Salk. 118. pl. 11. Ruled on evidence.

An ordinary working man married a woman of the like condition, and after cohabitation for some time, the husband left her, and during his absence the wife worked; and this action being brought for her diet, it was holden, that the money she earned should go to keep her.

Vern. 71. [At law a wife cannot make her husband liable for money *borrowed*, though

If the wife, whilst she lives separate from her husband, and hath a separate maintenance, buys goods of tradesmen who know of the separation and maintenance, they cannot sue the executors of the husband in Chancery for these goods; neither will equity give the executors any relief, because they have a very good defence at law.

lent and applied for the buying of necessaries. 1 Salk. 387. But in equity, the creditor will be] allowed to stand in the place of the tradesmen, and to have satisfaction, as far as they could, if they had been plaintiffs. Preced. in Chan. 502. 1 P. Wms. 482. Where equity will decree a wife a separate maintenance, *vide* Abr. Eq. 68. [There certainly are cases where equity has decreed alimony to the wife; but, whether the decrees proceeded upon a previous divorce in the ecclesiastical court, or upon an agreement between the parties, in many cases, doth not appear. Lasbrook v. Tyler, 1 Ch. Rep. 24. Ashton v. Ashton, *id.* 87. Russell v. Bodwill, *id.* 99. Whorewood v. Whorewood, *id.* 118. 1 Ch. Cas. 250. But it is observable, that all these cases, except that of Lasbrook v. Tyler, were during the times of the troubles, when commissioners were appointed, to whom jurisdiction was expressly given, and whose decrees were holden to be confirmed by the act for the confirmation of judicial proceedings. 1 Ch. Rep. 118. In Nichols v. Danvers, 2 Vern. 761. proceedings had been had against the husband, as appears from the registrar's book, (though not noticed in Mr. Vernon's report,) in the ecclesiastical court, *propter sævitiam*; and in Oxenden v. Oxenden, it appears from Gilbert's report of it, that there had actually been a divorce *propter sævitiam*; and in Angier v. Angier, Gilb. Eq. Rep. 172. there was an agreement. But in Williams v. Callow, 2 Vern. 752. the court certainly does appear to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce or agreement that the fund in dispute should be so applied. And in Watkyns v. Watkyns, 2 Atk. 96. the husband having quitted the kingdom, Lord *Hardwicke* decreed the wife the interest of a trust fund till he should return, and maintain her as he ought. Yet in Head v. Head, 3 Atk. 547. Lord *Hardwicke* observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly; and this opinion of Lord *Hardwicke* appears most reconcilable to principle; for the case of a divorce *propter sævitiam*, may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt, but that courts of equity may, concurrently with the spiritual court in proceeding upon it, decree a separate maintenance. Wood's Inst. 62. Sealing v. Crawley, 2 Vern. 386. Guth v. Guth, 3 Br. Ch. Rep. 6. The spiritual court however would be the more proper jurisdiction, if it acted *in rem*. Lit. Rep. 98. 2 Atk. 511. But if after an agreement between husband and wife to live separate, they appear to have cohabited, equity will consider the agreement as thereby waved.

Fletcher

Fletcher v. Fletcher, M. 1788. It is obſervable, that if courts of equity had an original and concurrent juriſdiction with the ſpiritual courts, it would have been unneceſſary to have given the commiſſioners, during the troubles, ſuch juriſdiction; and that the doubt in 1 Ch. Rep. 118. could not have been raiſed, reſpecting the validity of their decrees, after the act for confirming judicial proceedings. Beſides, even in the ſpiritual courts, they do not pretend to the right of decreeing alimony, but as incidental to a decree of divorce; and a decree of divorce or ſeparation was never ſuggeſted to be within the juriſdiction of a court of equity. Fonbl. notes on Eq. Tr. 96, 97. And Lord Chancellor Loughborough is reported to have ſaid, that he took it to be eſtabliſhed law, that no court, not even the eccleſiaſtical court, hath any *original* juriſdiction to give a wife ſeparate maintenance. It is always as *incidental* to other matter, that ſhe becomes entitled to a ſeparate proviſion. If ſhe applies to the Chancery, upon a *ſupplicavit*, for ſecurity of the peace againſt her huſband, and it is neceſſary that ſhe ſhould live apart; as incidental to that, the chancellor will allow her a ſeparate maintenance: So in the eccleſiaſtical court, if it is neceſſary for a divorce *a menſâ et toro propter ſævitiam*. 2 Vez. jun. 195.]

(I) What Acts done by the Huſband or Wife alone, or jointly with the Wife, ſhall bind the Wife; and herein of her Agreement or Diſagreement to ſuch Acts after the Death of her Huſband.

THE huſband, as head and governor of the family, hath an abſolute power over the chattels real and perſonal which he is poſſeſſed of in right of his wife, to diſpoſe of them as he thinks proper, and no act of concurrence of her's is of any avail, either in confirming or controlling ſuch diſpoſition: but the real eſtate is under a different regulation; and not under the power of the huſband, longer than during the coverture; and therefore any diſpoſition of it made by him alone may be defeated; alſo all charges laid on it by him, fall off with his death.

Roll. Abr. 346, 347. 2 Inſt. 510. 10 Co. 42. Sid. 11. [In equity the wife's conſent is neceſſary to the diſpoſal of her perſonal eſtate; and ſhe is perſonally examined in court, as in the caſe of fines levied at law.]

At common law, any alienation made by the huſband of the wife's land, whether by feoffment, (*a*) fine, or (*b*) recovery, was a diſcontinuance; and after his death ſhe was put to her *cui in vita*, to reinſtate herſelf; but now by the ſtatute of 32 *H.* 8. *cap.* 28. it is provided, *That no fine levied by the huſband alone, of lands, being the freehold and inheritance of the wife, ſhall in any wiſe be or make a diſcontinuance, or be otherwiſe prejudicial to her or her heirs; but that the wife and her heirs ſhall and may lawfully enter into the ſaid lands according to their rights and titles therein.*

2 Inſt. 681. (*a*) If ſhe neglects to enter within five years after the death of her huſband, and the fine was with proclamation, her entry is taken away, and her right for ever extinguiſhed; for this *vide* Co. Lit. 326. Dyer, 72. 162. Plowd. 373. 8 Co. 72. 2 Inſt. 681. 9 Co. 140. If lands be given to huſband and wife, and the heirs of their bodies, and the huſband alone levies a fine thereof, the wife may enter after his death by force of this ſtatute. 9 Co. 138. 2 Inſt. 681. Cro. Car. 477. (*b*) That a recovery ſuffered by the huſband alone is void, *vide* F. N. B 468. Booth, 185. 2 Inſt. 343. Plowd. 57. [The huſband alone may make a tenant to the præcipe. *Vide ſupra* (C).]

If a feme covert levies a fine of her own inheritance, without her huſband, this ſhall bind her and her heirs, becauſe they are eſtopped to claim any thing in the land, and cannot be admitted to ſay ſhe was covert againſt the record; but the huſband may enter and defeat it, either during the coverture, to reſtore him to the freehold he held *jure uxoris*, or after her death to reſtore himſelf to his tenancy by the courteſy; becauſe, no act of a feme covert can transfer that intereſt which the intermarriage hath veſted in the huſband; and if the huſband avoids it during the coverture, the wife or her heirs ſhall never after be bound by it.

Bro. tit. *Fines* 33. 10 Co. 43. Hob. 225. 7 Co. 8. Co. Lit. 46. If a feme covert, as ſole, levies a fine executory, and execution is ſued againſt the huſband and wife, he may ſtop the execution, becauſe no act of her's can prejudice him; and if in

in this caſe the huſband makes default, and ſhe is received, ſhe may for the benefit of her huſband diſturb the execution of her own fine; but after the death of her huſband ſhe cannot avoid it. Bro. tit. *Fine*, 79. Co. Reading, 9. [An entry by the huſband into part only of the land, whereof the wife alone levied a fine, will avoid the whole fine. Mayo v. Combes, 1 Freem. 396. There is one inſtance of a married woman being allowed to levy a fine without her huſband. The huſband had ſold lands, and covenanted that he and his wife, (when of age,) ſhould levy a fine. When the wife came of age, ſhe refuſed to join in it; but it was levied by the huſband alone, who afterwards went abroad. The wife afterwards conſented to levy it, but the huſband was abſent. It was ſaid, upon motion to levy it, that it had been uſual in ſuch caſes for the curſitor to make out a *præcipe* to the wife as a *feme ſole*; but no example of it was produced. The court would make no rule to authenticate ſuch a fine; but it was afterwards acknowledged *de bene eſſe* before the lord chief juſtice, then in court. Moreau's caſe, 2 Bl. Rep. 1205.]

18 E. 4. 12. Roll. Abr. 347. 2 Roll. Abr. 20. 2 Inſt. 515. 3 Atk. 712.

If a huſband and wife join in a fine to convey her own inheritance, it ought to be received, if, upon her (*a*) examination it appears to be voluntary and free from conſtraint; and if ſhe be of full age, the fine ſhall bind her as if ſhe had been ſole.

(*a*) *Note:* The books which ſay, that a fine ſhall not bind a woman under coverture, unleſs ſhe be examined, muſt not be conſtrued as if it were in her power to reverſe the fine for want of her examination; but they are to be underſtood in this ſenſe, that the judge ought not to receive a fine without examining her. 2 Inſt. 515.

2 Inſt. 515. 2 Roll. Abr. 17.

The examination of a feme covert is not always neceſſary in levying fines, becauſe that being provided that ſhe may not at the inſtance of her huſband make any unwary diſpoſition of her property, it follows, that when the huſband and wife take an eſtate by the fine, and part with nothing, the feme need not be examined: but where ſhe is to convey or paſs any eſtate or intereſt, either by herſelf or jointly with her huſband, there ſhe ought to be examined; therefore, if *A.* levies a fine *come ceo* to baron and feme, and they render to the conuzor, the feme ſhall be examined; ſo it is where ſhe takes an eſtate by the fine, rendering rent.

F. N. B. 21. Leon. 15. 3 Lev. 36. But for this *vide* head of *Fines and Recoveries.*

If huſband and wife levy a fine, and the wife is within age, they may join in a writ of error to reverſe it during the minority of the wife, not by any privilege of coverture, but becauſe, during her ſtate of infancy, no act of her's can be ſo obligatory as not to be cancelled, if ſhe thinks it prejudicial to her.

Co. Lit. 36. Dyer, 358. For this *vide* tit. *Jointure.*

If a man makes a jointure on his wife, either before or after marriage, and they both join in a fine, ſhe is bound thereby; and if the jointure was made before marriage, ſhe is barred to claim dower in any other lands of the huſband's; but if the jointure was made during coverture, ſhe may claim dower in the other lands.

2 Sand. 177. Sid. 466. S. C. Mod. 290. 2 Keb. 684. 703. Wotton and Hale.

If baron and feme by fine *ſur conceſſit* grant land to *J. S.* for 99 years, and warrant the ſaid land to *J. S.* during the ſaid term, and the baron dies, and *J. S.* is evicted by one that hath a prior title, he may thereupon bring covenant againſt the feme, notwithſtanding ſhe was covert at the time when the fine was levied.

10 Co. 43. 2 Roll. Abr. 395.

A recovery, as well as a fine by a feme-covert, is good to bar her, becauſe the *præcipe* in the recovery anſwers the writ of covenant in the fine to bring her into court, where the examination of the judges deſtroys the preſumption of law, that this is done by the coercion of her huſband, for then it is to be preſumed they would have refuſed her.

But if a wife alone, or with her husband, bargain and sell her lands by deed indented and enrolled, yet it shall not bind her; for a wife cannot be examined by any court without writ, and there is no writ allowed in this case. 2 Inst. 673. Hob. 225.

If a feme covert join with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her. But where the money shall be paid out of the personal estate of the husband, *vide* Brend v. Brend, 1 Vern. 213. [If a wife charge her estate with payment of her husband's debts, or apply her separate estate to such purpose, and it do not appear to have been intended by her as a gift to her husband, equity will decree the husband's assets to be applied in exoneration of her estate, or in re-payment of the money advanced. Earl of Huntingdon v. Countess of Huntingdon, 2 Vern. 437. 1 Br. P. C. 1. S. C. Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 2 Vern. 689. 1 P. Wms. 264. S. C. Bagot v. Oughton, 1 P. Wms. 347. Evelyn v. Evelyn, 2 P. Wms. 659. Lewis v. Nangle, Ambl. 150. Earl of Kinnoul v. Money, cited in 3 Br. Ch. Rep. 206. Clinton v. Hooper, 3 Br. Ch. Rep. 201. Parteriche v. Powlet, 2 Atk. 384. Lacam v. Mertius, 1 Vez. 313. Astley v. Earl of Tankerville, 3 Br. Ch. Rep. 545.] But for this *vide* head of *Mortgage*; where she shall be bound to a specifick performance of her agreements in equity, *vide* title *Agreements*, and 2 Vern. 61.

If a husband disseise another to the use of his wife, this does not make her a disseisoress, she having no will of her own, nor will any agreement of hers to the disseisin during the coverture, make her guilty of the disseisin, for the same reason: but her agreement after her husband's death will make her a disseisoress, because then she is capable of giving her consent, and that makes her tenant of the freehold, and so subject to the remedy of the disseisee. Roll. Abr. 660. Bro. Disseisin, 67.

So if a man disseise another to the use of a feme covert, her agreement to it signifies nothing; for though the husband's agreement to it settles the estate in the wife, yet it makes her no sharer in the guilt of the disseisin. Roll. Abr. 660. Bro. Disseisin, 67.

But if a feme covert actually enter and commit a disseisin, either solely or together with her husband, then she is a disseisoress, because she thereby gains a wrongful possession; but yet such actual entry cannot be to the use of her husband or a stranger, so as to make them disseisors, because though by such entry she gains an estate, yet she has no power of transferring it to another. Co. Lit. 357. Roll. Abr. 660. Bro. Disseisin, 15. 67. *Vide* 8 H. 6. 14 *cont.*

If the husband seised of lands in right of his wife, make a lease thereof for years by indenture or deed poll, reserving rent; all the books agree this to be a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto; for if she accepts rent which becomes due after his death, the lease is thereby become absolute and unavoidable: the reason whereof is, that the wife after her intermarriage being by law disabled to contract for, or make any disposition of her own possessions, as having subjected herself and her whole will to the will and power of her husband; the law thereupon transfers the power of dealing and contracting for her possessions to the husband, because no other can then intermeddle therewith; and without such power in the husband they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both: but to prevent the husband from abusing such power, and lest he should make leases to the prejudice Bro. Acceptance, 10. Bro. Leases, 24. Cro. Jac. 332. 2 And. 42. Co Lit. 45. Plow. 137. Cro. Jac. 563. Yelv. 1. Cro. Eliz. 769. [It hath been holden that a mortgage for years by husband and wife of the wife's inheritance, without any fine levied,

may be confirmed by circumſtances by the wife when diſcovert, although there be no actual re-delivery of the deed. Goodright v. Straphan, Cowp. 201. But ſee Drybutter v. Bartholomew, 2 P. Wms. 126.] As to leaſes made by huſband and wife, either at common law, or by virtue of 32 H. 8., *vide* head of *Leaſes and Terms for Years*.

judice of the wife's inheritance, the law has left her at liberty after his death, either to affirm and make good ſuch leaſe, or to defeat and avoid it, as ſhe finds it ſubſervient to her own intereſt: and this ſhe may do, though ſhe joined in ſuch leaſe, unleſs made purſuant to the ſtatute 32 *H.* 8. *cap.* 28.

Dyer, 159. Roll. Abr. 475. Roll. Rep. 132.

Huſband and wife made a leaſe for years, by indenture, of the wife's lands, reſerving rent; the leſſee enters, the huſband before any day of payment dies, the wife takes a ſecond huſband, and he at the day accepts the rent and dies: it was holden, that the wife could not now avoid the leaſe, for by her ſecond marriage ſhe transferred her power of avoiding it to her huſband, and his acceptance of the rent binds her, as her own act before ſuch marriage would have done, for he by the marriage ſucceeded into the power and place of the wife; and what ſhe might have done, either as to affirming or avoiding ſuch leaſe before marriage, the ſame may the huſband do after the marriage.

2 Roll. Rep. 344. 361. 372. Cro. Car. 7. Cro. El. 149. 4 Co. 29.

The huſband being ſeiſed of copyhold lands in right of his wife in fee, makes a leaſe thereof for years, not warranted by the cuſtom, which is a forfeiture of her eſtate; yet this ſhall not bind the wife or her heirs after the huſband's death, but that they may enter and avoid the leaſe, and thereby purge the forfeiture: and the diverſity ſeemeth between this act, which is at an end when the leaſe is expired or defeated by the entry of the lord, or the wife after the huſband's death, and ſuch acts as are a continuing detriment to the inheritance, as wilful waſte by the huſband, which tends to the deſtruction of the manor: ſo of non-payment of rent, denial of ſuit or ſervice; for ſuch forfeitures as theſe bind the inheritance of the wife after the huſband's death; but in the other caſe, the huſband cannot forfeit by this leaſe more than he can grant, which is but for his own life.

Plow. 293. Co. Lit. 351. Roll. Abr. 345.

A woman guardian in ſocage marries, and joins with her huſband by indenture in making a leaſe for years of the ward's lands, yet after her huſband's death ſhe may avoid the ſame; for though the huſband has abſolute power to diſpoſe of all chattels, either real or perſonal, whereof he is poſſeſſed in right of his wife, and the wardſhip of the body, and land in this caſe is but a chattel; yet the wife being poſſeſſed of it in right of the infant, and accountable to him for the profits when he comes of age, the huſband's diſpoſition ſhall not bind her after his death, but that ſhe may avoid it in right of the infant, whoſe guardian ſhe ſtill continues to be; and her own joining in the leaſe was not material, becauſe ſhe was then under coverture.

Co. Lit. 3. a. [(*a*) A bond to her ſingly is good. Br. tit. *Obligation*, p. 36. *Teſtamen. et*

A feme covert is capable of purchaſing (*a*); for ſuch an act does not make the property of the huſband liable to any diſadvantage, and the huſband is ſuppoſed to aſſent to this, as being for his advantage; but the huſband may (*b*) diſagree; and it ſhall avoid the purchaſe: but if he neither agrees nor diſagrees, the purchaſe is

good; for his conduct ſhall be eſteemed a tacit conſent, ſince it is to turn to his advantage: but in this caſe, though the huſband ſhould agree to the purchaſe, yet after his death ſhe may wave it; for having no will of her own at the time of the purchaſe, ſhe is not indiſpenſibly bound by the contract: therefore if ſhe does not, when under her own management and will, by ſome act expreſs her agreement to ſuch purchaſe, her heirs ſhall have the privilege of departing from it.

Volunt, p. 9. (*b*) And if he do, he may maintain trover for the recovery of the purchaſe-money. Garbrand v. Allan. 1 Ld. Raym. 224. The like remedy he may have for money loſt by the feme at cards. Rey v. Stephens, cited in 1 Sid. 112. The receipt of money by the feme will be binding upon the huſband, if it appear that ſhe *uſually* receives and pays money for him. Seaborne v. Blackſton, 2 Freem. 178.]

[A wife may, without her huſband, execute a naked authority, whether given before or after marriage. So where both an intereſt and an authority paſs to the wife, if the authority be collateral to, and do not flow from the intereſt; becauſe, then the two are as unconnected as if they were veſted in different perſons. And as a feme covert may, without her huſband, convey lands in mere execution of a power or authority, ſo may ſhe, with equal effect, in performance of a condition, where land is veſted in her on condition to convey to others. It ſeemeth doubtful, however, whether ſhe can convey lands which ſhe holds as truſtee without her huſband joining in the conveyance.

Co. Lit. 112. a. note 6. Peacock v. Monk, 2 Vez. 191. Gibbons v. Moulton, Rep. temp. Finch, 346. Sir W. Jones, 137. *Vide* note 6. Co. Lit. 112. a. Fonbl. notes on Eq. Tr. 85.

If a note be made payable to a feme ſole or order, and ſhe afterwards marry, ſhe cannot, during the coverture, indorſe it.

Connor v. Martin, 3 Wilſ. 5.

The bond of a feme covert is void; and ſo is her appointment of an attorney; for ſhe is incapable of executing a deed.

2 Wilſ. 3. 2 Saund. 213. But if a woman ſeal a bond in the preſence of her huſband, and he ſtand by, and do not gainſay, it ſhall bind him. Cited *per* Maſter of the Rolls, as adjudged in the time of H. 8. 2 Freem. 218.]

(K) Where the Huſband and Wife muſt join in bringing Actions.

IN thoſe caſes where the debt or cauſe of action will ſurvive to the wife, the huſband and wife are regularly to join in the action; as in recovering debts due to the wife before marriage, in actions relating to her freehold or inheritance, or injuries done to the perſon of the wife.

Roll. Abr. 347. Moor, 432. That a feme covert can in no caſe ſue without her huſband, *vide* letter (M).

But if a feme ſole hath a rent-charge, and rent is arrear, and ſhe marries, and the baron diſtrains for this rent, and thereupon a reſcous is made, this is a tort to the baron himſelf, and he may have an action (*a*) alone.

Cro. Eliz. 459. Owen, 82. S. P. Moor, 584. S.C. (*a*) Or may join his wife therein, becauſe it ariſes upon a duty due unto her before coverture. Cro. Eliz. 459. *per Cur.*

So if a feme ſole hath right to have common for life, and ſhe takes huſband, and he is hindered in taking the common, he may have an action alone without his wife (*b*), it being only to recover damages.

2 Bulſt. 14. adjudged. (*b*) The baron ſeiſed of a houſe for life; and, in the right of his feme, leaſed for years to the defendant, who burnt the houſe, and the baron alone brought an

an action for this; and whether it lay *dubitatur*; becauſe the damage was done to the eſtate of the feme; and if ſhe dies, the baron is not chargeable over in waſte, in regard of which only an action lies; becauſe it was the folly of the plaintiff that he made no ſpecial proviſion againſt waſte. Cro. Eliz. 461. —— If *A.* demiſes a houſe to *B.* for years, and *B.* covenants to repair the ſaid houſe, during the term, and after *A.* grants the reverſion to baron and feme, *&c.*; the baron may have an action alone upon this covenant; for therein damages only are to be recovered. Cro. Jac. 319. adjudged. 3 Bulſt. 163. Roll. Rep. 359. S. C. adjudged.

Bulſt. 21. They muſt join in *detinue* for charters concerning the wife's inheritance. 38 H. 6. 4. Roll. Abr. 347. So in trover for a deed by which a rent-charge was granted to her *dum ſola*, though it came to the hands of the defendant after coverture. Noy, 70. For rent due to her before coverture as tenant in *dower*. Roll. Abr. 318. 348. *Vide* Bulſt. 135, 136. Cro. Jac. 283. and *Quære* if ſince 32 H. 8. c. 37. there is any difference where the avowry is made for rent due before, and where after marriage. —— Whether the huſband alone may bring a *quare impedit*, *vide* Co. Lit. 351. a. Owen, 82. Lit. 13. 357. Winch. 73. 2 Bulſt. 14. Jenk. 2, 3. Bulſt. 110.

But if baron and feme are diſſeiſed of the land of the feme, they muſt join in an action for the recovery of this land.

Cro. Eliz. 608. 13 Co. 47. S. C. Moor, 912. S. C. 2 Inſt. 650. S. C. cited, 2 Mod. 270. S. C. cited. Jenk. Rep. 273. S. C. ſaid to be adjudged that the baron might have the action alone. *Vide* 1 Brownl. 9. 1 Jones, 325. —— If a ſtranger cuts trees upon the land of the feme, they may join. 15 E. 4. 9. b. Cro. Car. 4377. —— So they may join in treſpaſs *quare clauſum fregit*. But Lit. Rep. 285. *contr.*

If a feme ſole is poſſeſſed for years of a cloſe, to which time out of mind there hath been a way through the cloſe of *J. S.* next adjoining, and *J. S.* erects a building *ex tranſverſo viæ prædict.*, ſo that ſhe cannot uſe the ſaid way, and after ſhe marries, the baron and feme may join in an action for the ſtoppage during the coverture, declaring that after the ſaid marriage (*a*) they could not uſe the ſaid way, *&c.*, becauſe the wrong was done to the feme, and the (*b*) baron had the cloſe in her right.

Bulſt. 110. 2 Vent. 197. Cro. Car. 419. adjudged. 2 Mod. 217. S. C. cited, *arguendo*, as if adjudged that ſhe muſt join. Jones, 367. S. C. but S. P. does not appear. (*a*) For incloſing twenty acres of waſte, in which the feme had common, *ita quod* they could not, as before, take the profits with their cattle, *&c.*; and becauſe a feme covert cannot have cattle, Lit. Rep. 284, 285., the court inclined for the defendant; but it does not appear what judgment was given. (*b*) So in an action for not grinding at the wife's mill. Hob. 189. —— So where the feme had right to all the lop of certain trees during life, and the owner cut them down. Cro. Car. 437. adjudged. Jones, 376. In which laſt book it is ſaid the exception was, that the action was brought by the baron alone, and yet adjudged for him.

If *A.* declares that he was ſeiſed, in right of his wife, of a meſſuage, bakehouſe, *&c.*, and that the defendant erected two houſes of office ſo near the ſaid bakehouſe that the walls thereof became foundrous, and the air ſo unwholeſome that he loſt his cuſtom, *&c.*; the action lies for the huſband alone.

2 Mod. 269. Froſdick and Sterling adjudged; and that the caſes Cro. Car. 419. Jones, 367. Lit. Rep. 284. Hob. 189. warrant no more than that the wife may be joined, not that of neceſſity ſhe muſt.

If *A.* leaſes to *B.* for years, rendering rent, and after grants his reverſion to baron and feme, and *B.* attorns, and the rent is arrear, and the term expires, the baron may bring an action alone for this rent, becauſe this action is grounded upon the duty, and not upon the nature of their eſtate; and the money muſt come to the baron; and there is no difference where

2 Bulſt. 233. Roll. Rep. 52. S. C. adjudged.

baron and feme are (*a*) joint-leſſors, and where (*b*) joint-purchaſers.

(*a*) And then it was never queſtioned but the baron might bring the action alone; but when brought by both, it hath been doubted. Bulſt. 21. *per* Yelv. and *vide* Lit. Rep. 13. Palm. 207. [They may join, or not, at their election. Aleberry v. Walby, 1 Str. 229. Beaver v. Lane, 2 Mod. 217.] (*b*) But in that caſe, 2 Bulſt. 234. *per* Dod. he muſt bring the action generally, and not ſhew himſelf to be aſſignee; but yet Roll. Rep. 52., it appears, the action was ſo brought; and yet held, *per Cur'*, to be only *ſurpluſage*.

But if *A.* conveys lands to *B.* in fee, and covenants with him, his heirs and aſſigns, to make further aſſurance, and theſe lands are aſſigned to *J. S.* and his wife, and the heirs of *J. S.*, they muſt both join in an action on the covenant for further aſſurance.

Roll. Abr. 348. Cro. Car. 503. Jones, 505, 406, 407. S. C. adjudged, *vide* 3 Bulſt. 164. Roll. Rep. 300. Cro. Jac. 319.

But if a bond is made to a feme covert during coverture, conditioned to pay money to the feme, the baron (*c*) alone may bring an action upon this bond.

3 Lev. 403. adjudged upon a demurrer to the declaration; and a caſe was cited by Powel, where, upon a judgment obtained by baron and feme, the baron only ſued a *ſcire facias* for the damages and coſts, and had judgment. (*c*) If a bond be entered into to baron and feme, the baron may ſue it alone, and thereby he ſhews his diſſent to his wife's taking any thing by it; 2 Mod. 217. [1 Str. 229.; though it be entered into to the wife as adminiſtratrix. Ankerſtein v. Clarke, 4 Term Rep. 616.]

If *A.*, in conſideration that *B.*, a feme covert, will cure a certain wound, aſſumes and promiſes to *B.* to pay unto her 10*l.*, if *B.* does cure it accordingly; ſhe may join with her huſband in an *aſſumpſit* for this money (*d*), for this promiſe ariſing upon a matter of ſkill and performance of the wife, ſhe is the cauſe of the action; and ſuch an action will ſurvive to the wife.

Cro. Jac. 77. 205. adjudged, and affirmed in *Cam. Scacc.* Sid. 25. S.C. cited to be adjudged that they ought to join. 2 Sid. 128., like point; and *per* Glyn, Ch. Juſt., it may be in the name of both, or of the huſband alone. (*d*) But whatever the conſideration be, where there is an expreſs promiſe made to the wife, ſhe may join. Cro. Eliz. 61. But without an expreſs promiſe, the action does not lie; for the fruit and labour of the wife belongs to the huſband, for which he only ſhall bring the action. Salk. 114. 4 Mod. 156. S. C. and S. P. Carth. 251. All. 3. 6. Stile, 9. 298.

If *A.*, in conſideration that baron and feme had intermarried at his requeſt, aſſumes and promiſes to them to pay unto the feme 8*l. per ann.* during the coverture, *&c.*; notwithſtanding the whole benefit redounds to the huſband, yet in an action thereupon they (*e*) may join, *a fortiori*, becauſe it is an executory promiſe, and hath continuance, and is not to be done *unicâ vice* only.

(*e*) Or the baron may bring the action alone. All. 36. [*Qu.* If this be not the proper mode? Style, 297.]

It ſeems clearly agreed, that for debts (*f*) due to the wife, and all cauſes of action before coverture, the huſband muſt join in the action.

Roll. Abr. 347. Mo. 422. S. P. laid down as a rule. Owen, 82. Lit. Rep. 13. Keb. 440. 3 Term Rep. 631. The huſband alone cannot bring an *indebitat. aſſumpſit*, or an *infimul computaſſet*, for a debt due to the wife herſelf before coverture, much leſs when it is due to her as executrix or adminiſtratrix. Sid. 229. 2 Keb. 89. (*f*) In conſideration that *A.* will marry his daughter *B.*, aſſumes to give her as much as he gives any other of his daughters, *&c.*; and becauſe this promiſe was made before marriage, whether the baron and feme muſt not join in an action thereupon, *dubitatur*. Sid. 25.

In an action upon a *trover* before marriage, and a *converſion* after, the baron and feme ought to join, for this action, as a treſpaſs, diſaffirms the property; but the baron alone ought to

Sid. 172. Keb. 641. S. C. Vent 261. 2 Le

107. S. P. and that he may join the wife at his election. bring a *replevin* (*a*), *detinue*, *&c.*; for these actions admit and affirm a property in the feme at the time of the marriage, which by consequence must have vested in the baron.

[But see 3 Term Rep. 631., in confirmation of the position in the text. (*a*) *Vide* Ca. Temp. Hardw. 119.]

Carth. 462. Ward and Ellard adjudged. Salk. 117. pl. 8. Ld. Raym. 368. S. C. adjudged. But if *A.* declares, that the defendant being indebted to him and his wife as executrix to one *J. S.*, in consideration that *A.* would forbear to sue him for three months, assumed, *&c.*, and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger.

Yelv. 84. Cro. Jac. 110. S. P. adjudged. Whether such a recovery will be direct assets, or a *devastavit* for so much, *vide* head of *Executors and Administrators*.

Roll. Rep. 360. Lit. Rep. 285. For a battery or other personal *tort* done to the wife, they (*b*) must join, and if the wife dies, the action dies with her.

Brownl. 205. Noy, 18. Not for personal or other wrongs done to them both, unless where they have a joint interest, and they have wrong in respect thereof. March, 47. Cro. Car. 553. Jones, 440. Cro. Jac. 355. Roll. Rep. 108. 2 Mod. 66. 8 Mod. 200. 341. Vent. 328. 2 Vent. 29. Hard. 166. Stile, 128. Cro. Car. 175. Lev. 3. 2 Lev. 20. [1 Wilf. 224. 2 Str. 726. In equity, the husband cannot file a bill for a chose in action in right of the wife, without making her a party: if he do, and it be dismissed, it will not conclude the wife; and if he die before judgment or decree, she cannot revive the suit. Clearke v. Lord Angier, 2 Freem. 160.] (*b*) And the judgment must be, that the baron and feme shall recover, notwithstanding the baron only is to have the damages. Godb. 369.

Cro. Car. 89, 90. adjudged, and affirmed *in Cam. Scacc.* Cro. Jac. 538. S. P. adjudged. But the baron (*c*) may bring an action alone for the battery, carrying away and detaining of his wife, *per quod solamen & consortium* of his said wife *amisit*, because the action is founded upon the special damage done to himself, and will be no bar to another action brought by baron and feme, or by the feme after the death of the baron, for the same battery.

2 Roll. Abr. 556. Jones, 440. Lit. Rep. 339. 2 Roll. Rep. 51. S. P. adjudged. (*c*) Where an action is brought for words spoken of, or other tort done to the wife, and founded upon the special damage of the husband, she must not join. Sid. 346. Lev. 140. Keb. Rep. 791. pl. 47. 2 Keb. Rep. 387. pl. 63.

Cro. Jac. 664. Adjudged after verdict, and affirmed in *error*. *Vide* Stile, 236. Sid. 225. Stile, 202. In trespass by baron and feme, they declared for a battery of the feme, *& quod* the defendant *alia enormia eis intulit*; and though objected, the feme cannot join for a wrong done to the baron, yet because the *alia enormia*, *&c.* was but form, and only in aggravation of damages, and altered not the substance of the declaration, it was adjuged for the plaintiffs.

Salk. 119. pl. 12. Russel and Corne. [6 Mod. 127. S. C. 2 Ld. Raym. 1031. Andr. 245. and 2 Str. 1094. S. C. cited. 11 Mod. 264.] So in trespass and false imprisonment by baron and feme, *per quod negotia domestica* of the husband *remanserunt infecta ad grave damnum ipsorum*; and it was objected, that this being laid as a special damage to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages.

(*d*) Sid. 387. adjudged; and said *per Cur'*, it could not be otherwise. (*d*) In (*e*) trespass by baron and feme for (*f*) beating the feme they may declare that it was *ad damnum ipsorum*, notwithstanding a feme covert can have no damages, for this action will survive.

2 Keb. 434. S. C. Palm. 359. 3 Mod. 120. So in debt upon a bond made to the feme *dum sola*; for the non-payment so her *dum sola*, was to her damage, as the non-payment

payment ſince is to the damage of the baron. Stile, 134. adjudged; and ſaid it is the uſual way of declaring in ſuch caſe. (*e*) So for words ſpoken of the feme. March, 212. (*f*) *Vide* Cro. Jac. 473. 644. Stile, 155. 2 Keb. 387.

But if in *trover* by baron and feme, they declare *quod cum poſſeſſionat. fuerunt, &c.* and that the defendant converted, *ad damnum ipſorum*, this is naught after verdict; for the poſſeſſion of the wife is the poſſeſſion of her huſband, and ſo is the property; ſo that the converſion cannot be to the damage of the wife, but of the huſband only. Salk. 114. pl. 1.

[Although an action cannot, regularly, be brought by or againſt a feme covert, yet the objection to it by the parties to the ſuit, it hath in ſome caſes been laid down, can be taken only (*a*) in abatement: therefore the feme (*b*), after ſhe has been treated by a plaintiff as a feme ſole, may have proceſs of execution for the coſts in her own name, as ſole, for the plaintiff is concluded from denying it. And huſband and wife (*c*), who have improperly joined in an action, are not at liberty after verdict for the defendant, to object to ſuch impropriety, in order to diſcharge themſelves of coſts. Milner v. Milner, 3 Term Rep. 627. (*a*) But ſee Candell v. Shaw, 4 Term Rep. 361. and Read v. Jewſon, there cited, where the objection

was made by the defendant after verdict, and allowed. And to an action on a bond acknowledged by a feme covert, coverture may be given in evidence on *non eſt factum*, for the inſtrument is merely void. 1 Ld. Raym. 313. 3 Burr. 1805. (*b*) Wortley v. Rayner, Dougl. 637. But the huſband cannot have execution without a *ſcire facias*. *Ibid.* (*c*) —— v. Helyers, Cro. Car. 175.]

(L) Where they muſt be jointly ſued.

THE huſband is by law anſwerable for all actions for which his wife ſtood attached at the time of the coverture; and alſo for all her torts and treſpaſſes during coverture, in which caſes the action muſt be joint againſt them both; (*d*) for if ſhe alone were ſued, it might be a means of making the huſband's property liable, without giving him an opportunity of defending himſelf. Co. Lit. 133. Dr. Plit. 3. 2 H. 6. 4. *Vide infra* Letter (M.) 308. (*d*) And therefore if a man recovers

againſt a feme covert as ſole, the huſband may avoid it by writ of *error*, and may come in at any time and plead it; but for this *vide* 17 Aſſ. pl. 17. Stile, 254. 280. 2 Roll. Rep. 53. 22 H. 6. 31. 3 Term Rep. 631. and tit. *Error and Abatement*.

If goods come to a feme covert by *trover*, the action may be brought againſt the huſband and wife, but the converſion muſt be laid only in the huſband, becauſe the wife cannot convert goods to her own uſe; and the action is brought againſt both, becauſe both were concerned in the treſpaſs of taking them. For this *vide* Co. Lit. 351. Roll. Abr. 6. pl. 7. Yelv. 166. Noy, 79. Leon. 312. Cro. Car. 494.

254. Roll. Abr. 348., where it was laid *quod ad uſum proprium*, or *ad uſum ſuum converterunt*; for this muſt be intended to the uſe of both, and not of the huſband only. Vent. 33. [This point is ſettled as laid down in the text. 1 Salk. 114. Andr. 245.] In debt upon a *deveſtavit* againſt baron and feme executrix, it ſhall not be laid *quod deveſtaverunt*; for a feme covert cannot waſte. 2 Lev. 145.

An action on the caſe was brought againſt baron and feme, for retaining and keeping the ſervant of the plaintiff, and judgment accordingly. 2 Lev. 63. and, note by the reporter, no notice

was taken that a feme covert may not make a retainer or contract; but perhaps the receiving and keeping the ſervant without any contract is a treſpaſs of which a feme covert may be guilty. *Qu.*

17 E. 4. 7. 2 H. 4. 19. b. 3 H. 4. 1. Roll. Abr. 348.

If a leaſe for life or years be made to baron and feme, reſerving rent (*a*), an action of debt for rent arrear may be brought againſt both, for this is for the advantage of the wife.

(*a*) But an *aſſumpſit* lies not againſt baron and feme on a promiſe made by the wife during coverture; for *quoad* the wife, it is void. Palm. 313. But if a feme covert takes up goods from a tradeſman, affirming herſelf to be a feme ſole, *quære*, if this be not ſuch an injurious taking as will ſubject the huſband and wife to an action, though neither can be charged on the contract?

Swithin v. Vincent, 2 Wilſ. 227.

[It would be error to join the wife in a declaration for words ſpoken by the huſband *only*, and ſuch declaration would be bad either upon demurrer, or in arreſt of judgment: two declarations therefore for words, the one againſt huſband and wife, the other againſt huſband only, cannot be conſolidated.]

For this *vide* tit. "*Bail in Civil Cauſes.*" (B) 5. How ſhe may reverſe an outlawry, ſee tit. *Outlawry*.

If an action be brought againſt the huſband and wife, and the wife be arreſted, ſhe ſhall be diſcharged upon common bail; for nobody can be ſuppoſed to undertake for a wife who hath no property of her own.

Pitts v. Meller, 2 Str. 1167. Finch v. Duddin, *id.* 1237. Langſtaff v. Rain, 1 Wilſ. 149. Anon. 3 Wilſ. 124.

[The court will not diſcharge a wife taken in execution upon a judgment obtained againſt her and her huſband.

Gordon v. Halpen, Ca. Temp. Hardw. 101.

On a motion that the wife may have leave to plead ſeparately from her huſband, it appeared that her eſtate was ſettled upon her, and that the ſettlement had been confirmed in the Houſe of Lords to be for her ſeparate maintenance, but the eſtate was made liable to anſwer all actions brought againſt the huſband on her account: it was ſuggeſted, in ſupport of the motion, that this was a fictitious demand in the plaintiff ſet up by connivance of the huſband, and that he would let judgment go by default, and ſo ſhare with the plaintiff in what ſhould be recovered. But *per Cur.* We cannot allow you to ſever in pleading: your beſt way will be to plead in the name of huſband and wife; and if the huſband ſhould diſavow, and that be contrary to the order of the Houſe of Lords, you will know how to enforce that order; but we can do nothing in it.

Clark v. Norris. 1 H. Bl. 235.

If the huſband enter an appearance for himſelf only, where he is ſued with his wife, this is not ſuch an irregularity as will authorize the plaintiff to ſign judgment without demanding a plea.]

(M) Where a Wife ſhall be conſidered as a Feme Sole; [and herein of her ſeparate Eſtate.]

Br. *Baron et Feme*, p. 66. Co. Litt. 133. a. 1 Roll. Rep. 400. Moor, 85. 1 Bulſt. 140. 3 Bulſt. 18. 2 Vern. 104.

A Huſband who hath abjured the realm, or is baniſhed (*b*), is thereby *civiliter mortuus*; and being diſabled to ſue or be ſued in right of his wife, ſhe muſt be conſidered as a feme ſole; for it would be unreaſonable that ſhe ſhould be remedileſs on her part, and equally (*c*) hard upon thoſe who had any demand on her, that not being able to have any redreſs from the huſband, they ſhould not have any againſt her.

[(*b*) Though the baniſhment be only for a limited time. Sparrow v. Carruthers, cited in 1 Term Rep.

Rep. 7.] (*c*) In *aſſumpſit*, the defendant proved that ſhe was married, and her huſband alive in *France*: the plaintiff had judgment; upon which, as a verdict againſt evidence, ſhe moved for a new trial; but it was denied; for it ſhall be intended, that ſhe was divorced: beſides, the huſband is an alien enemy; and in that caſe, why is not his wife chargeable as a feme ſole? Comb. 402. Salk. 116. 646. Ld. Raym. 147. [In equity, if the huſband is out of the juriſdiction of the court, though not an exile, Dubois v. Hole, 2 Vern. 613.; or if he cannot be found, Bell v. Commiſſary Hyde, Pr. Ch. 328., the wife may be compelled to anſwer ſeparately.]

By the cuſtom in *London*, if a feme covert trades by herſelf in a trade with which her huſband does not intermeddle, ſhe may ſue and be ſued as a feme ſole. 10 Mod. 6. But for this ſee tit. *Cuſtoms of London*; and Leon. 131. Lit. Rep. 31. Hetl. 9. 2 Brownl. 128. Mod. 26. 1 Show. 183. [But the cuſtom is confined to ſuits in the city courts: ſhe cannot ſue alone in the ſuperior courts, upon a cauſe of action accruing during the coverture, even though ſhe be diſcovert at the time of commencing the ſuit. Caudell v. Shaw, 4 Term Rep. 361. That ſhe may be a bankrupt, ſee tit. *Bankrupt* (A). By a ſettlement *before* marriage, the huſband may put his wife in a ſituation to carry on a ſeparate trade; and if he do not intermeddle therewith, the ſtock in trade will be exempt from his debts; and the wife will be ſolely entitled to the increaſe and produce. Jarman v. Woolloton, 3 Term Rep. 628., and Haſelinton v. Gill, there cited.]

[In the caſe of a divorce *a menſâ et thoro*, of which alimony is a conſequent, the wife, it ſeems, becomes ſolely (*a*) reſponſible to creditors: and ſo in the caſe of a voluntary parting, and a ſeparate maintenance allowed her by the huſband; for as ſoon as ſhe acquireth a will, and an intereſt diſtinct from, and independent on her huſband, the diſability of coverture is ſuppoſed to ceaſe. It hath therefore been determined by the court of K. B., though it by no means appears to be ſettled (*b*), that a woman ſo ſeparated and with ſuch maintenance, may contract and be ſued alone for any perſonal demand. And the liability of her being ſued alone muſt neceſſarily infer her capacity of being ſole plaintiff againſt thoſe with whom ſhe may contract. Her power too, in ſuch circumſtances, over her real property at law, hath lately been aſſerted to a very conſiderable extent (*c*): for it hath been holden, that a wife who had a copyhold eſtate to her ſeparate uſe, and lived ſeparate from her huſband, could ſurrender the ſame without her huſband, he having, upon the ſeparation, covenanted to join in all neceſſary conveyance of ſuch eſtates, and to ſuch uſes as ſhe ſhould appoint. Ringſtead v. Lady Laneſborough, Co. *Bankrupt Laws*, 32. Barwell v. Brookes, *id.* 36. Corbet v. Poelnitz, 1 Term Rep. 5. See *contr.* Hatchett v. Baddeley, 2 Bl. Rep. 1079. Lean v. Schutz, *id.* 1195.

[(*a*) But not where alimony is allowed only *pendente lite:* the fund muſt be permanent. Ellah v. Leigh, 5 Term Rep. 679. See too the obſervations of the court in that caſe. (*b*) *Vide* 6 Term Rep. 604. (*c*) Compton v. Collinſon, 1 H. Bl. 334. The adequacy of the ſettlement, or the circumſtances of the huſband at the time of making it, are points which have not yet been diſcuſſed. Such a ſettlement, indeed, *with a covenant by the truſtees to indemnify the huſband againſt the wife's debts*, hath been holden to be good againſt creditors prior to the time of making it, for the covenant is a valuable conſideration. Stephens v. Olive, 2 Br. Ch. Rep. 90.; and King v. Brewer, there cited, as decided by Lord Loughborough at *Chelmsford* aſſizes 1776. But without ſuch covenant the huſband is diſcharged from the wife's debts; for, as to him, the reaſon of introducing it, is, that he may be protected againſt the coſts he may incur by being ſued for thoſe debts. Angier v. Angier, Gilb. Eq. Rep. 152. But if the operation of the covenant be, as ſtated in the caſe of Stephens v. Olive, it would follow, that any agreement between huſband and wife, ſecuring her a ſeparate maintenance, without ſuch covenant, may be ſet aſide by creditors; unleſs it could be ſhewn that the conduct of the huſband had been ſo harſh and cruel, as to afford the wife a ſufficient ground for a ſentence of alimony in the ſpiritual court, if the wife had ſued him in ſuch court; under which circumſtance, it ſeems, a court of equity will ſuſtain a conveyance by the huſband of part of his eſtate, as a ſeparate maintenance for his wife, even againſt the claims of creditors. Hobbs v. Hull, July 1786, Fonbl. notes on Eq. Tr. 102.

But it is in a court of equity, where a feme covert is uſually, and where perhaps only ſhe can properly be, conſidered as a feme ſole; it being competent to that court to act upon her property in the hands of her truſtees, and therefore to treat her as

having intereſts and obligations diſtinct from thoſe of her huſband. If, therefore, ſhe claims any rights in oppoſition to thoſe claimed by her huſband, or if ſhe lives ſeparate from him (*a*), or diſapproves (*b*) the defence he wiſhes her to make, ſhe may, in equity, obtain an order (*c*) to defend a ſuit ſeparately. If a huſband is plaintiff in a ſuit (*d*), and makes his wife a defendant, he is conſidered as thereby renouncing his marital right over her, and ſhe is allowed to anſwer ſeparately without an order of the court for the purpoſe. And as ſhe may defend a ſuit inſtituted againſt her by her huſband, ſo ſhe may inſtitute a ſuit againſt him: but the bill muſt (*e*) be exhibited in her name by her next friend, though ſhe may defend without ſuch protection. And the court (*f*) will not permit a bill to be filed by any one without her conſent.

(*a*) Pr. Ch. 329.
(*b*) 2 Atk. 50. 2 Eq. Ca. Abr. 66.
(*c*) But a ſeparate anſwer put in without ſuch order may be ſuppreſſed as irregularly filed. 1 Ch. Rep. 68. But ſee 2 P. Wms. 371, where allowed.

(*d*) 3 Atk. 478. (*e*) 2 Vez. 452. (*f*) Pre. Ch. 326. If a married woman obſtinately refuſeth to join with her huſband, ſhe may be compelled to make a ſeparate defence; and for that purpoſe an order may be obtained that proceſs may iſſue againſt her ſeparately. 1 Ch. Ca. 296. It ſhould be obſerved, however, that though a woman may be proceeded againſt without her huſband, yet the court cannot make a perſonal decree againſt her for the payment of a debt; all they can do is, to call forth her perſonal property in the hands of truſtees, and to direct the application of it. 1 Br. Ch. Rep. 16. 2 Atk. 68.

The general grounds upon which equity allows a wife to inſtitute a ſuit againſt her huſband, are, where any thing is given (*g*) to her ſeparate uſe; or the huſband refuſeth (*h*) to perform marriage-articles; or articles (*i*) for a ſeparate maintenance; or where the wife (*k*), having been deſerted by her huſband, hath, during his abſence, acquired by her labour a ſeparate property, of which he hath plundered her. And it will decree a ſpecifick performance of articles of ſeparation (*l*) at the ſuit of the wife, though the huſband offer to take her back again, if it appears that a *perpetual* ſeparation was intended by the parties: but not ſo, where the ſeparation is merely (*m*) temporary, or there (*n*) hath been a ſubſequent cohabitation. Nor is it any anſwer to ſuch a ſuit, that the wife (*o*) hath been guilty even of adultery. However, in moſt caſes, where a wife comes into equity to ſupport her poſſeſſion independent on her huſband, it is her merit which entitles her to relief; and therefore the court will not decree maintenance (*p*) where there is full proof of elopement and adultery.

(*g*) 2 Vez. 452. For if no truſtees are interpoſed, the huſband is conſidered as a truſtee for the wife. 2 P. Wms. 316. And where a legacy was given to a feme covert, with a direction "that her receipt ſhould be a ſufficient diſcharge to the executors," it was holden to be equivalent to the teſtator's ſaying, "that it ſhould be to her ſeparate uſe." Lee v. Prieaux, 3 Br. Ch. Rep. 381. (*h*) 2 Vern. 493. (*i*) Gilb. Eq. Rep. 152. (*k*) 1 Atk 278. (*l*) 3 Br. Ch. Rep. 614. (*m*) 1 Vez. 17, and 3 Atk. 547. (*n*) Fletcher v. Fletcher cited in 3 Br. Ch. Rep. 619. (*o*) 3 P. Wms. 269.; and Blount v. Winter, reported in 3 P. Wms. 279. Cox's edition. (*p*) 2 Atk. 96.

Where the property of a wife is in the power of a court of equity, it will not part with it, unleſs the huſband make a proper ſettlement, or the wife in court conſent to his receiving it. And it hath gone ſo far (*q*) as to reſtrain him from proceeding in the ſpiritual court for the wife's portion ariſing out of perſonal eſtate, becauſe that court cannot oblige him to make an adequate proviſion on her.

Finch's Rep. 145. 2 P. Wms. 639. 3 P. Wms. 123. 205. 1 Str. 238. 1 Vez. 538. But this equity is perſonal to the wife; for if ſhe die in her huſband's lifetime, though ſhe leave children, her huſband is entitled to her perſonal property, without making any proviſion for them. Scriven v. Tapley, Ambl. 599. Phipps v. Earl of *Anglеſea*, Fonbl. notes on Eq. Tr. 89. (*q*) Pr. Ch. 548. 2 Atk. 420. Toth. 111.

The

The wife's consent (*a*) to the payment of money to her husband, though she be not personally present, being resident abroad, may be given, and acted upon; but it cannot, by the rules of (*b*) the court in such case, be dispensed with, if the sum exceed 100 guineas; nor will the court part with the property, even with such consent, unless there be an affidavit both by husband and wife that it is not settled (*c*).

(*a*) 2 Br. Ch. Ca. 663.
(*b*) 3 Br. Ch. Ca. 237.
(*c*) 2 Br. Ch. Ca. 663. 2 Vez. jun. 38. In *ex parte* Higham, 2 Vez. 579., Lord Hardwicke appears to have refused to order the whole of the wife's fortune to be paid to the husband, though the wife was in court, and desired it might. See also Blackwood v. Morris, cited in Ca. Temp. Talb. 43., to the same effect. But in Willetts v. Cay, 2 Atk. 67., the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband, though insolvent, the wife being in court, and giving her consent. As to part of her fortune, if she will persist in requiring it to be paid to her husband, the court must comply with her request. Dimmock v. Atkinson, 3 Br. Ch. Ca. 197. With the consent of the wife, money left in trust for the wife and her heirs, to be laid out in land, ordered to be paid to the husband, without being invested in land. Pearson v. Brereton, 3 Atk. 71. Stock standing in the names of trustees under a settlement, the dividends to be paid to the wife, or to such uses as she should from time to time, during coverture, appoint; the principal to be transferred, after her death, to the husband, ordered, upon her consent, to be paid, though no appointment to the husband. Clarke v. Pister, 26th March 1778, cited in 3 Br. Ch. Rep. 568. So a legacy given to a wife for her sole use, with a power of appointment by will, and in default of appointment, to her executors, ordered, upon her consent, to be paid to her husband. Newman v. Cartony, 24th April 1771. *Ibid.* So of money settled in like manner. Ellis v. Atkinson, 3 Br. Ch. Rep. 565.

And a woman, having a separate estate, may pass it without an examination in court; and she will be bound to a specifick performance, unless there be any proof of fraud or undue influence on the part of the husband. Lord *Hardwicke* (*d*) indeed seems to have thought, that the power of a feme covert to dispose of her separate estate must be confined to such part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, reserved to herself such right by way of trust, or of a power over an use; and doubted, whether a court of equity would carry into execution a bare agreement to the prejudice of the heir at law. But this doubt (*e*) is now done away; for it hath been since determined, that a court of equity will compel the heir to make a conveyance to the party in whose favour such an agreement was made. And in all those (*f*) cases where a feme covert hath such power, she may exercise it without joining her trustees, unless their joining is made necessary.

Allen v. Papworth, 1 Vez. 163. Pybus v. Smith, 3 Br. Ch. Rep. 340.
(*d*) Peacock v. Monk, 2 Vez. 191.
(*e*) Wright v. Cadogan, 6 Br. P. C. 156. Rippon v. Dawding. Ambl. 565.
(*f*) Grigby v. Cox, 1 Vez. 517.

If a feme covert, having separate property, borrows money, and executes a bond, or enters into a bond conjointly with her husband, as a security for his debts, this will give a foundation to demand the money out of her separate estate; and her declarations may in such case be read in evidence against her.

Peacock v. Monk, 2 Vez. 190. Norton v. Turvill, 2 P. Wms. 144. Hulme v. Tenant, 1 Br. Ch. Rep. 16. It hath been holden, too, that the separate property may be applied to the discharge of a bond given by her *before* marriage. In this case, it must be observed, that two bills were filed; the first against the wife only, in respect of her separate property, which was dismissed; the plaintiff then sued out writs against husband and wife; but, the husband absconding, so that he could not be served, the plaintiff proceeded to outlawry, and then filed a second bill against the wife only. Briscoe v. Kennedy, at the Rolls, 21st July 1762; cited in 1 Br. Ch. Rep. 18.

If a wife charge her estate with the payment of her husband's debts, or apply her separate estate to such purpose, and it do not appear to be intended by her as a gift to him, equity will decree the

Huntingdon v. Huntingdon, 2 Vern. 437. 1 Br.

P. C. 1. Pocock v. Lee, 2 Vern. 604. Tate v. Auſtin, 1 P. Wms. 264. 2 Vern. 689. Parteriche v. Pawlett, 2 Atk. 384. Clinton v. Hooper, 3 Br. Ch. Rep. 201.

the huſband's aſſets to be applied in exoneration of her eſtate, or in re-payment of the money advanced.

Slanning v. Style, 3 P. Wms. 334. and Calmady v. Calmady, there cited. Bletſow v. Sawyer, 1 Vern. 245. Moor v. Freeman, Bunb. 205. Mitchell v. Mitchell, there cited. Beard v. Beard, 3 Atk. 72.]

In equity gifts may be ſupported, between huſband and wife, though the law doth not allow the property to paſs. Such gifts however muſt not be prejudicial to creditors; nor muſt they be of the whole of the huſband's eſtate.

Barratry.

(A) Who ſhall be ſaid to be a Barrator.

(B) Of the Form of the Proceedings againſt ſuch an Offender.

(C) How puniſhed.

(A) Who ſhall be ſaid to be a Barrator.

[Barrator, according to Junius, is *vitilitigator*, and is a forenſick term, taken from the *Normans*. The Iſlandick and Scandinavian, *baratta*; the Anglo-Norman, *baret*; and the Italian, *baratta*, are all words ſignifying a quarrel, or contention. Skene ſaith that barrators were ſimoniſts, ſo called from the Italian, *barrataria*, which ſignifieth corruption in a judge, who giveth an unjuſt ſentence for money. And, with us, it may be obſerved, by ſtat. 3 E. 1. c. 33., barrators are forbidden to give judgments.] Co. Lit. 368. a. b. 8 Co. 36. b. Hawk. P. C. Bk. 1. c. 21. Dan. 725. 3 Inſt. 175.

A BARRATOR is deſcribed a perſon who is a common mover, exciter, or maintainer of ſuits or quarrels, either in courts or in the country; and this offence conſiſting in all kinds of diſturbances of the peace, and the ſpreading of falſe rumours and calumnies, whereby diſcord and diſquiet may grow among neighbours, it is not material whether the ſuits commenced be in a court of record or not; or whether thoſe quarrels relate to a diſputed title of poſſeſſions or not.

Roll. Abr. 335. But by Hawk. P.C. Bk. 1. c. 21., if ſuch ſuits are merely groundleſs, and brought only with a deſign to oppreſs the defendants, ſuch a man may as properly be called a barrator, as if he had ſtirred up others to bring them. *Vide* 3 Mod. 98. 8 Co. 36. b. 2 Atk. 340.

But if a man proſecutes an infinite number of ſuits, which are his own ſuits, againſt others, yet he ſhall not be a barrator by this; for if they are falſe and groundleſs, the defendants ſhall have coſts againſt him.

An

An attorney cannot be deemed a barrator in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. Hawk. P.C. Bk. 1. c. 21.

Alſo it ſeems clear, that no man can be a barrator in reſpect to (*a*) one act only; for every indictment for ſuch crime muſt charge the defendant with being *communis barractator*. Hawk. P.C. Bk. 1. c. 21. (*a*) In reſpect to one or two acts only.

A feme covert (*b*) cannot be indicted as a common barrator.

2 Roll. Abr. 39. (*b*) But this opinion, Serjeant Hawkins ſays, is juſtly queſtionable: for ſince a feme covert is as capable of exciting quarrels, in frequent repetition whereof the notion of barratry ſeems to conſiſt, as if ſhe were ſole, why ſhould ſhe not as properly be indictable for it? 1 Hawk. P. C. Bk. 2. c. 21.

(B) Of the Form of the Proceedings againſt ſuch an Offender.

NO general indictment, charging the defendant with being a common oppreſſor and diſturber of the peace, and ſtirrer up of ſtrife among neighbours, is good, without adding the words *communis barractator*, which is a term of art appropriated by the law to this purpoſe. Mod. 288. Sid. 282. Cro. Jac. 526.

An indictment of barratry concluding *cont. formam ſtatuti* is good, though no ſtatute be made directly againſt it, but only for the puniſhment of it, ſuppoſing it an offence at common law. 2 Roll. Abr. 79. Cro. Jac. 527. Cro. Car. 340. 2 Keb. 409, 410. Cro. Eliz. 148. Hawk. P. C. Bk. 1. c. 21.

Alſo it hath been holden, that an indictment of this kind may be good, without alleging the offence at any certain place: becauſe, from the nature of the thing, conſiſting in the repetition of ſeveral acts, it muſt be intended to have happened in ſeveral places; for which cauſe it is ſaid, that a trial ought to be by a jury from the body of the county. 2 Keb. 410. Cro. El. 195. Latch, 194. Palm. 450. and Roll. Rep. 295. *cont.*

It hath been reſolved, that ſuch an indictment is not good, without concluding *cont. pacem*, &c., for this is an eſſential part of it. Cro. Jac. 527.

It ſeemeth to be the ſettled practice at this day, not to ſuffer the proſecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove againſt him; for otherwiſe it will be impoſſible to prepare a defence againſt ſo general and uncertain a charge, which may be proved by ſuch a multiplicity of different inſtances. 5 Mod. 18. 1 Hawk. P. C. Bk. 1. c. 21. 2 Atk. 340.

(C) How puniſhed.

IF they are common perſons, the uſual puniſhment is by fine and impriſonment, and alſo by binding them to their good behaviour; but if they are of any profeſſion relating to the law, they may be further puniſhed by being diſabled to practice for the future. Hut. 104. 1 Hawk. P. C. Bk. 1. c. 21. Whether juſtices of the peace, as ſuch, have cognizance of barratry, without any other commiſſion, by virtue of the 34 Ed. 3. 1. *Quære*; and *vide* Hawk. P. C. Bk. 1. c. 21. Yelv. 46. 2 Roll. Rep. 151., and 2 Hawk. P. C. Bk. 2. c. 8. § 39.

Baſtardy.

[According to Ld. Coke, "*baſtardus dicitur a Græco verbo* "*βασταξις*," viz. *meretrix, ſeu concubina, quia procreatur ex meretrice ſeu concubinâ.* But Sir Henry Spelman, *verbo baſtard*, rejects this derivation, and holds it to be a pure *Saxon* word, "*baſtart*;" viz. *impurè natus, ut apud nos, upſtart dicitur homo novus.* It is compounded of *baſe*, vile, or ignoble; and πεοητ, original. Others, among whom is Dr. Johnſon, derive it from the *Britiſh*, "baſtaerd," or "baſtardd," a word compounded of bâs, *minimè profundus*, et tardd, *germinatio*, tarddu, *germinare, pullulare, ſalire, oriri ut fontes, q. d. qui non a profundâ et antiquâ nobilitate ortum deducit, ſed qui nuper ortus eſt et germinavit.* The word *bas*, or *baſe*, it may be obſerved, is from the *Perſick*, *baſt*, *baſy*. Hickes deduceth it from the Iſlandick, *buſta*; and *ar*, or, and *ord*, viz. *principium*, whence *buſta-ord*, or *buſtard*, *origine vel ortu non legitimus. Vide* Davies, Cambro. Brit. Lexi., Du Freſne's Gloſſ. Jun. Etymol., and Hickes' Theſ.] In ancient days, baſtardy was ſo diſgraceful, that to retain a baſtard in a man's houſe, was a reflection; and the ſtain and reproach of the parent's crime dwelt always upon the iſſue, ſo that he could not be admitted to a feudal ſervice; and therefore, when the biſhops requeſted that our law ſhould be changed, in the particular of Baſtard Eignes, the ſtatute ſays, that all the barons and earls anſwered, *unâ voce, nolumus leges Angliæ mutare.* Merton, 9. 2 Inſt. 93. [See notes, Co. Lit. 244. b. 245. a. 13th edit. In *Germany*, and with us, (who derive many of our cuſtoms and political opinions from the *Germans*,) baſtardy was always a circumſtance of ignominy. But in *Spain*, *Italy*, and *France*, baſtards were, in many reſpects, on an equal footing with legitimate children. Butler's Co. Lit. 243. b. note 2. But Sir H. Spelman tells us, (he doth not, indeed, refer to any authority,) that, among the northern nations, baſtardy was no bar to ſucceſſion; and, to ſhew that it was not conſidered by them as ignominious, he cites the letter of the Conqueror to Allan Count of *Brittany*, beginning with theſe words: "*Ego Willelmus Rex, cognomento* baſtardus." Euſtathius aſſerts, that baſtards were as honourable as legitimate children about the time of the *Trojan* war; but the paſſage in the Iliad, Θ 281., which he refers to as eſtabliſhing this equality, evidently ſhews the contrary. Perhaps there was no time, among any civilized people, when illegitimacy was not reputed a diſgrace.] (*a*) He is *quaſi nullius filius*, and can be heir to no man. Doct. and Stud. Dial. 2. c. 7. Inſt. 123. But though he cannot inherit any anceſtor, yet when he hath gotten a name of reputation, he may purchaſe by it; for all ſurnames were originally acquired by reputation. *George Shelly* conveyed lands to the uſe of himſelf, the remainder to *George Shelly* his ſon; whereas in truth *George* was born of one *B.* in matrimony of one *C.*, yet was reputed the ſon of *George*, and educated by him; though the boy was but ſix years old, it was ruled that he ſhould take the remainder; for having got by reputation the name of *George Shelly*, theſe words are a certain deſignation of the perſon to take the remainder. But if a remainder be limited to the eldeſt iſſue of *J. S.*, whether legitimate or illegitimate, *J. S.* hath iſſue a baſtard, he ſhall not take this remainder; for it is not veſted in *J. S.* as it was in the other caſe, but is in contingency, and the certain time is not defined when this contingency ſhall happen; for the baſtard, at his birth, does not acquire the reputation of being the iſſue of *J. S.*; and ſince the baſtard, when firſt in being, cannot take by virtue of this limitation, he can never take it; for he cannot be underſtood to be the perſon deſigned and marked out by theſe words, if, after his birth, it depends on the uncertainty of popular reputation, whether he ſhould take the remainder or not; and ſuch a deſignation of the perſon as contains no certainty in itſelf, or no relation to any other certain matter that may reduce it to certainty, is a void limitation. Co. Lit. 3. b. 6 Co. 65. But where a remainder is limited to the eldeſt ſon of *Jane S.*, whether legitimate or illegitimate,

gitimate, and ſhe hath iſſue a baſtard, he ſhall take this remainder, becauſe he acquires the denomination of her iſſue, by being born of her body; and ſo it was never uncertain who was deſigned by this remainder. Noy, 33. [See Metham v. Duke of *Devon*, 1 P. Wms. 529., where Ld. Macclesfield inclined againſt ſuch a remainder; and ſee M. Hargrave's obſervations upon this caſe. Co. Lit. 3. b. note 1.] If parents are married, and afterwards divorced, this gives the iſſue the reputation of children; and ſo doth a ſubſequent marriage of the parents. 6 Co. 65. Hughes's Abr. 363. If the mother diſpoſe of all her lands holden in chivalry, to her baſtard ſon, ſhe is not within the 32 H. 8. c. 1., which forbids the owners to diſpoſe of above two-thirds of ſuch land for preferment of children; for children in any law muſt be intended ſuch as are lawfully begotten. Dyer, 345. Co. Lit. 123. b. 2 Roll. Abr. 785. If a man, in conſideration of natural affection and love, covenants to ſtand ſeiſed to the uſe of a baſtard, this is not good; for he is not *de ſanguine patris*; but it is ſaid, that a woman may give lands in frank marriage with her baſtard, becauſe he is of the blood of the mother; but he hath no father, but from reputation only. Dyer, 374. And. 79. 6 Co. 77. Noy, 35. A court of equity will not ſupply the want of a ſurrender of a copyhold eſtate in favour of a baſtard, as it will for a legitimate child. Preced. Chan. 475. [If a baſtard, poſſeſſed of perſonal eſtate, dies inteſtate, and without wife or children, the crown is entitled to ſuch property, including leaſes or terms of years. The king, or other immediate lord of the fee, is alſo entitled to a real eſtate of inheritance, of which a baſtard dies ſeiſed, without having deviſed it, and without leaving iſſue. This is the reſult of a baſtard's being ſuppoſed to have no other relations, no heirs, or next of kin, except thoſe ariſing from his own contract of marriage, namely, his wife and progeny. But the rigorous exertion of this prerogative would, in many obvious caſes, carry the appearance of great hardſhip. It is uſual, therefore, to make over the royal prerogative to ſome one; not indeed quite unconditionally and gratuitouſly, but with the reſervation of a tenth, or other ſmall proportion of the value, both of real and perſonal eſtate. 3 P. Wms. 33. 1 Wooddeſ. 397, 8. Baſtards are within the ſtat. 26 Geo. 3. c. 33., which requireth the conſent of parents or guardians to the marriage of perſons under age; for the rule of *nullius filius* applies only to caſes of inheritance. 1 Term Rep. 96.]

Under this head we ſhall conſider,

(A) Who are Baſtards.

(B) Where Baſtardy is to be tried, and the Rules concerning ſuch Trial: And herein of general and ſpecial Baſtardy.

(C) Of Baſtard *Eigne* and *Mulier Puiſne*.

(D) How Baſtards are to be provided for: And herein of the Duty and Power of Juſtices of the Peace.

(E) Murdering Baſtards.

(A) Who are Baſtards.

ALL perſons born out of lawful matrimony are baſtards by the common law; but, by the civil law, thoſe that are born before marriage are legitimated by a ſubſequent marriage; for, by the civil law, all perſons adopted into a man's family were inheritable; and the canoniſts have allowed of this notion, becauſe the ſubſequent marriage, they ſay, takes away the preceding guilt, and ſhews a conſent from the beginning. This difference between the civil law may likewiſe be aſcribed to the power which the father, by the *Roman* law, had over his children, becauſe he was the author of their being, and had the care of their education;

47 E. 3. 14. b. 11 H. 4. 81. Bract. lib. 5. fol. 416. Roll. Abr. 624. [1 Bl. Comm. 454, 5. By the *Roman* law, it ſhould be obſerved, the father

could legitimate only his "*natural children*," or the offspring of his concubine, who, by this epithet of "*natural*," were diſtinguiſhed from the ſpurious brood of adultery, proſtitution, and inceſt, to whom *Juſtinian* reluctantly grants the neceſſary aliments of life. *Vide* Inſt. l. 1. 10. Pandect. l. 1. tit. 7. Cod. l. 1. tit. 27. Nov. 74. 89. Heinec. Elem. Jur. de Legitimatione.]

ucation; if therefore a child ſhould not be legitimated by a ſubſequent marriage, the parent would not have had him under his power; for no man had a power over the *vulgo quæſiti*; and conſequently the father would not have commanded that to which he gave being; nor would the child have had the benefit of the parent's education; which would have cut a member from the commonwealth.

All perſons born within marriage are legitimate, unleſs there is an apparent impoſſibility that they ſhould be generated by the huſband; for there is the ſtrongeſt preſumption that can be, that they are legitimate, becauſe the huſband hath the power and dominion over his wife, and therefore may by the law keep her by force within the bounds of duty; to which the canoniſts have added a fanciful reaſon, to wit, the huſband, having the ownerſhip of his wife, hath the property of the fruit of her body, though planted by another; *quicunque ſemen appoſuit, marito acquiritur, quia eſt dominus ventris.* Now the preſumption thus being that it is the huſband's child, it muſt be deſtroyed by contrary proof; and this negative, that it is not the huſband's child, is capable of no other proof than this only, that it muſt be ſhewn impoſſible it ſhould be the huſband's child; if therefore the huſband be proved caſtrate, the iſſue are baſtards.

[1 H. 6. 3. b. Bro. *Baſtardy*, 26. Ro. Abr. *Baſtard*, (B). 13.] If the huſband be under the age of fourteen, the iſſue are baſtards; for, before the age of puberty, generation is naturally impoſſible.

18 H. 6. 31. 34. 29 Aſſ. 54. Bro. *Baſtardy*, 36. Co. Lit. 244. [The age of puberty is fixed by us, after the *Roman* law, at the age of fourteen. Before the time of *Juſtinian*, puberty, in males, was judged of *ex habitu corporis*: but that emperor, thinking *inſpectionem habitudinis corporis* an indecent practice, fixed its commencement immediately upon the completion of the fourteenth year. Inſt. l. 1. tit. 22. But it is abſurd to ſuppoſe that generation is phyſically impoſſible before the age of fourteen; nor is it ſo concluded in the authority to which the paſſage in the text refers. 1 H. 6. 3. b. What is there ſaid, (and it is, by the way, merely the ſpeech of counſel,) is, that in ſuch caſe, the iſſue ſhall be baſtard, "*pur ceo que ne poit eſtre* entendus par nul ley *que l'enfant deins cel age poit engend.*"]

Roll. Abr. 358. Co. Lit. 244. Bract. 239. If the huſband be in *Ireland* during the time the wife goes with child, the iſſue is no baſtard, becauſe the huſband was within the king's dominions. Roll. Abr. 358. *Quære.*

If the huſband be not within the four ſeas during the time that paſſeth between the conception and birth of the child, it is a baſtard. This was ſettled when the king's dominions extended to the four ſeas only; for to paſs and re-paſs in the king's dominions was poſſible, without any knowledge or proof; but to paſs out of another's dominions into the king's, without ſome knowledge or proof of the matter, was ſuppoſed by the law not poſſible; for there is no ſuch paſſage in a realm well governed without examination.

Carth. 469. Salk. 122. pl. 5. [But it hath been ſettled ever

An order of two juſtices, which was affirmed on appeal, adjudged *J. S.* the reputed father of a baſtard child; the order recited ſpecially, that *Mary*, the wife of *Jonathan Spence*, mariner, was delivered of a male baſtard child, and that it appeared to them

them upon oath of, &c., that *Jonathan Spence*, her huſband, was in the king's ſervice at *Cadiz* in *Spain*, and not within the king of *England*'s dominions, at the time when the ſaid child was begotten or born; and becauſe it did not appear that the huſband was abſent all the time, as well as at the time of conception and the child's being born, the order was quaſhed. ſince Pendrel's caſe, in 5 G. 2., that not only proof of being out of the kingdom, but alſo every

other kind of evidence tending to prove the impoſſibility, or even improbability, of the huſband's being the father, is admiſſible. 2 Str. 925. 3 P. Wms. 114. 1 Bl. Comm. 457. Lomax v. Holmden, 2 Str. 940. Rex v. Inhabitants of *Bedall*, *id*. 1076. Ca. Temp. Hardw. 379.; and Andr. 8. S. C. Goodright v. Saul, 4 Term Rep. 356. Rex v. Inhabitants of *Lubbenham*, *id*. 251.]

If the marriage is made null by divorce, the iſſue is illegitimate; as if the parties be divorced for pre-contract, conſanguinity, affinity, or frigidity; for where the marriage is nullified, it is a copulation without marriage, and conſequently the iſſue are baſtards; and it is the ſame by our law, whether they have notice or not of the conſanguinity, becauſe we look no further than the diſſolution. Roll. Abr. 358, 359, 360.

If a man marry his couſin within the degrees, or his ſiſter, the iſſue got between them is not a baſtard till there be a divorce; for though ſuch a marriage be unlawful, yet it remains good till ſentence of divorce be pronounced, and conſequently the iſſue muſt be eſteemed legitimate till ſuch a diſſolution. Roll. Abr. 357.

If a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have iſſue by the ſecond marriage, which continues without divorce, the iſſue are lawful; for a man may be *habilis & inhabilis diverſis temporibus*, and the ſecond marriage is not avoided by any divorce, and therefore ſtands good in law. 5 Co. 98. b. Burie's caſe. 2 Leon. 169. S. C. Jenk. Rep. 268. Noy, 72. Moor, 225. pl. 366. S. C. by the name of Morris and Webber.

A bed-rid perſon marries a woman that is pregnant in his chamber, the woman is delivered twelve weeks after; the child adjudged a baſtard, for the apparent impoſſibility of his being the father of it. 2 Roll. Abr. 353. Foxcroft's caſe.

If a woman marry *groſſment*, *enſient* it is the child of the huſband; for, when they teſtify their conſent by a publick marriage before the birth of the child, it is a publick acknowledgment that the child is his, for at that time the child is one with the mother, and therefore in taking the mother he takes the child with her. Roll. Abr. 358.

If a man is married within the age of conſent, and when he comes to that age he is divorced by reaſon of his diſſent from the marriage, and then he marries again, and hath iſſue, and dies; it cannot be averred that he cohabited with his firſt wife to avoid the divorce and diſannul the ſecond marriage, and baſtardize the iſſue, for the eccleſiaſtical courts are proper judges in this caſe; and when by ſentence they have declared the marriage void, it cannot belong to the temporal courts to inquire into and ſet aſide their ſentence, for that is to take away their juriſdiction; the ſame law if the firſt wife had been divorced *cauſâ præcontractus*. 7 Co. 41. Kenn's caſe. Roll. Abr. 360. Cro. Jac. 186. 4 Co. 29. Godolph. 484.

If there be a ſeparation for adultery *a menſâ & toro*, the iſſue born afterwards are preſumed *primâ facie* not to be the huſband's, unleſs 11 H. 7. 27. a. Roll. Abr. 359. 7 Co. 42.

Salk. 123. pl. 7. 3 P. Wms. 275. unleſs it appear upon proof that the huſband after ſuch ſeparation did cohabit with his wife.

1 Wooddeſ. 394. In the caſe of adultery, a [Where parliament diſſolves a marriage for a cauſe ſubſequent thereto, there is no neceſſary or general occaſion for reputing the children illegitimate.]

clauſe is occaſionally inſerted for illegitimating children born after a particular time. See Martin's *Divorce Bill*, 1793.

Roll. Abr. 360. 7 Co. 43. b. If *A.* takes *B.* to wife, and has iſſue by her, and they are afterwards divorced, becauſe they were within the age of conſent at the time of marriage, and afterwards diſagreed; and then *A.* takes *D.* to wife, by whom he hath iſſue, and dies; upon the ſuit of the iſſue of *B.* the eccleſiaſtical commiſſioners, upon a commiſſion directed to them, cannot inquire into the marriage between *A.* and *D.* becauſe they are dead; for though a ſentence of divorce may be repealed after the death of the parties by ſuit in the ſpiritual courts, yet no ſentence of divorce can paſs there after the death of the parties; for a divorce in the eccleſiaſtical courts, after the death of the parties, can be only made to baſtardize the iſſue of that marriage, which being a thing that concerns the inheritance, is properly cognizable in the temporal courts; therefore a prohibition ſhall be granted to ſtop their proceeding upon it.

Palm. 9. Roll. Abr. 356. Godolph. 281. Stile, 277. See Mr. Hargrave's note, 1 Co. Lit. 123. b. As to the legitimation of children born after the death of the huſband, it is agreed, that the uſual time of birth is nine ſolar months and ten days; but it may be haſtened or prolonged by accident; as by hard uſage, want of ſuſtenance, *&c.*; becauſe the nouriſhment of the child in the womb, depends on that of the mother; ſo that a child hath been allowed legitimate nine months and twenty days after the death of the father; but when the child was born eleven months after the death of the huſband, and it was proved the huſband could not enjoy his wife within a month before his death, it was adjudged a baſtard.

Palm. 9. Co. Lit. 8. A lewd woman after her huſband's death, married her adulterer, and within ſix months and a day after her firſt huſband's death had a child; it was adjudged the firſt huſband's, becauſe he had the dominion of the woman at the time of her conception.

21 E. 3. 39. Co. Lit. 8. a. Bro. 97. Roll. Abr. 357. But to prevent this doubtfulneſs in heirs, and to hinder A wife marries immediately after her huſband's death, and hath a child nine months and eleven days after the death of her firſt huſband; it was adjudged the ſecond huſband's, becauſe it was born one day after the uſual time, and the uſual time is the only meaſure to diſcern between them: but if it be born at the end of nine months and ten days, the father is doubtful, and ſome have ſaid, that the child may chooſe his father.

the wife from putting falſe children upon her deceaſed huſband, the law hath provided the writ *de ventre inſpiciendo* for the huſband's heir: and if the wife be found with child, or ſuſpected to be ſo, ſhe muſt be removed to a caſtle, and there ſafely kept till her delivery; and by this writ the heir may take her away from her ſecond huſband; but it lies not for the heir apparent, who hath no intereſt in the eſtate in the life of the anceſtor. Co. Lit. 8. Roll. Abr. 357. This power of removing the reliſt of the anceſtor to a caſtle, in caſe ſhe really is, or is ſuſpected to be, with child, ſeems only to be uſed where the woman continues unmarried; for if ſhe takes another huſband, and the ſheriff returns, that he cauſed her to be ſearched by ſuch women, and found her to be *enſient*, the courſe ſeems to be this, *viz.* for

for the huſband to enter into recognizance that ſhe ſhall not remove from the houſe where they then inhabit; after which a writ is to be awarded to the ſheriff, to cauſe her to be viewed every day till her delivery, by two, at leaſt, of the ſaid women returned by him; and that three or more of them ſhall be preſent with her at her delivery. Cro. Jac. 685. Mo. 523. Co. Lit. 8. Cro. Eliz. 566. Reg. 227. [This writ is grantable to tenant in tail. *Ex parte* Aiſcough, 2 P. Wms. 591. Moſel. 391. It is now granted to a deviſee, whether for life, or in tail, or in fee. *Ex parte* Bateman, at the Rolls, 10th Dec. 1784. *Ex parte* Bellett, at the Rolls, 20th Dec. 1786. *Ex parte* Wallop, 4 Br. Ch. Rep. 90. In Moſely, a caſe of *perſonal eſtate* is cited, in which the then Maſter of the Rolls, in conformity to the reaſon of the common law, directed, that the maſter ſhould appoint two matrons to inſpect a woman. Moſ. 391.]

(B) Where Baſtardy is to be tried, and the Rules concerning ſuch Trial: And herein of general and ſpecial Baſtardy.

BASTARDY, in relation to the ſeveral manners of its trial, is diſtinguiſhed into general and ſpecial baſtardy. General baſtardy is the baſtardy tried by the biſhop, which in its notion contains two things. 1. It ſhould not be a baſtard made legitimate by a ſubſequent marriage. 2dly, That it ſhould be a point collateral to the original cauſe of action. Roll. Abr. 361. Bro. tit. *Baſtardy*, 97. That where general baſtardy is pleaded, the court, though the parties conclude to the country, muſt direct a writ to the biſhop. Raſt. Ent. 105. The iſſue on general baſtardy runs in this manner: *Prædict.* J. R. *dicit quod* J. S. *eſt baſtardus & natus fuit apud* C. *in com. præd. in dioceſ. de* W. *& hoc paratus eſt verificare viis & modis quibus convenit ac prout curia regis hic conſideraverit & prædict.* J. S. *dicit quod ipſe objectione prædict. præcludi non debet quia dicit quod ipſe eſt legitimus & non baſtardus & hoc paratus eſt verificare ubi & quomodo & prout curia regis hic conſiderabit & prædict.* J. R. *ſimiliter*. Raſt. Ent. 29. 279. 289.

Formerly baſtards had a way in ſuch iſſues to trick themſelves into legitimation, for they uſed to bring feigned actions, and get ſuborned witneſſes before the biſhop to prove their legitimation, and then got the certificate returned of record, and after that their legitimation could never be conteſted; for being returned of record, as a point adjudged by its proper judges, and remaining among the memorials of the court, all perſons were concluded by it: but this created great inconveniences, as is taken notice of in the preamble of the 9 *H.* 6. *cap.* 11., in the caſe of ſeveral perſons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their intereſt was concluded: to remedy this inconvenience without altering the rule of law, it was enacted, That before any writ to the biſhop, there ſhould be a proclamation made in the ſame court, and after that the iſſue ſhould be certified into Chancery, where proclamation ſhould be made once in every month for three months, and then the chancellor ſhould certify it to the court where the plea depends, and afterwards it ſhould be again proclaimed in the ſame court, that all that are concerned may go to the ordinary to make their allegations; and without theſe circumſtances, any writ granted to the ordinary, and all proceedings thereupon, ſhall be utterly void. Roll. Abr. 361.

If the ordinary certify or try baſtardy without a writ from the king's temporal courts, it is void; for the ſpiritual juriſdiction within theſe kingdoms is derived from the king, and therefore Roll. Abr. 361.

it muſt be exerciſed in the manner the king hath appointed; for it would be injurious if they ſhould declare legitimation where the rights of inheritance are ſo nearly concerned, without an apparent neceſſity.

Roll. Abr. 362. The certificate muſt be under the ſeal of the ordinary, and not under the ſeal of the commiſſary only; for the command is to the biſhop himſelf to certify; and therefore the execution of the command muſt appear to be by the biſhop in proper perſon.

Roll. Abr. 362. If a man be certified baſtard, this binds perpetually, though the perſon ſo adjudged a baſtard is not party to the action, for all perſons are (*a*) eſtopped to ſpeak againſt the memorial of any judicatory; becauſe the act of the publick judicatory under which any perſon lives, is his own act; and were they not thus bound, there might be contradiction in certificates.

(*a*) But in the trial of ſpecial baſtardy, no perſon is bound by a verdict, unleſs he was party to the original ſuit; for no man can be bound by a judicatory from whence there lies an appeal, unleſs he be capable of that appeal; for it would be a contradiction, where there is an appeal ſuppoſed, to conclude a perſon that is incapable of bringing his appeal; as all perſons who are not parties to the ſuit are; and therefore, on a certificate, which is the higheſt act of that ſort of judgment, every ſtranger is concluded, but not by verdict, becauſe an attaint lies for him that is party to the original action. Roll. Abr. 362.

Roll. Abr. 362. If the tenant be certified baſtard, and die, though the writ abate, yet the certification ſtands in full force. If a man be certified baſtard, that doth not bind a ſtranger till returned of record, becauſe it is no judicial act till recorded in the place appointed to record ſuch tranſactions; nor doth it bind the party to the action till judgment thereon; becauſe if he avoid the action, he avoids all the conſequences of the action; and therefore if the defendant be certified baſtard by the ordinary, yet if the plaintiff be nonſuit, and they cannot go on to trial, the biſhop's certificate never appears of record, and therefore is not binding.

Roll. Abr. 362. If a man be certified *mulier*, no man is eſtopped to baſtardize him, for though he may be a *mulier* by the ſpiritual law, yet he may be a baſtard by our law; and therefore any man, notwithſtanding the certificate, may plead the iſſue of ſpecial baſtardy.

Bro. 76. 4 E. 3. 39. Raſt. 289. When a writ is awarded to the biſhop to certify baſtardy, day is given in court to attend ſuch certification, otherwiſe the parties would be without day in court, in waiting for the biſhop's certificate, and this would create a diſcontinuance, and therefore the parties muſt attend the day, and not expect that the proceedings ſhould be revived by reſummons; though ſome have holden the contrary, becauſe the biſhop is judge, and ſo not bound to a certain day.

21 H. 4. 78. Bro. *Baſtardy*, 97. a. *Ne unques accouple in loyal matrimony* is no plea but in dower, and in appeal to baſtardize any perſon, baſtardy general or ſpecial muſt be pleaded; for the matrimony is there to be queſtioned, where there is a claim under the relation of wife, but there is more than marriage in queſtion in the point of legitimation.

Roll. Abr. 361. The plea of baſtardy may be tried by the biſhop in action perſonal, as well as real.

If there be no biſhop, the certificate muſt be made by the guardian of the ſpiritualties, for he is to ſuſtain the office in the mean time. Bro. 97. Bro. 98.

In an aſſiſe the tenant makes bar as heir; the plaintiff ſays the tenant is a baſtard; the tenant ſays, he is a *mulier*, born at *London;* and prays a writ to the biſhop of *London;* the plaintiff ſays, that he was born at *L.* in *Surry*, (the county alſo wherein the lands lie,) and prays that it may be tried by aſſize; but this could not be granted, becauſe here baſtardy was particularly pleaded, and not left at large upon the iſſue; but the certificate in this caſe was directed to the biſhop of *Wincheſter*, within whoſe juriſdiction *Surry* is, becauſe where the place of birth is in diſpute, the trial muſt be in the place where the land lies; for where the place of birth is controverted, it is uncertain, and ſo is the ſame as if not alleged. 28 E. 3. 27. Bro. 97. In *Mortdanceſtor* the tenant pleads baſtardy in the demandant; this ſhall be certified by the biſhop of the dioceſe where the writ is brought, though the demandant ſays he is a *mulier*, born in another dioceſe; for he may bring his proofs and evidence to the dioceſe where the writ is brought. Bro. *Baſtardy*, 97.

In an aſſize the biſhop certified directly, that the defendant was a baſtard, and it was indorſed on the certificate, that *A.*, the mother of the defendant, left her huſband for ſeven years, in which time the defendant was begotten by one *B.*, a prieſt, and ſo a baſtard; but becauſe the defendant was made a baſtard in the certificate, they gave no heed to the indorſement, as a thing foreign and immaterial. Bro. *Baſtardy*, 98.

Special baſtardy, which is always tried by a jury in the temporal courts, is twofold: 1ſt, Where the baſtardy is the giſt of the action, and the material part of the iſſue. (*a*) 2dly, Where thoſe are baſtards by the common law that are *muliers* by the ſpiritual law, and ſuch are thoſe that are born before marriage, whoſe parents afterwards intermarry.

(*a*) The iſſue is in this manner: *Et prædict.* P. *dicit quod prædict.* W. *actionem verſus eum habere non debet quia dicit quod ubi prædict.* W. *per breve ſuum prædict. præſupponit & aſſerit ſe fuiſſe filium & hæredem præd.* T. *idem* W. *natus fuit extra omnia ſponſalia & hoc paratus eſt verificare unde petit judicium ſi præd.* W. *ut filius & hæres prædict.* T. *ſeu alterius cujuſcunque, &c. verſus eum habere debeat. Et prædict.* W. *dicit quod prædict.* T. *patet ſuus habuit quandam uxorem ſibi deſponſatam* A. *nomine de qua ipſe natus fuit infra ſponſalia inter ipſum* T. & A. *celebrat. & verificat. unde petit judicium.* So that when the party avers the birth within eſpouſals by way of reply, he doth not offer an iſſue, becauſe that were to take an iſſue too much at large; but it is neceſſary to ſet forth the manner of the birth, *viz.* of whom he was born, that they may go to iſſue upon a particular matter; otherwiſe, he that takes this plea would be put on the proof of an univerſal negative, which cannot be proved; and then the party that objected the defect, muſt offer an iſſue in this manner: *Et prædict.* P. *dicit ut prius quod prædict.* W. *natus fuit extra omnia ſponſalia & non infra ſponſalia ut prædict.* W. *ſuperius allegavit & de hoc ponit ſe ſuper patriam & prædict.* W. *ſimiliter ideo, &c.* Raſt. Ent. 387. Dyer, 97. pl. 51.

If a man receives any temporal damage by being called a baſtard, and brings his action in the temporal courts, and the defendant juſtifies that the plaintiff is a baſtard, this muſt be tried at common law, and not by writ to the biſhop; for otherwiſe you ſuppoſe an action brought in a court which hath not a capacity to try the cauſe of action. Brownl. 1. Hob. 179. Godolph. *Eccl. Law*, 479. Co. Ent. 29.

If it be found by an aſſiſe taken at large that a man is a baſtard, the temporal courts are judges of it, for the jury cannot be eſtopped to ſpeak truth, which may fall within their own knowledge; and what they find becomes the record of the temporal courts, and ſo within their conuzance. Bro. *Baſtardy*, 97.

Fitz. Abr. 12. 2 Inſt. 400.

In an aſſize of *mortdanceſter*, one of the three points inquirable is, Whether the demandant be heir to *J. S.*, the anceſtor? in which caſe, if the tenant pleads he is ready to hear the recognizance of the aſſiſe, (*& hoc paratus eſt per aſſiſam inquirere,*) he cannot give in evidence that the demandant is a baſtard, but he ought to have pleaded the ſame; for if this were given in evidence, and not pleaded, the ſpiritual court would be ouſted of their juriſdiction.

(C) Of Baſtard *Eigne*, and *Mulier Puiſne*.

Lit. Sect. 399. Co. Lit. 245.

A Man who hath iſſue a ſon by a woman before marriage, and afterwards marries the ſame woman, and hath iſſue a ſecond ſon born after marriage; the firſt of theſe is termed in law a *baſtard eigne*, and the ſecond a *mulier*. By the common law, as hath been ſaid, ſuch *baſtard eigne* is as incapable of inheriting, as if the father and mother had never married; but yet there is one caſe in which his iſſue was let into the ſucceſſion, and that was by the conſent of the lord and perſon legitimate; as if upon the death of the father the *baſtard eigne* enters, and the *mulier* during his whole life never diſturbs him, he cannot upon the death of the *baſtard eigne* enter upon his iſſue.

7 Co. 44. Jenk. Rep. 268. Brownl. 42. Co. Lit. 33. a. Lit. ſect. 399. Co. Lit. 245.

No man can baſtardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man muſt be baſtardized by the rules of the civil or common law: by the rules of the civil law, this perſon is by ſuppoſition legitimate; and if the common law be made the judge, he cannot be baſtardized; for it is a rule of common law, that a perſonal defect dies with the perſon, and cannot after his death be (*a*) objected to his ſucceſſor that repreſents him; and this rule of law was taken from the humanity of the ancients, who would not allow the calumny of the dead; as alſo from an important reaſon of convenience, for pedigrees are often derived through ſeveral perſons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an eaſy matter to throw on them the aſperſion of baſtardy by any forged evidence, which cannot be confronted by oppoſite proof; and ſo it is fit to limit a time in which all proofs of baſtardy are to be diſallowed.

(*a*) Though this ſeems to be the doctrine of the old books, yet there is this modern caſe: An ejectment was brought by one *Pride* againſt the earls of *Bath* and *Montague*; *Pride* made title as heir to *George* Duke of *Albemarle*, proving himſelf the ſon of one who was brother to the duke, and that the duke died without iſſue; the defendant gave evidence, that Duke *George* had iſſue Duke *Chriſtopher*, who conveyed to him; plaintiff gave evidence, that Duke *Chriſtopher* was a baſtard, begotten of ſuch a woman, who, at the time of her marriage with the ſaid *George* Duke of *Albemarle*, was married to another man, who was then, and is yet living: Upon which it was objected, That ſince Duke *George* and this woman lived together, as man and wife, and were now dead, the plaintiff could not be admitted to baſtardize the iſſue, who was dead alſo; and who, during his whole life, was reputed and taken to be the legitimate ſon of the duke, and ſo ſtiled by the duke himſelf in his deed of ſettlement, and in his will, his ſon and heir; *& quod juſtum non eſt aliquem poſt mortem facere baſtardum.* The court held that true of ſuch a baſtard as is meant by Littleton, in his caſe of *baſtard eigne*, and *mulier puiſne*; but ſuch a baſtard as is born before the eſpouſals of a father and mother, who may afterwards marry; and ſaid, the rule extended only to that caſe. Salk. 120. Pride v. Earls of *Bath*, &c. 7 W. & M. 3 Lev. 410. S. C., who tells us, that though the evidence was admitted by Holt, and Gil. Eyre, the other judges in court, the jury were not ſatisfied with it, and gave a verdict for the Earl of *Bath*.

To exclude the *mulier* from the inheritance, there muſt not only be an uninterrupted poſſeſſion of the *baſtard eigne* during his life, but a deſcent to his iſſue. Co. Lit. 244. Roll. Abr. 624.

If he *baſtard eigne* dies, leaving iſſue *in ventre ſa mere*, and the *mulier* enters, and then the ſon is born, the ſon of the *baſtard eigne* is for ever excluded, becauſe there was no deſcent; and ſo our law in this diſagrees with the civil law, which, for the benefit of the infant, reputes a child in its mother's womb in the ſame condition as if it were born. Co. Lit. 244. Hughes, 365.

If the *baſtard eigne* enter, and die without iſſue, yet the lord by eſcheat cannot claim it againſt the *mulier*; for there is no deſcent caſt to extinguiſh his right. Co. Lit. 244.

If the *mulier* enters into the land after the deceaſe of the baſtard, before the heir of the *baſtard eigne*, yet he is barred; for the land is caſt upon the iſſue of the baſtard immediately after his death, and the deſcent to him is made without any entry, and conſequently he is within the benefit of the rule. Co. Lit. 244.

If the *mulier* be an infant during the poſſeſſion of the *baſtard eigne*, yet he is barred by the deſcent; for though no laches can be imputed to an infant, becauſe, not being of the age of conſent, his permiſſion cannot be taken for a conſent; yet in ſuch caſes where time is limited by the law for pleas and actions, infants are included, unleſs ſpecially excepted; for here their permiſſion is taken for a conſent, becauſe they are ſuppoſed to conſent to the eſtabliſhed law, to which they are obliged for protection during minority: and the law hath not thought fit to except, becauſe it is a publick miſchief in a very tender point, for it might be any man's caſe, to ſuffer by the baſtard of an anceſtor, and the law hath given the infants guardians to plead by; but it cannot revive the evidence of legitimation, which ſo eaſily periſhes with the life of the party. Co. Lit. 244. 8 Co. 101. Sir Richard Pexhall's caſe. Plowd. 372.

If a man hath iſſue a ſon *baſtard eigne*, and a daughter, being *mulier puiſne*, and the daughter is married, the father dies, and the ſon enters, and dies ſeiſed; this ſhall bar the *mulier*, for ſhe might have claimed by her huſband; the ſame law if the *baſtard eigne* enters, and enjoys peaceably during his life, while the *mulier* is impriſoned, or beyond ſea, or of nonſane memory; for the conſtant and quiet poſſeſſion of the *baſtard eigne*, together with the character he had, during life, of being legitimate, ſhall, in a caſe of ſuch nice conſequence, outweigh, at a trial, any evidence that can be brought to the contrary. Co. Lit. 244. 8 Co. 101.

The deſcent of ſervices, rents, or reverſions expectant upon eſtates-tail, or for life, whereon rents are reſerved, ſhall bind the *mulier*; for the enjoyment of theſe equally ſuppoſe the character of legitimate, as the poſſeſſion of any corporal rights; but ſuch a deſcent would not drive the party that hath right to an action; for it is a contradiction in terms, that a man ſhould be diſpoſſeſſed of a mere right. Co. Lit. 244. 8 Co. 101.

If the *baſtard eigne* die ſeiſed, and the ſon endow the wife, yet the deſcent takes away the right of the *mulier*; the *baſtard eigne*'s Co. Lit. 244. 8 Co. 101.

entering into religion is ſuch a deſcent as takes away the right of the *mulier*.

29 E. 3. 38. b. Hughes, 366. Roll. Abr. 625. Tenant in tail, the remainder in tail, the remainder in fee; tenant in tail hath iſſue *baſtard eigne* and *mulier puiſne*, and dies; the baſtard entereth, and continueth his poſſeſſion, and hath iſſue, and dies; the iſſue enters; the *mulier* dies: he in remainder ſhall have a *formedon* againſt the iſſue of the baſtard, and the continuance of the poſſeſſion of the baſtard ſhall not prejudice him; for the ſtatute *Weſtm.* 2. ſays, that the will of the donor manifeſtly expreſſed in his gift muſt be obſerved; now the baſtard cannot bring himſelf within the intention of the donor: for he is neither the heir, nor a perſon begotten by a tenant in tail, ſince, in law, he is the ſon of no man; and conſequently the expreſs words of the ſtatute exclude him from the inheritance, which ſet aſide the rules of common law in this caſe.

Co. Lit. 244. If a man hath iſſue *baſtard eigne* and *mulier puiſne*, the baſtard in the life of the father dies, leaving iſſue, and then the father dies, and the ſon of the baſtard enters and dies ſeiſed, and it deſcends to his iſſue, the deſcent ſhall bind the *mulier;* for if otherwiſe, it would be baſtardizing the anceſtor after one deſcent, which is contrary to the rule.

Co. Lit. 244. If *baſtard eigne* and *mulier puiſne* daughters enter and occupy in coparcenary, the law will not ſuppoſe the whole in the *mulier*, but by a more eaſy conſtruction preſume, that the *mulier* admits the other into the inheritance: ſo if there be *baſtard eigne* and *mulier puiſne*, and the *mulier* enter to hunt or hawk, this doth not diſturb the baſtard's poſſeſſion; for a man's intention doth always govern and denominate his actions; and in this caſe he did not enter to claim.

Co. Lit. 245. If the *baſtard eigne* enter after the deceaſe of his father, and the king ſeiſe the land for a contempt (whereby the profits only are taken) without cauſe, and the baſtard die, and the iſſue petition, and be reſtored, he ſhall hold it againſt the *mulier;* for when the king ſeiſeth land without cauſe, he ſhall only hold it as a ſubſtitute to the poſſeſſor.

Co. Lit. 244. 20 E. 3. Voucher, 129. Hughes, 365. The baſtard being empleaded ſhall have his age, for the dilatory plea muſt be determined before the pleas in chief can come on; ſo that the plea of infancy will ſtay the ſuit before it can be inquired whether he is or is not a baſtard: alſo he ſhall be vouched as heir to the father, for *qui ſentit commodum ſentire debet & onus.*

(D) How Baſtards are to be provided for: And herein of the Duty and Power of Juſtices of the Peace.

(*a*) A ſingle juſtice may bind to the good beha-

BY the 18 *Eliz. cap.* 3. it is enacted, "That (*a*) two juſtices "of the peace, whereof one to be of the (*b*) *quorum*, in or "next unto the limits where the pariſh church is, within which "pariſh

" pariſh the baſtard ſhall be (*c*) born, upon (*d*) examination of
" the cauſe and circumſtances, ſhall and may by their diſcretion
" take order, as well for the puniſhment of the mother, and
" (*e*) reputed father of ſuch baſtard child, as alſo for the better
" relief of every ſuch pariſh, in part or in all; and ſhall and
" may likewiſe by like diſcretion take (*f*) order for the keeping
" of every (*g*) ſuch baſtard child, by charging ſuch mother or
" reputed father with the payment of the money weekly, or other
" ſuſtentation for the relief of ſuch child, in ſuch wiſe as they
" ſhall think meet and convenient; and if, after the ſame order
" by them ſubſcribed under their hands, any the ſaid perſons,
" *viz.* mother, or reputed father, upon notice thereof, ſhall not
" for their part obſerve and perform the ſaid order, that then
" every ſuch party ſo making default, in not performing the ſaid
" order, to be committed (*h*) to ward to the common gaol,
" there to remain without bail or mainprize, except he, ſhe, or
" they ſhall put in ſufficient ſurety to perform the ſaid order,
" or elſe perſonally to appear at the (*i*) next general ſeſſions of
" the peace to be held in that (*k*) county where ſuch order ſhall
" be taken, and alſo to (*l*) abide ſuch order as the ſaid juſtices of
" the peace, or the major part of them, then and there ſhall
" take in that behalf, if they then and there ſhall take any; and
" that if at the ſaid ſeſſions the ſaid juſtices ſhall take no other
" order, then to abide and perform the order before made, as is
" aboveſaid."

viour him that is charged or ſuſpected to have begotten a baſtard child. Lam. 122. Crom. 196. Dalt. 44. But the two juſtices cannot make any order purſuant to this ſtatute, unleſs the child has been a charge to the pariſh. Comb. 39. Vent. 37. If the two juſtices diſagree, ſo that they make no order, the two juſtices of the next diviſion, being of the ſame county, may make the

order. Dalt. 44. If five juſtices make the order, it is good; for the ſtatute is not reſtrictive, but requires two at leaſt. 2 Salk. 477. pl. 18. If *J. S.* is adjudged the father of a baſtard child, and by the order, it appears that the examination of the woman was by one juſtice only, though the ordering part thereof is ſaid to be made by two, the court will quaſh it. Rex v. Beard, 2 Salk. 478. pl. 22. [Both juſtices muſt be preſent at the ſame time and place when the woman is examined; and if ſhe refuſe to filiate, the warrant of commitment muſt be ſigned by them together. 2 Bl. Rep. 1017. An order of removal, however, by two juſtices, ſeparately, and in different counties, hath been adjudged not *void*, but *voidable* only by appeal to the next ſeſſions. 4 Term Rep. 596. The order muſt bear, upon the face of it, that it was made on the complaint of the pariſh where the child was born. 1 Bott. 3d edit. p. 561. But the complaint may be made by others as well as the pariſh. 1 Barnard. K. B. 261. If a child be born in an extra-parochial place, no order can be made. 1 Bott. 421. pl. 553.] We the ſaid juſtices *doth*, inſtead of *do*; an order was quaſhed for this fault. Salk. 122. pl. 6. 2 Ld. Raym. 1197. (*b*) One of the juſtices muſt be of the *quorum*. Dalt. 47. An order quaſhed, becauſe it did not appear that one of the juſtices was of the *quorum*. 2 Salk. 477. pl. 18. Sid. 222. S. P. but Comb. 63. *cont.*, and there ſaid, that this exception had been over-ruled ſeveral times; and ſee now 26 G. 2. c. 27., whereby orders of juſtices are not to be vacated for not expreſſing one of them to be of the *quorum*. (*c*) The place of birth muſt be ſet forth in the order, becauſe it may be born in a pariſh where the two juſtices, who made the order, had no juriſdiction; and that it may appear that it was born in that pariſh to which the relief is ordered. Stile, 368. Dalt, 47. (*d*) And therefore, not only the mother, but likewiſe the putative father, ſhould be ſummoned to appear, and both parties examined before any order is made; but this, however agreeable it ſeems to natural juſtice, is not always practiſed, the juſtices being apprehenſive that ſuch warning would tend to no other uſe, but to make the father keep out of the way: however, it has been reſolved that ſuch ſummons is neceſſary. Dalt. 52. [The ſummons may be by a third juſtice. Ca. Temp. Hardw. 112.; the order need not ſtate it. Caſ. Sett. 127. The preſence of the putative father not neceſſary. Cald. 308.] An order made by two juſtices of the peace was quaſhed, becauſe it was made on an affidavit brought to them without examination of any witneſſes. Comb. 103. (*e*) They muſt adjudge him the father of the child. Sid. 363. Stile, 154. Dalt. 52. Dougl. 662. [(*f*) It muſt appear by the order, that the child was born in the pariſh to which the money is ordered to be paid. Sty. 368.; and it muſt be ſo adjudged. Cald. 172. An order, deſcribing the child as chargeable to an hamlet, is bad. Caſ. Sett. 164. It muſt mention the ſex, and name of the child. 1 Str. 503.] An order, that the reputed father ſhould pay ſo much till further order, was quaſhed; for that further order might be forty years hence. 2 Show. 129. An order, that the reputed father ſhould give ſuch ſecurity, as overſeers or churchwardens ſhall think fit, is naught; for by ſuch order the juſtices delegate their authority to others. 2 Salk. 477. pl. 20. Dalt. 47. An order to pay ſo much money a week till the child is fourteen

years

years of age, is naught; for the juſtices have no power but to indemnify the pariſh; and that is done by obliging the father to maintain the child as long as it may be chargeable to the pariſh. Salk. 121. pl. 2. Comb. 232. S. P. But an order for payment, till nine years old, hath been adjudged good. 2 Str. 788. Barnard. K. B. 31. Set. & Rem. 126. pl. 171. fol. 410. An order, that the father ſhould pay ſo much money a week to the pariſh till the child was twelve years old, quaſhed; for the father may take it away and maintain it himſelf. Vent. 48. 59. Sid. 222. S. P. Mod. 20. [The father hath no ſuch power, nor any right to the cuſtody of it; for, till ſeven years of * age, the child ſhall ſtay with the mother for nurture. 2 Saund. 183. 1 Ventr. 210. Caſ. of S. 64. Newland v. Oſman, Tr. 27 G. 2. 1 Burn. Juſt. 199. 15th ed. 2 Wilſ. 126. 5 Term Rep. 278.] An order, that the father ſhould pay ſo much weekly, without ſaying for how long, is naught; for it ſhould be ſo long as it is chargeable to the pariſh. Stile, 134. S. P. 2 Keb. 575. 2 Salk. 480. pl. 31. The juſtices may order the payment of a ſum in groſs, for the charges the pariſh has been already at to midwife, nurſe, &c. Dalt. 47. Vent. 336. Salk. 124. pl. 1. But an order, that the father ſhould pay 4*l.* to the midwife, and 7*s.* a week until the child was able to get its living by working, was quaſhed: 1ſt, Becauſe it did not appear that the pariſh procured the midwife, or were at any charge with reſpect to her; and they have no power to order any money but for the indemnity of the pariſh. 2dly, 7*s.* a week is exceſſive, and uncertain as to the time; for the father may, if he pleaſes, maintain it cheaper; and the order ſhould have been for ſo long time as it ſhall be chargeable to the pariſh. Vent. 210. An order, that the father ſhould pay 2*d.* a week, is too little, and unreaſonable. Sid. 363. When they order a ſum in groſs, they muſt ſhew for what, and the charges the pariſh hath been at. Comb. 103. They cannot order a ſum in groſs for putting out the child apprentice. Comb. 448. An order to pay ſo much weekly to the overſeers of the poor for, &c. is good; for, before the inſtitution of theſe, it might have been ordered to be paid to two or three of the inhabitants. Salk. 122. pl. 6. 2 Ld. Raym. 1197. The order directed, that ſecurity ſhould be given for the performance of it; and, becauſe the ſtatute directs, that the ſecurity ſhould be either to perform order, or appear at the next ſeſſions; for this the order was quaſhed. 2 Show. 258. 2 Bulſt. 242. S. P. (*g*) If the child is no baſtard, and yet they judge him ſuch, an action lies againſt them. Where the huſband was ſeven years abſent beyond ſea, and they adjudged the child, which the wife had in that time, a baſtard. 5 Mod. 419. Salk. 122. pl. 5. 123. pl. 7. *vide ſupra.* [(*h*) A feme covert, and a ſoldier, may be committed for diſobedience to an order of baſtardy; and the commitment may be, either to the common gaol, or houſe of correction. 3 Burr. 1679. 2 Term Rep. 270. 5 Term Rep. 156. But a perſon cannot be committed for refuſing to diſcover the father of a baſtard child. 1 Bott. 422. pl. 554. An order cannot be made for ſecurity till after contempt. 2 Ld. Raym. 858.] (*i*) Muſt be intended, that the order made by the two juſtices muſt be confirmed, or diſcharged, at the next quarter ſeſſions of that part of the county where it was made, and not at the ſeſſions in the county; for that would be miſchievous in many counties where there are ſeveral ſeſſions in diſtinct parts of the county. Dalt. 48. Sid. 149. Muſt be the next, after notice of the order. Sid. 325. [If an order of baſtardy be quaſhed by the court of general quarter ſeſſions next after ſuch order, the court of K. B. will not intend that a court of general ſeſſions intervened. 3 Term Rep. 496.] (*k*) Exception was taken to an order, that it was made *ad ſeſſionem pacis in com. præd.* and did not ſay, *pro com.* but over-ruled. Vent. 37. (*l*) It ſeems, by the better opinions, that the juſtices in their ſeſſions, have no power to make an original order, and are only to reverſe, or affirm, the order made by the two juſtices; but for this, *vide* 2 Bulſt. 342. 355. Dalt. 48, 49. Cro. Car. 337. 341. 2 Show. 132. pl. 110. Vent. 48. 59. [It is ſettled, that the juſtices at ſeſſions have ſuch power. Dougl. 610.] But, upon the the removal of the cauſe by *certiorari*, the court of King's Bench may either reverſe the order in whole, or in part; and though they reverſe the order for irregularity, yet will they oblige the father to give ſecurity to appear at the next ſeſſions, to abide ſuch further order as ſhall then be made. Comb. 264. 2 Salk. 477. pl. 20. [It is for this reaſon, that the perſonal appearance of the defendant is required on a motion to quaſh an order. 1 Bl. Rep. 198. The ſeſſions, in the caſe of an appeal, cannot commit for non-payment, but muſt proceed on the original order. 2 Ld. Raym. 1157. After the defendant is diſcharged by the ſeſſions, on the merits, a new order cannot be made. 2 Ld. Raym. 1423.]

[* The ſame law prevailed in *France*; for, in the caſe of ſeparation between huſband and wife, the children under ſeven years old, were to remain with their mother, according to the cuſtom of *Beauvoiſis*, in 1283, c. 57. p. 294. And this law goes as far back as the time of the Emperor *Julian*: for that prince informs us, in his *Miſopogon*, that he was placed, at that age, under the care of a governor.]

Carth. 397. Boerham and Waltham, Salk. 121. pl. 4. 5 Mod. 204. Comb. 360. *Vide* 2 Bulſt. 349, 350. Dalt. 94.

Baſtard children gain a ſettlement in the pariſh where they are born; but if a woman big with child of a baſtard, is by order of two juſtices removed from the pariſh of *A.* to *B.*, as her laſt place of ſettlement, from which order *B.* appeals, but before the next ſeſſion ſhe is delivered of a baſtard child in *B.*, and afterwards the order of the two juſtices is vacated, the child muſt follow the mother, and gains a ſettlement in *A.*

[So, if a woman comes to beg as a vagrant in a pariſh which ſhe does not belong to, and drops her baſtard

baſtard there, it ſhall be ſettled in the mother's own pariſh, if ſhe is apprehended for her vagrancy. Stat. 17 G. 2. c. 5. So a baſtard born in gaol. Seſſ. Ca. V. 1. 94.; or in a licenced lying-in hoſpital, 13 Geo. 3. c. 82. § 5.; or in any houſe of induſtry, 20 Geo. 3. c. 36. § 2.; or under a certificate, 1 Str. 186. 2 Str. 1168. Burr. Sett. Ca. 187. 264. 650.; ſhall follow the mother's ſettlement.]

[When a baſtard, having a different ſettlement from its mother, lives with her for nurture, the pariſh where the baſtard's ſettlement is, muſt maintain it. Dougl. 7. 9. n. 2.

If the parents neglect to provide for the ſuſtenance of a baſtard child, the pariſh where it is born muſt do it, though the juſtices make no order for that purpoſe.] 1 H. Bl. Rep. 253. See Dougl. 9.

By the 7 *Jac.* 1. *cap.* 4. it is enacted, "That every lewd "woman which ſhall (*a*) have any baſtard which may be "(*b*) chargeable to the pariſh, the (*c*) juſtices of the peace ſhall "commit ſuch lewd woman to the houſe of correction, there to "be puniſhed and ſet to hard work during the term of one "whole year; and if ſhe ſhall eftſoons offend (*d*) again, then to "be commited to the ſaid houſe of correction as aforeſaid, and "there to remain till ſhe can put in good ſureties for her good "behaviour not to offend again."

(*a*) The woman muſt be delivered of ſuch baſtard child before ſhe can be ſent to the houſe of correction; and the child is not to be ſent with her. Dalt. 48. (*b*) The child muſt be chargeable to the pariſh; therefore, if the father, or any other, maintains it, it ſeems, ſhe is not to be puniſhed by this ſtatute. *Vide* Dalt. 46. (*c*) Muſt be by two juſtices at leaſt. Dalt. 46. (*d*) But ſhe ſhall not be puniſhed upon this part of the ſtatute, unleſs ſhe were before convicted and puniſhed on the firſt. Q. If ſhe were before proceeded againſt purſuant to the ſtat. 18 Eliz. c. 3. 2 Bulſt. 348, 349.

By the 13 & 14 *Car.* 2. *cap.* 12. *par.* 19., "Whereas the pu-"tative fathers and lewd mothers of baſtard children run away "out of the pariſh, and ſometimes out of the county, and leave "the ſaid baſtard children upon the charge of the pariſh where they "are born, although ſuch putative father and mother have eſtates "ſufficient to diſcharge ſuch pariſh; it is therefore enacted, That "it ſhall and may be lawful for the churchwardens and overſeers "for the poor of ſuch pariſh where any baſtard child ſhall be "born, to take and ſeize ſo much of the goods and chattels, "and to receive ſo much of the annual rents or profits of the "lands of ſuch putative fathers or lewd mothers, as ſhall be or-"dered by any two juſtices (*e*) of the peace, for or towards the "diſcharge of the pariſh, to be confirmed at the ſeſſions, for the "bringing up and providing for ſuch baſtard child, and there-"upon it ſhall be lawful for the ſeſſions to make an order for "the churchwardens or overſeers of the poor of ſuch pariſh, to "diſpoſe of the goods by ſale or otherwiſe, or ſo much of them "for the purpoſes aforeſaid, as the court ſhall think fit, and to "receive the rents and profits, or ſo much of them as ſhall be "ordered by the ſeſſions as aforeſaid, of his or her lands."

[(*e*) An order, giving the churchwardens power to ſeize ſuch of the putative father's goods as they may think proper, is bad. 2 Ld. Raym. 858.]

By the 6 *Geo.* 2. *cap.* 31. it is enacted, "That if any ſingle "woman ſhall be delivered of a baſtard child, which ſhall be "chargeable, or likely to become chargeable to any pariſh or "extra-parochial place, or ſhall declare herſelf to be with child, "and that ſuch child is likely to be born a baſtard, and to be "chargeable to any pariſh or extra-parochial place, and ſhall in "either

[An examination taken under this act, is admiſſible evidence on an application to the court

of ſeſſions to make an order of filiation, though the woman die before ſuch application can be made. Rex v. Ravenſtone, 5 Term Rep. 373.]

" either of ſuch caſes, on an examination to be taken in writing " upon oath, before any one or more juſtice or juſtices of the " peace of any county, riding, diviſion, city, liberty, or town " corporate, wherein ſuch pariſh or place ſhall lie, charge any " perſon with having gotten her with child, it ſhall and may be " lawful to and for ſuch juſtice or juſtices, upon application " made to him or them by the overſeers of the poor of ſuch pa- " riſh, or by any one of them, or by any ſubſtantial houſeholder " of ſuch extra-parochial place, to iſſue out his or their warrant " or warrants, for the immediate apprehending of ſuch perſon ſo " charged as aforeſaid, and for bringing him before ſuch juſtice " or juſtices, or before any other of his majeſty's juſtices of the " peace of ſuch county, *&c.*; and the juſtice and juſtices before " whom ſuch perſon ſhall be brought, is and are hereby au- " thorized and required to commit the perſon ſo charged as " aforeſaid, to the common gaol or houſe of correction of ſuch " county, *&c.*, unleſs he ſhall give ſecurity to indemnify ſuch " pariſh or place, or ſhall enter into a recognizance with ſuf- " ficient ſurety, upon condition to appear at the next general " quarter-ſeſſions, or general ſeſſions of the peace, to be held for " ſuch county, *&c.*, and to abide and perform ſuch order or " orders, as ſhall be made in purſuance of an act paſſed in the " 18th year of Queen *Elizabeth*, concerning baſtards begotten " and born out of lawful matrimony.

" Provided, That if the woman ſo charging any perſon as " aforeſaid ſhall happen to die, or be married, before ſhe ſhall be " delivered, or if ſhe ſhall miſcarry of ſuch child, or ſhall appear " not to have been with child at the time of her examination, " then and in any of the ſaid caſes ſuch perſon ſhall be diſ- " charged from his recognizance at the next general quarter " ſeſſions, or general ſeſſions of the peace to be holden for ſuch " county, *&c.*, or immediately releaſed out of cuſtody, by war- " rant under the hand and ſeal, or hands and ſeals, of any one or " more juſtice or juſtices of the peace reſiding in or near the " limits where ſuch pariſh or place ſhall lie.

" Provided alſo, That upon application made by any perſon " who ſhall be committed to any gaol or houſe of correction by " virtue of this act, or by any perſon on his behalf, to any juſ- " tice or juſtices reſiding in or near the limits where ſuch pariſh " or place ſhall lie; ſuch juſtice or juſtices is and are hereby " authorized and required to ſummon the overſeer or overſeers " of the poor of ſuch pariſh, or one or more of the ſubſtantial " houſeholders of ſuch extra-parochial place, to appear before " him or them at a time and place to be mentioned in ſuch " ſummons, to ſhew cauſe why ſuch perſon ſhould not be diſ- " charged; and if no order ſhall appear to have been made in " purſuance of the ſaid act of the 18th of *Elizabeth*, or within " ſix weeks after ſuch woman ſhall have been delivered, ſuch " juſtice or juſtices ſhall and may diſcharge him from his im- " priſonment in ſuch gaol or houſe of correction to which he " ſhall have been committed.

" Provided

" Provided always, That it ſhall not be lawful for any juſtice " or juſtices of the peace, to ſend for any woman whatſoever " before ſhe ſhall be delivered, and one month after, in order to " her being examined concerning her pregnancy, or ſuppoſed " pregnancy, or to compel any woman before ſhe ſhall be de- " livered, to anſwer to any queſtions relating to her pregnancy." [This proviſion ſhews the humanity of our laws; but it proves very frequently an hardſhip upon pariſhes, by ſuffering the parents to eſcape 1 Black. Comm. 458. To an indictment, before the paſſing of this act, for ſecreting a woman big with an illegitimate child, ſo that ſhe could not be had to give evidence againſt the father, the defendant demurred: *Et per Cur.* Judgment for the defendant, for it cannot be illegitimate before born, there being always a poſſibility that it may be born in lawful wedlock. 1 Str. 612. 2 Ld. Raym. 1368.]

(E) Murdering Baſtards.

BY the *ſtat.* 21 *Jac. c.* 27., If a woman delivered of iſſue, which being born alive would be a baſtard, endeavour by burying, drowning, *&c.*, by herſelf or others, ſo to conceal its death, that it may not appear, whether born alive or not, it is *murder*, unleſs ſhe prove by one witneſs at leaſt, that it was born dead. [Upon this ſtatute, it hath been adjudged, that it is not neceſſary that the indictment be drawn ſpecially, or conclude *contra formam ſtatuti*; for the ſtatute doth not create a new offence, but only makes the concealment undeniable evidence of murder. It hath been agreed, too, that where a woman appears to have endeavoured to conceal the death of ſuch child, within the ſtatute, there is no need of any proof that the child was born alive; but it ſhall be undeniably taken, that the child was born alive, and murdered by the mother. 2 Hawk. P. C. c. 46. § 43. But of late years, as this law ſeemeth to be ſomewhat ſevere, it hath been uſual, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption is admitted. 4 Bl. Comm. 198. It hath been adjudged, that where a woman lay in a chamber by herſelf, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the following night, yet ſhe was not within the ſtatute, becauſe ſhe knocked for help. Kelynge, 32. Alſo it hath been agreed, that if a woman confeſs herſelf with child before-hand, and afterwards be ſurpriſed and delivered, nobody being with her, ſhe is not within the ſtatute, becauſe there was no intent of concealment. Kelynge, 33. So, if it appear that ſhe hath made any the ſlighteſt proviſion for clothing the child.]

Bigamy.

MATRIMONIAL cauſes are properly cognizable in the ſpiritual courts, and offences againſt the rights of marriage puniſhable by the eccleſiaſtical law: but this offence of bigamy, or marrying a ſecond wife, the firſt being alive, is made felony by ſtatute, but the offender is not ouſted the benefit of his clergy. Cro. Eliz. 94. Hawk. P. C. c. 34. [This offence is corruptly called *bigamy*; for *that* properly ſignifies being twice married: it is more juſtly denominated *polygamy*, or having a plurality of wives. —Bigamy, according to the canoniſts, conſiſted in marrying two virgins ſucceſſively, one after the death of the other, or in once marrying a widow. Such were eſteemed incapable of orders; and by a canon of the council of *Lyons*, A. D. 1274, holden under pope Gregory X. were *omni privilegio clericali*

cali nudati et coercione fori ſecularis addicti. (6 Decretal. l. 12.) This canon was adopted and explained in *England*, by ſtatute 4 E. 1. ſt. 3. c. 5., and bigamy thereupon became no uncommon counterplea to the claim of benefit of the clergy. (M. 40 E. 3. 42. M. 1 H. 4. 11. 48. M. 13 H. 4. 6. Staunf. P. C. 134.) The cogniſance of the plea of bigamy was declared by ſtat. 18 E. 3. ſt. 3. c. 2. to belong to the court chriſtian, like that of baſtardy. But by ſt. 1 Edw. 6. c. 12. § 16. bigamy was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dy. 201. 4 Bl. Comm. 163.—It may be added, as a further mark, perhaps, of the odiouſneſs of bigamy, among the very early inhabitants of this iſland, that by the cuſtom of gavelkind, which was very extenſive, and is ſuppoſed to be a relick of the ancient Britons, (1 Inſt. 175. b.) a ſecond marriage incurred a forfeiture of dower. 1 Inſt. 33. b. 1 Wooddeſ. 425.]

See Obſerv. on ſtat. 436. 3d edition, wherein you will find an ill-grounded obſervation of the King of *Pruſſia*'s on this law, with the proper anſwer. [In proſecutions on this ſtatute, a marriage in fact muſt be proved. 4 Burr. 2059.]

By the 1 *Jac.* 1. *cap.* 11. it is enacted, "That if any perſon or perſons within his majeſty's dominions of *England* and *Wales*, being married, do marry any perſon or perſons, the former huſband or wife being alive, that then every ſuch offence ſhall be felony, and the perſon or perſons ſo offending ſhall ſuffer death as in caſes of felony; and the party and parties ſo offending ſhall receive ſuch and like proceeding, trial, and execution, in ſuch county where ſuch perſon or perſons ſhall be apprehended, as if the offence had been (*a*) committed in ſuch county where ſuch perſon or perſons ſhall be taken or apprehended:" But it is provided, "That nothing in this ſtatute contained ſhall extend to any perſon or perſons whoſe huſband or wife ſhall be continually remaining beyond the ſeas by the ſpace of ſeven years together; or whoſe huſband or wife ſhall abſent him or herſelf the one from the other by the ſpace of ſeven years together, in any parts within his majeſty's dominions, the one of them not knowing the other to be living within that time. Alſo provided, That the ſtatute ſhall not extend to any perſon or perſons who ſhall be at the time of ſuch marriage (*b*) divorced by a ſentence in the eccleſiaſtical court, or to any perſon or perſons where the former marriage ſhall be by ſentence in the eccleſiaſtical court declared to be void and of no effect; nor to any perſon or perſons, for or by reaſon of any former marriage had or made within (*c*) age of conſent. Alſo provided, That no attainder for this offence ſhall make or work any corruption of blood, loſs of dower, or diſinheriſon of heir or heirs."

(*a*) It is agreed, that if the firſt marriage were beyond ſea, and the latter in *England*, the party may be indicted here; but if the firſt were in *England*, and the latter beyond ſea, it is ſaid that the party cannot be indicted, becauſe the ſecond marriage, which made the offence, was not within any county here. Sid. 171. But 1 Hawk. P. C. c. 34. holds, that the party may in the laſt caſe be indicted, and relies on the expreſs words of the ſtatute. (*b*) Divorces *a menſâ & toro*, *cauſâ adulterii*, and *ſævitiæ*, are within the exception in the ſtatute, though the word *ſeparamus*, and not *divortiamus*, be made uſe of in the ſentence; for the ſtatute being penal, ſhall be conſtrued favourably; and ſuch ſeparations are taken for divorces in common underſtanding. 1 Hawk. P. C. c. 34. 3 Inſt. 89. H. P. C. 122. Kelynge, 27. Cro. Car. 461. 2. [If a marriage be declared void by an eccleſiaſtical ſentence, and there be an appeal to a higher ſpiritual tribunal, which, by ſuſpending that ſentence, is a ſuppoſed continuation of the marriage, yet one of the parties marrying again doth not incur the penalties of this law, although ſuch ſecond marriage is indeed unlawful. Gibſ. Cod. t. 22. c. 4. A ſentence in the eccleſiaſtical court in a ſuit for jactitation doth not preclude the crown from proving the marriage in an indictment on this ſtatute. And admitting that ſuch a ſentence were ſo far concluſive as to the fact of marriage, the crown may avoid the effect of the concluſion by giving evidence that the ſentence had been obtained by fraud and colluſion. Ducheſs of Kingſton's trial, 11 St. Tr. 262.] (*c*) If one of the parties only were under the age of conſent at the time of ſuch marriage, the exception extends as well to the party above the age of conſent, as to the other; becauſe the power of diſagreeing was equal on both ſides. Roll. Abr. 340. 3 Inſt. 89. Co. Lit. 79. H. P. C. 121. Hawk. P. C. 111. [The firſt and true wife is not an admiſſible witneſs againſt her huſband. 1 Hale, 692. Even an affidavit by the firſt wife, to poſtpone the trial againſt the huſband, on an indictment upon this ſtatute, hath been rejected. O. B. Feb. 1786. But ſee Adding. P. S. 411. But the ſecond woman is competent to prove the marriage, for ſhe is not his wife ſo much as *de facto*. 1 Hale, 693.]

Bills of Sale.

A Bill of ſale is a ſolemn contract under ſeal, whereby a man paſſeth the right of intereſt that he hath in goods and chattels: for if a man promiſe or give any chattels without valuable conſideration, or without delivering poſſeſſion, this alters no property, becauſe it is *nudum pactum unde non oritur actio;* but if a man ſell goods by deed under ſeal duly executed, this alters the property between the parties, though there be no conſideration, or no delivery of poſſeſſion, becauſe a man is eſtopped to deny his own deed, or affirm any thing contrary to the manifeſt ſolemnity of contracting. Yelv. 196. Cro. Jac. 270. Brown, 111. 6 Co. 18.

[By ſt. 26 *Geo.* 3. *c.* 60. § 17. it is enacted, "That when and "ſo often as the property in any ſhip or veſſel, belonging to any "of his majeſty's ſubjects, ſhall be transferred to any other or "others of his majeſty's ſubjects, in whole or in part, the certi- "ficate of the regiſtry of ſuch ſhip or veſſel (required by this act) "ſhall be truly and accurately (*a*) recited in words at length, in "the bill or other inſtrument of ſale thereof; and that otherwiſe "ſuch bill of ſale ſhall be utterly null and void to all intents and "purpoſes."

The deciſions upon bills of ſale having ariſen chiefly upon the ſtatute of 13 *El. c.* 5., the reader is referred for them to tit. *Fraud*, C.] 3 Term Rep. 406. (*a*) A mere clerical miſtake will not vitiate it. 4 Term Rep. 161.

Bill of Exceptions.

At common law a writ of error lay for an error in law, apparent in the record, or for an error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing *ore tenus*, which was over-ruled by the judge, this could not be aſſigned, for error not appearing within the record, nor being an error in fact, but in law; and ſo the party grieved was without remedy. And therefore, 2 Inſt. 426.

"By the ſtatute (*b*) *Weſtm.* 2., when one impleaded before "any of the juſtices, alleges an exception, praying they will "allow (*b*) *Viz.* 13 E. 1. *c.* 31. For prece-

dents of bills of exceptions, and proceeding thereupon, *vide* Raſt. Ent. 275. 323. Brownl. Ent. 129. Lutw. 906.

"allow it; and if they will not, if he that alleges the exception "writes the ſame, and requires the juſtices will put to their ſeals, "the juſtices ſhall ſo do; and if one will not, another ſhall; "and if, upon complaint made of the juſtices, the king cauſe "the record to come before him, and the exception be not found "in the roll, and the plaintiff ſhew the written exception, with "the ſeal of the juſtices thereto put, the juſtice ſhall be com- "manded to appear at a certain day, either to confeſs or deny "his ſeal; and if he cannot deny his ſeal, they ſhall proceed to "judgment according to the exception, as it ought to be allowed "or diſallowed."

3 Burr. 1692. 1 Bl. Rep. 556. Bull. *N. P.* 317.

In the conſtruction of this ſtatute, the following opinions have been holden:

2 Inſt. 427.

That the ſtatute (*a*) extends to the plaintiff as well as defendant; alſo to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee, and in all actions whether real, perſonal, or mixt.

(*a*) But it does not extend to one not party to the record, as bailiff of a franchiſe, who demands conuzance. 2 Inſt. 427.

Bridgman and Holt, Show. P. C. 120. Bull. *N. P.* 316.

[A bill of exceptions ought to be upon ſome point of law, either in admitting or denying evidence, or a challenge, or ſome matter of law ariſing upon a fact not denied, in which either party is over-ruled by the court. If ſuch bill be tendered, and the exceptions in it truly ſtated, the judges ought to ſet their ſeals in teſtimony that ſuch exceptions were taken at the trial: but if the bill contain matters falſe, or untruly ſtated, or matters wherein they were not over-ruled, they are not obliged to affix the ſeal. A bill of exceptions is not to draw the whole matter into examination again; it is only for a ſingle point, and the truth of it can never be doubted after the bill is ſealed, for the adverſe party is concluded from averring the contrary, or ſupplying the omiſſion of it.]

Sid. 84. Sir Henry Vane's caſe. Lev. 68. S. C. Keb. 324. S. C. Raym. 486. S. C. cited. Kelynge, 15. S. C. reſolved: But

It ſeems agreed, that no *bill of exceptions* is to be allowed in treaſon or felony, for the words of the ſtatute are, *cum aliquis implacitatur coram aliquibus juſticiariis, &c.*; and if ſuch bills were allowed it would be attended with great inconveniency, becauſe of the many frivolous exceptions that might be put in by priſoners to the delay of juſtice; beſides, in criminal caſes the judges are of counſel with the priſoner, and are to ſee that juſtice is done him.

whether on indictments for offences not capital, a *bill of exceptions* is to be allowed, Q. & *vide* 2 Hawk. P. C. c. 46. § 1. [In 1 Leon. 5. it was allowed in an indictment for a treſpaſs; in 1 Vent. 336., in an information in nature of a *quo warranto*; in 1 Vern. 175., in an indictment for a riot; and in K. v. Bounce, cited in Ca. Temp. Hardw. 250., it was allowed by Lord Raym. at *Ni. Pri.* that it might be done in an indictment for a libel. In the Exchequer, it is allowed upon information; but thoſe are properly civil ſuits for the king's debts: So in *devenerunt*; but they are called the king's actions of trover. *Per* Ld. Hardwicke, Ca. Temp. Hardw. 251.]

Rex v. Preſton, Burr. S. C. 77. 2 Str. 1040.

[A bill of exceptions will not lie to the juſtices at ſeſſions on hearing an appeal againſt an order of removal; for their authority is final as to matters of fact.]

Ca. Temp. Hardw. 249. 1 Barnard. K. B. 415. S. C.

The

The ſtatute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, *&c.*; alſo to challenges of jurors, and any material evidence offered and over-ruled. 2 Inſt. 427. Dyer, 231. pl. 3. Raym. 486. But if, with reſpect to theſe, a falſity be inſerted in the bill, the judges are not bound to ſeal it, but may return the ſpecial matter; for the command of the writ is conditional, *quod ſi ita eſt tunc ſigilla veſtra apponatis.* Show. P. C. 122.

If in a trial upon a title to a leaſe for years, the judges (though inſiſted upon) will not direct the jury that the probate of a will is concluſive evidence, but will only tell the jury that it is good evidence; and thereupon the jury find there is no ſuch will; yet a bill of exceptions will not lie; for though the evidence be concluſive, the jury, if they will, may run the hazard of an attaint. Raym. 404. Chicheſter and Philips, 2 Jones, 146. S. C. adjudged in B. R. upon a writ of error of a judgment in C. B. in *Ireland*, which was affirmed in B. R. there; and it was ſaid, the proper method had been, to demur to the evidence. *Vide* Show. P. C. 120. 122. *&c.* That if the evidence allowed, be not believed by the jury, no bill of exceptions lies.

If one offers to demur upon evidence, and is over-ruled, and after judgment a writ of error is brought, this cannot be aſſigned for error, but it is a proper caſe for a bill of exceptions, and the remedy which the ſtatute in that caſe appoints. Cro. Car. 341. Cort and the Biſhop of St. *David's*, Jones, 331. S. C. by which it appears, that a bill of exceptions was tendered and ſigned. *Vide* 7 Mod. 53., where it is ſaid, that if the judge erroneouſly over-rule a matter offered in evidence, though the tendering of a bill of exceptions be the moſt regular method, yet it is good cauſe of a new trial; for each party has a right to have his legal witneſſes heard, or evidence received by the jury.

My Lord *Coke* is of opinion, that the ſtatute, notwithſtanding theſe words, *& ſi forte ad querimoniam de facto juſtic. venire fac. dominus rex recordum coram eo*, extends not only to the Common Pleas, but to (*a*) all other courts of record, on whoſe judgments a writ of error lies to the *King's Bench*, but alſo to the county court, the hundred, and court-baron; for therein, ſays he, the judges are moſt likely to err; and albeit of judgments given in them a writ of error lieth not, but a writ of falſe judgment in the *C. B.*, yet the caſe being in the ſame or greater miſchief, the purview of this ſtatute doth extend to theſe inferior courts. 2 Inſt. 427. (*a*) It has likewiſe been holden, that it extends even to the King's Bench, on a trial at bar, though the proceedings there are *coram rege.* 2 Jones, 117. 2 Lev. 237. Skin. 356. 2 Show. Rep. 147. Burr. S. C. 81.; but *contr.* 2 Show. Rep. 287. A bill of exceptions lies upon a trial in the Exchequer, though that record cannot be removed in B. R. but by error will be brought before other juſtices. 2 Lev. 238.

If one of the juſtices ſets his ſeal to the bill, it is ſufficient; but if they all refuſe, it is a contempt in them all, for which the party grieved may have a writ grounded upon the ſtatute, commanding them to put their ſeals, *&c.* 2 Inſt. 427. Raym. 182. S. P. 2 Lev. 237. S. P. *Vide* Show. P. C. 116. where a petition was exhibited to the lords in parliament, to oblige the judges to ſign, and there ſaid, that the proper remedy againſt them was an action grounded on the ſtatute, which was to be tried by a jury.

Although no time be appointed by this act when the juſtices ſhall put their ſeals, the party muſt pray the ſame before judgment: but if they deny it, then may they be commanded after judgment to put their ſeals, and then the putting of their ſeals after judgment ſhall be ſufficient. 2 Inſt. 427.

Salk. 288. pl. 26. Wright v. Sharp.

But where a corporation-book was offered in evidence at the aſſizes to prove a member of the corporation not in poſſeſſion, and refuſed, and no bill of exceptions was then tendered, nor was the exception then reduced to writing; and the trial proceeded, and a verdict was given for the plaintiff; the court being the next term moved for a bill of exceptions, it was urged for the bill, that the law requires *quod proponat exceptionem ſuam*, and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict is given againſt him; and the ſame memory that ſerves the judges for a new trial, will ſerve for a bill of exceptions. On the other ſide it was ſaid, that this practice would prove a great difficulty to judges and delay of juſtice; that the precedents and entries ſuppoſe the exception to be written down upon its being diſallowed, and the ſtatute ought to be conſtrued ſo as to prevent inconvenience: beſides, the words of the act are in the preſent tenſe, and ſo is the writ formed on the act. *Holt*, Ch. Juſt., If this practice ſhould prevail, the judge would be in a ſtrange condition: he forgets the exception, and refuſes to ſign the bill, ſo an action muſt be brought: you ſhould have inſiſted on your exception at the trial, you waive it if you acquieſce, and ſhall not reſort back to your exception after verdict againſt you, when, perhaps, if you had ſtood upon your exception, the party had other evidence, and need not have put the cauſe on this point: the ſtatute indeed appoints no time; but the nature and reaſon of the thing requires the exception ſhould be reduced to writing when taken and diſallowed, like a ſpecial verdict, or a demurrer to evidence; not that they need be drawn up in form, but the ſubſtance muſt be reduced to writing whilſt the thing is tranſacting, becauſe it is become a record; ſo the motion was denied.

Vide Lutw. 905, 906. and 3 Bur. 1692. *&c.* the caſe of Money *&* *al'* v. Leach.

When this bill is ſigned, there goes out (*a*) a *ſcire facias* to the (*b*) judge who ſigned it, *ad cognoſcendum ſcriptum*; and the *ſcire facias* to the judge, and his return with the bill muſt be entered on the iſſue roll and made part of the record, and has a retroſpect if done at the trial; which is to be removed by writ of error.

(*a*) Where the record is in the ſame court, there is no occaſion for a *ſcire facias ad cognoſcend.*, 2 Jones, 117. 2 Lev. 237., being preſent to confeſs or deny their ſeal. [But the bill of exceptions is in nature of a writ of error, and therefore cannot be determined in the court out of which the record iſſues. Davenport v. Tyrell, 1 Bl. Rep. 675. Searle v. Lord Barrington, 2 Str. 826. Money v. Leach, 3 Burr. 1692. But though that court hath no juriſdiction in ſuch caſe, yet, if a ſpecial verdict be found in the ſame cauſe, upon which they pronounce judgment, and that judgment be right, their proceeding on the bill of exceptions will not alone be a ground for a court of error to reverſe the judgment. Cowp. 501.] (*b*) If the judge dies, a *ſcire facias* lies againſt his executors to, *&c.* 2 Inſt. 428. If the judge denies his ſeal, the party may prove it by witneſſes. 2 Inſt. 428. Though the party grieved be dead, his heirs or executors may have error upon the bill of exceptions. 2 Inſt. 427.

Vent. 366, 367. 2 Lev. 237. 2 Jones, 117. [If the court of error give judgment in favour of the

When a bill of exceptions is allowed, the court will not ſuffer the party to move any thing in arreſt of judgment on the point on which the bill of exceptions was allowed; having given their opinion upon it before; for his proper redreſs is by writ of error, and it is preſumed that the court was ſatisfied in the point when the party tendered his bill of exceptions, though argued in *Lev.* that

that it ought to be uſed as well to *prevent* as to *reverſe* the judgment. bill of exceptions, and are of opinion, that the evidence, though not concluſive, ought to have been received, they will award a *venire facias de novo*. Davies v. Pierce, 2 Term Rep. 125. But where there is a bill of exceptions, the court below will not grant a new trial on the very point contained in it. Fabrigas v. Moſtyn, 2 Bl. Rep. 929.]

Borough-Engliſh.

BOrough-Engliſh is a cuſtom which prevails in certain ancient boroughs, by virtue of which the youngeſt ſon ſhall inherit his father as to the lands of which he is ſeiſed in fee-ſimple or fee-tail. The (*a*) reaſon of this cuſtom ſeems to be, that in theſe boroughs, people chiefly maintained and ſupported themſelves by trade and induſtry; and the elder children being provided for out of their father's goods, and introduced into his trade in his life-time, were able to ſubſiſt of themſelves without any land proviſion, and therefore the lands deſcended to the youngeſt ſon, he being in moſt danger of being left deſtitute. Lit. § 165. Noy, 106. It is called Borough-Engliſh, becauſe, as ſome hold, it firſt prevailed in *England*. Co. Lit. 110. b. Lit. § 211. 8 E. 4. 19. 2.

(*a*) Others have told us, that the reaſon of this inſtitution, was, becauſe the lord demanded the firſt night with the bride, ſo that they thought the eldeſt not legitimate. Preface to 3 Mod. Rep. [But this reaſon is rejected; for though, perhaps, ſufficient to exclude the eldeſt, it would only, if taken in its full force, convey the inheritance to the ſecond ſon, as the next worthy, and not to the youngeſt. This barbarous cuſtom, Sir W. Blackſtone thinks, never prevailed in *England*, though, he ſaith, it certainly did in *Scotland*, (under the name of *mercheta*, or *marcheta*,) till aboliſhed by *Malcolm* 3. Mr. Robinſon, however, tells us, that it prevailed here, in ſeveral manors in the northern counties, in which a fine is now paid as a commutation for the right; though he acknowledges that the cuſtom of borough-engliſh doth not particularly obtain in thoſe manors where ſuch fine is paid. Rob. on *Gavelkind*, Appendix. It ſhould be obſerved, that in *Scotland*, it was the fine paid by way of commutation for the exerciſe of the right, not the right itſelf, which was called *marcheta*; Skene *verbo Marcheta*. Buchan. Hiſt of *Scot.* lib. 7. And the ſame term is well known in our law, for a fine due to the lord on the marriage of the ſon or daughter of his villein. Co. Lit. 117. b. 140. a. Bract. lib. 2. f. 26. And a late ingenious writer hath thought, that the *mercheta* of the *Scots* is merely *Britiſh*, and nothing more than the Merch-ed of Howel Dha, the daughter-hood, or the fine for the marriage of the daughter. Whitaker's Hiſt. of *Manceſter*, vol. 1. 359. Sir W. Blackſtone deduceth the origin of this cuſtom from the *Tartars*, among whom, according to Father Duhalde, it alſo prevails. 2 Bl. Com. 85.]

[There is no difference between the law concerning copyholds in borough-engliſh, and freeholds in borough-engliſh, as is agreed in Cro. Car. 411.]

If land in borough-engliſh be given to *A.* and his heirs for the life of *B.*, and *A.* die in the life of *B.* leaving two ſons, the youngeſt ſhall be the ſpecial occupant, becauſe the heir that is repreſentative of the father, as to land of that nature, muſt be the occupant, ſince the heir muſt take by deſcent, and not by purchaſe. Co. Lit. 110. b. 1 Salk. 244. *per* Holt, and S. P. reſolved between Baxter and Dodſwell. [2 Lev. 138. 3 Keb. 475. 486. 498. But he takes, as heir. 2 Vern. 226. Vaugh. 201. Robinſ. *Gavelkind*, 97.]

By the cuſtom of borough-engliſh, the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench; Co. Lit. 33. 111. F.N.B. 150.

Cro. Eliz. 415. Mo. pl. 566. She bench; and this is given to her the better to provide for the younger children, with the care of whom ſhe is intruſted.

ſhall have dower of rent, common out of lands in gavelkind, borough-engliſh, &c. for theſe enſue the nature of the land. Bro. *Cuſtom*, 44. 58. The huſband ſhall be tenant by curteſy of borough-engliſh land. *Vide* head of *Curteſy of England.*

Cro. Eliz. 204. Plow. 28. *Vide* head of *Gavelkind.* For a condition broken, the heir at common law ſhall enter, becauſe the condition is a thing of new creation, and collateral to the land; but when the eldeſt ſon enters, the youngeſt ſon ſhall enjoy the land; for, by breach of the condition, he is reſtored to the ancient eſtate.

Vide head of *Warranty.* The benefit of a warranty annexed to lands in borough-engliſh ſhall not go to the youngeſt ſon.

Co. Lit. 242. If a man be ſeiſed of land of the nature of borough-engliſh, and have iſſue two ſons, and die, and the eldeſt ſon, before any entry made by the youngeſt, enter into the land by abatement, and die ſeiſed, this ſhall not take away the entry of the youngeſt brother, becauſe the eldeſt ſhall be preſumed to enter to preſerve the eſtate in his family, which he or his heirs may ſome time or other, upon failure of his brother's line, happen to enjoy.

N. Dyer, 179. b. Jenk. Rep. 220. If a man ſeiſed of borough-engliſh lands make a feoffment in fee to the uſe of himſelf and the heirs male of his body, *(ſecundum curſum communis legis,)* and die, leaving iſſue two ſons, the youngeſt, notwithſtanding the feoffment and theſe words, ſhall inherit thoſe lands.

Co. Lit. 175. b. (*a*) But as to ſuch cuſtoms as are no part thereof, but merely collateral, they muſt be ſhewn in pleading; as that the lands are deviſable, &c.; but for this *vide* Cro. Car. 562. 2 Sid. 154. Sid. 77. 138. Lev. 80. Raym. 77., and tit. *Gavelkind.* [As to the ſpecial cuſtoms, ſome of them reſtrain, and others extend the general cuſtom. Of the firſt ſort are, 1. The cuſtom of a manor in the duchy of *Cornwall*, that an eſtate in fee in the lands ſhall go to the eldeſt ſon; but if in tail, the tenements ſhall deſcend to the heir at common law; and this was holden a good cuſtom in the caſe of Chapman and Chapman, March, 54. 2. In 32 E. 3. Age, 81, it is pleaded, that in the ſoke of *B.*, if a man has ſeveral ſons by one wife, the youngeſt ſhall inherit after the death of the father: but if he has two ſons by different venters, the eldeſt ſhall inherit to the father, and not the youngeſt; and this cuſtom is there allowed good. Co. Lit. 140. b. Thoſe more exenſive than the general cuſtom, are, 1. That if the tenant has no ſons, but ſeveral brothers, his youngeſt brother ſhall inherit. Co. Lit. 110. b. 2. That the youngeſt ſiſter ſhall inherit. Co. Lit. 140. b.]—For other cuſtoms in the nature of borough-engliſh, *vide* tit. *Deſcent*, (D.) and Co. Lit. 110. Dan. 548, 549.

Salk. 243. pl. 4. Clemens and Scudamore, adjudged. 6 Mod. 120. S. C. adjudged. If *A.* hath iſſue five ſons, and the youngeſt dies in the life-time of the father, leaving iſſue a daughter, after which the father purchaſeth lands in borough-engliſh, and dies, the daughter of the fifth ſon ſhall, *jure repræſentationis*, inherit thoſe lands, and not the fourth ſon.

2 Ld. Raym. 1024. S. C. 1 P. Wms. 64. S. C.

Lutwyche v. Lutwyche, Ca. Temp. Talb. 276. [The youngeſt ſon, it hath been determined, ſhall have his whole diſtributive ſhare of the perſonal eſtate of his father dying inteſtate, without bringing into hotchpot an eſtate of the nature of borough-engliſh deſcended to him from his father; for that ſuch eſtate deſcended is not within the ſtatute of diſtributions.]

Bridges.

PUBLICK bridges, which are of general conveniency, are, of common right, to be repaired by all the inhabitants of that county in which they lie.

[The reparation of publick bridges was part of

the *trinoda necessitas*, to which, by the ancient law, every man's estate was liable, *viz. expeditio contra hostem, arcium constructio, et pontium reparatio.* So in the *Roman* law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nullius q. dignitatis ac venerationis meritis, cessare oportet.* C. 11. 74. 4.] 10 E. 3. 28. Roll. Abr. 368. 2 Inst. 701. 13 Co. 33. Hale, P. C. 143. Cro. Car. 365. [The obligation to repair being upon all the inhabitants of a county, it follows, that they are not liable to an action, at the suit of an individual, for an injury sustained by him in consequence of a bridge being out of repair. 2 Term Rep. K. B. 667.]

But a corporation aggregate, (*a*) either in respect of a special tenure of certain lands, or in respect of a special prescription; also any other person by reason of such a special tenure, may be compelled to repair them.

Hale's P. C. 143. Dalt. c. 14.

(*a*) A body politick may be bound

either *ratione tenuræ, sive præscriptionis.* 2 Inst. 700. 13 Co. 33. But a private person, though he may be bound *ratione tenuræ*, is not bound *ratione præscriptionis. Vide* Hawk. P. C. 221. Fitzh. 54. 98. Salk. 358. pl. 5. 3 Salk. 77. 381. pl 3. 6 Mod. 150. If a bishop, *&c.* hath once or twice of alms repaired a bridge, this binds not; but yet it is evidence against him, that he ought to repair, unless he proves the contrary. 2 Inst. 700.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land, chargeable with the repairs of a common bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs; and shall be put to their remedy at law for a (*b*) contribution from those who are bound to bear a proportionable share in the charge; for cases of this nature require the utmost expedition; and bridges, being of absolute necessity, are not to lie unrepaired till law-suits are determined.

Jones, 273. Pop. 192. 6 Mod. 307. 12 Mod. 198. 409. Ld. Raym. 725. 2 Ld. Raym. 792. 804. Salk. 358. pl. 6.

(*b*) Where the party

grieved may, in such case, have a writ to the justices, *de deonerando pro rata portione.* F. N. B. 235. Reg. 268. 2 Inst. 700. Where he may bring his bill in equity. Hard. 131.

If a manor, holden by the service or tenure of repairing a common bridge, comes, by the alienation of the lord, into the hands of several persons, every alienee, being tenant of any parcel, either of the (*c*) demesnes or services, shall be liable to the whole charges, and put to this remedy for a contribution from the rest; and though the lord, on such alienation, agreed, that the purchasers should be exempt from the charges, yet however binding such agreement might be among themselves, it shall not work a general injury, by making the remedy the publick had, more difficult than it was before.

Salk. 358. pl. 5. *Per Cur.*, on a trial at bar.

(*c*) If charged *ratione tenuræ* of a manor, the ancient freeholders and copyholders are not liable to contribute; for

nothing is part of the manor but the demesnes and services; but those, who have any part of the demesne land by purchase, must contribute. Hard. 131. *per Cur.* 2 Ld. Raym. 792. 804. [A tenant at will, of a house adjoining to a common bridge, is compellable, in respect of his possession, to repair the house, so as the publick sustain no injury by it; though he is not bound to repair as to his landlord. 2 Ld. Raym. 856.]

Salk. 358. pl. 5. *Per Cur.*

So if a manor ſubject to ſuch charge comes into the hands of the crown, yet the duty upon it continues; and any perſon claiming afterwards under the crown, the whole manor, or any part thereof, ſhall be liable to an indictment or information, for want of due repairs.

1 Hawk. P. C. c. 77. § 1. Raym. 384.

If part of a bridge lie within a franchiſe, thoſe of the franchiſe may be charged with the repairs for ſo much; alſo, by a ſpecial tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of the county are to repair the reſt.

1 Hawk. P. C. c. 77. § 4. Poph. 192.

It hath been reſolved, that it is not ſufficient for the defendants to an indictment for not repairing a bridge, to excuſe themſelves by ſhewing that they are not bound either to repair the whole, or any part of the bridge, without ſhewing what other perſon is bound to repair the ſame; and it is ſaid, that in ſuch caſe the whole charge ſhall be laid upon ſuch defendants, by reaſon of their ill plea.

Hawk. P. C. c. 77. § 5. Sid. 146. 2 Lev. 112. [An indictment for not repairing a bridge, muſt ſhew what ſort of bridge it is, whether for carts and carriages, or for horſes, or for footmen only. 2 Ld. Raym. 1175. Where the obligation to repair ariſeth from the tenure of certain lands, the indictment muſt ſtate where thoſe lands lie. 2 H. H. P. C. 181.]

It is ſaid, that where ſuch defendants plead that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverſe to the charge againſt themſelves; the attorney-general, in this ſpecial caſe, may take a traverſe upon a traverſe, and inſiſt that the defendants are bound to the repairs, and traverſe the charge alleged againſt *A. B.*, and that an iſſue ought to be taken of ſuch ſecond traverſe; and that the attorney-general may afterwards ſurmiſe that the defendants are bound to repair it, and that the whole matter ſhall be tried by an indifferent jury.

43 Aſſ. pl. 37. Br. tit. *Preſentments in Courts*, pl. 22. 29. Dalt. c. 14. Hawk. P. C. c. 77. § 1.

It ſeems clear that thoſe who are bound to repair ſuch bridges, muſt make them of ſuch height and ſtrength as ſhall be anſwerable for the courſe of the water, whether it continues in the old channel, or makes a new one; and that they are not puniſhable as treſpaſſers for entering on any adjoining land for ſuch purpoſe, or for laying on the materials requiſite for ſuch repairs.

6 Mod. 307. [(*a*) He is made ſo by 1 Ann. ſt. 1. c. 18. § 13.

No inhabitant of a county ought to be a juror for the trial of an iſſue, whether the county be bound to ſuch repairs or not; but it is ſaid, that he may be a good witneſs (*a*).

Upon a ſuggeſtion on the record, that the queſtion was between the Citizens of *Norwich* and the Inhabitants of the County of *Norfolk*; and they being intereſted, there could be no indifferent trial had there; the court awarded the *venire* for the trial of an information for not repairing a bridge within the boundaries of the county of the city of *Norwich* into *Suffolk*. And the trial in *Suffolk* was ruled to be proper, by three Juſtices, againſt Forteſcue, J.; though the defendants had pleaded only the general iſſue. Str. 177. And if the juſtices are all intereſted, the trial ſhall be in the next county. 2 Burr. 859. If the boundaries of a city are enlarged by letters patent, the obligation to repair bridges upon the newly annexed lands, paſſeth with thoſe lands. Str. 177.]

2 Inſt. 701. Carth. 193. 6 Mod. 307. By *Magna Charta*, c. 15., no town or freeman ſhall be diſtrained to make bridges *niſi ab antiquo & de jure facere conſueverunt*, which, *vide* explained, 2 Inſt. 29.

No man can be compelled to build or contribute to the charges of building any new bridge, without an act of parliament; nor can the inhabitants of the whole county, by their own authority, change a bridge or highway from one place to another.

If

If a man makes a bridge for the common good of the king's subjects, he is not bound to repair it. 2 Inſt. 701. Roll. Abr. 368. If a private perſon builds a bridge, which afterwards becomes a public conveniency, the inhabitants of the county are bound to repair it. Salk. 359. pl. 7. 6 Mod. 307.

[Where an owner of a mill cut a channel to it acroſs the highway, and threw a bridge over that part of the highway which was ſo cut through; which bridge was uſed as a publick bridge: it was adjudged, that the repair of it lay upon him. But where a townſhip that were bound to repair a foot-bridge, pulled down that bridge, and built another for horſes and carriages in a different and more commodious part of the river; and this bridge became afterwards of general publick utility; it was holden that the county, and not the townſhip, ought to repair it. In this latter caſe, beſides that the bridge was of a *different* kind, and in a *different* ſituation, from that which the townſhip were originally charged with the repair of, it did not appear that they derived any greater or other advantage from it, than the publick at large: but in the former caſe, the bridge was erected in conſequence of the new cut which the owner of the mill had made, which cut was a publick nuiſance, and was merely for the particular accommodation of his mill, ſo that he received benefit from the bridge beyond that which the publick enjoyed by it. This diſtinction was made by Lord *Kenyon*, in the caſe of the King v. the Inhabitants of *Glamorganſhire*.—To an indictment againſt the county for not repairing a bridge, they pleaded that it had been built by a Mr. *Mackworth* for his private accommodation, in order to lead to his tin-mines; and that the preſent proprietor of thoſe mines ſtill made uſe of it for that purpoſe. But as there was no evidence that the *Mackworth* family had done any thing which induced the neceſſity of erecting that bridge; and as it was become of publick utility; the learned judge ruled, that the county was bound to repair it, notwithſtanding that it ſtill continued to be a benefit to the preſent proprietors of the mines.

Roll. Abr. 368. pl. 2. Com. Dig. tit. *Chimin*, B. 2. 5 Burr. 2594. 2 Bl. Rep. 685.

Summer aſſizes at *Hereford*, 1788.

Juſtices at ſeſſions cannot make an order for the repair of a bridge, but muſt proceed by indictment.

1 Salk. 359. pl. 7.

Nor can they make an aſſeſſment upon a hundred, for reimburſing two of the inhabitants the expences they incur, by being diſtrained to appear and defend an indictment for not repairing a bridge within the hundred.]

Vin. Abr. tit. *Bridges*, (B). pl. 38.

By the 22 *H.* 8. *c.* 5., "The juſtices of peace in every ſhire, "franchiſe, or borough, or (*a*) four of them, whereof one to be "of the *quorum*, may inquire and determine, in their general "ſeſſions, of annoyances of bridges broken in the (*b*) highways, "and make ſuch proceſs and pains on every preſentment, againſt "the perſons charged, *&c.*, as the *King's Bench* is uſed to do, "or as it ſhall ſeem by their diſcretions to be neceſſary and con-"venient."

(*a*) Unleſs the juſtices of the peace of a county or town, *&c.* be four in number, and one of them of the *quorum*, they have no manner of juriſdiction by virtue of this ſtatute. 2 Inſt. 701, 702. But it is ſaid, that the juſtices of the peace of the county, in which ſuch town, being not a county of itſelf, and wanting ſuch a number of juſtices, ſhall lie, may, by virtue of this clauſe of the ſtatute, determine all annoyances of bridges within ſuch town, *&c.* if it be known what perſons in certain are bound to repair the ſame; but if it

be not known, it ſeems that ſuch annoyances are left to the remedy of the common law; becauſe the clauſe, which in ſuch caſe authoriſes the juſtices of the peace to tax all the inhabitants, ſeems, expreſsly, to confine the power of taxing the inhabitants of ſuch town to their own juſtices. 2 Inſt. 704. Hawk. P. C. c. 77. § 15. (*b*) This ſtatute extends to bridges in the highways only. 6 Mod. 255, 256. Salk. 359. pl. 8. 2 Ld. Raym. 1174. But juſtices of peace are ſaid to have juriſdiction over nuiſances to other common bridges, by virtue of 1 Eliz. c. 3, and the general words of the ſtatute of Ed. 3. c. 10. *Vide* 2 Hawk. P. C. c. 8. § 39.

(*a*) It hath been queſtioned, whether a borough which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 Hawk. P. C. c. 77. § 19. *Vide* Skin. 254. pl. 2.

" And where it cannot be known who ought to make ſuch " bridges decayed, they ſhall be made by the inhabitants of the " ſhire, city, or town (*a*) corporate wherein they ſhall be; and " if part ſhall be in one ſhire, *&c.* and part in another, the inhabitants of each ſhall repair and make ſuch part as lies within " their reſpective limits."

(*b*) *Viz.* ſhall make a diſtinct tax on each houſeholder living in the county, and each occupier of land lying in the county, whether he dwell in it or not; and whether ſuch houſeholder or occupier be a body politick or natural; and though he claim an exception by a prior act of parliament. 2 Inſt. 703, 704. Keb. 91. *Note*; This method of taxing, and raiſing money taxed, ſeems altered by 1 Ann. ſtat. 1. c. 18. *quod vide.*

" And for ſpeedy reformation of ſuch bridges, the juſtices of " peace of ſuch ſhire or town, or four of them, whereof one " to be of the *quorum*, may call before them either the conſtables, or elſe two of the moſt honeſt inhabitants of every " town and pariſh, and with the aſſent of the ſaid conſtables or " inhabitants, may (*b*) tax every inhabitant within their limits, " in ſuch ſums as may be thought convenient; and ſhall cauſe " the names and ſums of each perſon to be written on a roll indented, and ſhall have power to make two collectors of every " hundred for the collection of ſuch tax; which collectors receiving one part of the roll indented, under the ſeals of the " juſtices, ſhall have power to collect all the ſums therein contained, and to diſtrain thoſe who ſhall refuſe to pay; and the " ſame juſtices, or four of them, may alſo name two ſurveyors, " who ſhall ſee every ſuch decayed bridge repaired from time to " time, to whom the ſaid collectors ſhall pay the ſaid ſums by " them received; and the collectors and ſurveyors, and their " executors, ſhall from time to time make a true account to the " juſtices, or four of them, whereof one of the *quorum*, of their " receipts, payments, and expences; and if any of them ſhall " refuſe that to do, the ſame juſtices, or four of them, may " make proceſſes againſt them by attachment, under their ſeals, " returnable at the general ſeſſions; and, if they appear, may " compel them to account, or elſe, on their refuſal, may commit " them *quouſque*."

No money to be expended in the repair of bridges without the preſentment of the grand jury. 14 Geo. 2. c. 33. Juſtices of

" And it is further enacted, That where the bridge is in one " ſhire, and the perſon bound to amend it in another, or where " the bridge is in a town corporate, and the perſon bound to repair it out of it, the juſtices of ſuch ſhire or town corporate " may enquire and determine all ſuch annoyances within their " limits; and on a preſentment may make proceſs againſt ſuch " perſons; and do further in every behalf, in every ſuch caſe, as " they might do by the ſaid act, in caſe that ſuch perſons were " in the ſame ſhire, *&c.*; and all ſheriffs and bailiffs of liberties

" ſhall

" ſhall ſerve ſuch proceſs, on pain to make ſuch fine as ſhall be " ſet by the ſaid juſtices."

the peace may purchaſe adjoining grounds for enlarging bridges. As to ſtatutes relative to particular bridges, ſee the Tables to the Statutes, title *Bridges*.

" Provided, That nothing in this act ſhall be prejudicial to " the liberties of the five ports; but that the warden, mayors, " bailiffs, and *jurats* of the ſame ports, may enquire and deter- " mine all annoyances of bridges therein, and make ſuch proceſs, " &c. as the juſtices of peace may do in other places, by virtue " of the ſaid act."

" And it is further enacted, That the ſaid juſtices, &c. may " allow ſuch reaſonable coſts and charges to the ſaid ſurveyors " and collectors, as by their diſcretion ſhall be thought con- " venient."

" And it is further enacted, That ſuch parts of highways as " lie next adjoining to the ends of bridges by the ſpace of 300 " feet, ſhall be amended as often as need ſhall require; and that " the juſtices, or four of them, whereof one of the *quorum*, " within their ſeveral limits, may enquire and determine in their " general ſeſſions all annoyances therein, and do in every thing " concerning the ſame, in as ample a manner as they may do for " making and repairing bridges."

[By ſtat. 1 *Ann. ſeſſ.* 1. *c.* 18. The act of 22 *Hen.* 8. *c.* 5. is confirmed, except where altered by this act.

By § 2. Juſtices at their general or quarter ſeſſions have power upon preſentment (*a*) that any bridge is out of repair within their commiſſions, which by them ought to be repaired, to lay (*b*) ſuch ſum on every pariſh as it hath uſually been aſſeſſed at towards the repair of ſuch bridge, which ſhall be levied by the conſtables of each pariſh or ſuch other perſons as the juſtices ſhall appoint, and by them in ſix days after the receipt thereof paid to the high conſtables, who are to pay it over in ten days to the perſons appointed by the ſeſſions to be treaſurers.—On non-payment in ten days after demand, the money to be levied by diſtreſs and ſale.

(*a*) The bridge to be repaired muſt be ſtated in the preſentment to be a publick bridge, and out of repair; and this muſt appear upon the face of the order of aſſeſſment; but it is not neceſſary that the jury ſhould preſent by whom the bridge ought to be repaired. Andr. 285. (*b*) A general rate by the ſeſſions on the ſeveral pariſhes, &c. with orders to the churchwardens, &c. to aſſeſs the inhabitants, is ſufficient. *Id.* 101.

§ 3. Conſtables neglecting to aſſeſs, collect, or pay the money, to forfeit forty ſhillings, and treaſurers paying any money but by order of juſtices at ſeſſions, to forfeit five pounds.

§ 4. Fines impoſed upon preſentments or indictments not to be returned into the Exchequer, but to be paid to the treaſurers, and applied towards the building or repairing of the bridges.

§ 5. All matters concerning the repair of bridges to be determined in the county where they lie, and not elſewhere; and no preſentment or indictment for non-repair of bridges and the highways at the end thereof, to be removed by *certiorari* (*c*).

(*c*) This act extends only to bridges which the county is bound to repair; for where a private perſon, or a pariſh, is charged, and the right will come in queſtion, the ſtat. of 5 & 6 W. & M. c. 11. hath allowed the granting of a *certiorari*. 2 Str. 900. 1 Barnard. 445.

§ 6. Juſtices

§ 6. Juſtices to allow a ſum not exceeding 3*d.* in the pound to perſons concerned in the execution of this act.

§ 7. Perſons proſecuted for any thing done by them under this act to plead the general iſſue, and give this act, and the act of 22 *H.* 8. *c.* 5., and the ſpecial matter in evidence; and upon the plaintiff being nonſuited, or having a verdict againſt him, to have double coſts.

§ 8. This act not to diſcharge particular perſons, eſtates, or places heretofore liable to the repairs of any bridge.

§ 9. All forfeitures and penalties incurred by this act to be applied towards repairs.

§ 13. In all informations or indictments the evidence of the inhabitants of the town or county in which decayed bridges or highways lie, ſhall be admitted.

By 12 *G.* 2. *c.* 29. § 13., No part of the county rate to be levied by that act ſhall be applied to the repair of any bridges, but upon preſentment of the grand jury.

By § 14. Juſtices (*a*) at their general or quarter ſeſſions may contract for the repairs of bridges for any term not exceeding ſeven years, the contractor giving ſecurity for the due performance of his contract, and the juſtices giving notice at their ſeſſions of their intention of entering into ſuch contract. The contract to be made at the loweſt price propoſed, and when agreed to, to be entered, together with all orders relating thereto, in a book to be kept by the clerk of the peace, *&c.*, who ſhall keep it among the records of the county, *&c.*, to be open to the inſpection of any of the juſtices within the limits of their commiſſions, and by perſons employed under this act, without fee or reward.

(*a*) Where the juſtices at ſeſſions appointed a committee of magiſtrates to inſpect the ſtate of a county bridge, and to make any contract for repairing or re-building, to be executed by the clerk of the peace on behalf of the county; and afterwards made an order adopting a contract for re-building, propoſed by the committee, and directed to be prepared by the clerk of the peace; which contract was thereupon executed by the clerk of the peace; and the juſtices, at a ſubſequent ſeſſions, confirmed all the reſolutions of the committee: the acts of the committee, ſo confirmed, were the acts of the ſeſſions, and the authority given to the committee, and ſo exerciſed by them, was not ſuch a delegation of power by the ſeſſions as invalidated their order. 5 Term Rep. 279.

By 14 *G.* 2. *c.* 33. Juſtices at their general or general quarter ſeſſions are empowered to purchaſe lands (*b*) near to any county bridge, for the purpoſe of enlarging or rebuilding ſuch bridge, not exceeding one acre for each bridge, which land ſhall be paid for out of the monies raiſed by the county rate under the 12 *G.* 2., by the county treaſurer thereto authoriſed by order under the hands and ſeals of the majority of the juſtices at ſeſſions, and ſhall be conveyed to ſuch perſon or perſons as the majority of the ſaid juſtices at ſuch ſeſſions ſhall appoint, in truſt for the enlarging or rebuilding of the reſpective bridges.]

(*b*) This power of purchaſing lands, impliedly gives the power of altering the poſition of the bridge to ſuit the conveniency of the publick. 5 Term Rep. 282, 3.

Burglary.

BURGLARY is a felony at the common law, in breaking and entering the manſion-houſe of another, or a church, or the walls or gates of a walled town, in the night, with an intent to commit ſome felony, whether ſuch felonious intention be executed or not. H. P. C. 80. 3 Inſt. 63. S. P. C. 30. a. Dalt. c. 99. Crom. 31. 22 Aſſ. pl. 95.

1 Hawk. P. C. c. 38. [4 Bl. Com. 223. *Burglatores*, or *burgatores*, were ſo called, according to Sir H. Spelman, *quod dum alii per compos latrocinantur eminùs, hi burgos pertinaciùs effringunt, et depræ-dantur.* And, in the opinion of the ſame writer, the word *burglaria* was brought here by the *Normans*, for he doth not find it among the *Saxons*. The crime, however, is noticed in our earlieſt laws, under the names of hurbpræc, and hamſocne, and was puniſhable with death. *Vide* LL. Canuti, cap. 61. & Hen. 1. c. 13.—The deſcription of the offence hath varied at different times, and hath been much larger than it is at preſent: nor doth the circumſtance of *time*, which is now of its very eſſence, ſeem to have been formerly much, if at all, attended to; its malignity, for many centuries, being ſuppoſed to conſiſt merely in the invaſion on the right of habitation, of which the law of *England* hath always had ſo tender a regard. It doth not appear, at leaſt the editor's reſearches have not enabled him to diſcover, at what particular period this circumſtance was firſt deemed eſſential to the crime. However, it muſt have been ſettled before the reign of E. 6.; for, in the 4th year of that king, we find it expreſsly laid down, that it ſhall not be adjudged burglary, "*niſi ou le infreinder del meaſon eſt per noctem*, Br. tit. *Corone*, pl. 185.; and two years before, we meet with *per noctem*, introduced, as of courſe, in the mention of this offence. *Id.* pl. 180.]

In this definition it will be neceſſary to conſider,

(A) What Breaking is ſufficient to conſtitute this Offence.

(B) What Entry.

(C) Whether both be neceſſary.

(D) What ſhall be accounted Night-time for that Purpoſe.

(E) In what Place this Offence may be committed.

(F) Of the Intention to commit ſome Felony.

(G) How this Offence is puniſhed, and the Offender excluded his Clergy.

(A) What Breaking is ſufficient to conſtitute this Offence.

ONE who comes down by a chimney, who opens a window, or breaks the glaſs thereof, unlocks a door, or draws the latch of a door, is guilty of breaking the houſe, as much as if he had actually forced open the door, or had broken a hole in the wall, &c. H. P. C. 80. 3 Inſt. 64. 1 Hawk. P. C. c. 38. § 4.

Alſo,

Crom. 32. And. 115. *cont.* 1 Hawk. P. C. c. 38. § 4., leaves this a *quære*. Yet ſee the next clauſe.

Alſo, if one aſſault a houſe with an intent to rob it, and the owner of the houſe, in order to drive him away, opens the door, and he thereupon enters, he is guilty of breaking the houſe.

Kelynge, 42. 63. Crom. 32. Dalt. c. 99. H.P.C. 81. 1 Hawk. P. C. c. 38. § 5.

If perſons coming to an houſe with an intent to rob it, are let in under a pretence of buſineſs with the owner, and then riſle the houſe; or if perſons, having ſuch a felonious intent, take lodgings in a houſe, and then fall on the landlord and rob him; or if perſons, having ſuch intent, raiſe an hue and cry, and prevail on the conſtable to ſearch the houſe, and being let in by that means, bind the conſtable and rob; in theſe caſes the offenders have been adjudged guilty of burglary.

Kelynge, 30. 67. H.P.C. 81, 82. 1 Hawk. P. C. c. 38. § 4. Stra. 481. H. H. P. C. 562. Hut. 20. 33.

It is burglary for one who enters by an open door, or lies in a houſe by the owner's conſent, to unlatch a chamber-door with a felonious intent. So if a ſervant draws the latch of the chamber-door in which his maſter lies, with an intent to murder him.

2 Stra. 881. H. H. P. C. 553. [Lord Bacon was of opinion that it was burglary; but Ld. Hale thought that it was not. Bac. El. 65. H. H. P. C. 554.]

By the 12 *Ann. ſtat.* 1. *cap.* 7. it is recited, "That there had "been ſome doubt, whether the entering into a manſion-houſe "without breaking the ſame, with an intent to commit ſome "felony, and breaking the ſaid houſe in the night-time to get "out, were burglary; and thereupon it is declared and enacted, "That if any perſon ſhall enter into the manſion or dwelling-"houſe of another by day or by night, without breaking the ſame, "with an intent to commit felony, or being in ſuch houſe ſhall "commit any felony, and ſhall in the night-time break the ſaid "houſe to get out of the ſame, ſuch perſon is and ſhall be ad-"judged and taken to be guilty of burglary, and ouſted of the "benefit of clergy, in the ſame manner as if ſuch perſon had "broken and entered the ſaid houſe in the night-time, with an "intent to commit felony there."

3 Inſt. 64. H. P. C. 80. Hawk. P. C. c. 38.

But if one enter into a houſe by a door which he finds open, or through a hole which was made there before, and ſteal goods, *&c.*, or draw any thing out of a houſe through a door or window which was open before, or enter into a houſe by the doors open in the day-time, and lie there till night, and then rob and go away, without breaking any part of the houſe, he is not guilty of burglary; and therefore ſuch breaking, as is implied by law in every unlawful entry on the poſſeſſion of another, whether it lie open or be incloſed, though it will maintain a common indictment, or action of treſpaſs *quare clauſum fregit*, will not ſatisfy the words *felonicè & burglariter fregit*.

See Fost. *Cr. Law*, 108, 109.

Cupboards, preſſes, lockers, and other fixtures of the like kind, which merely ſupply the place of cheſts and other ordinary utenſils of houſehold, ſhould be conſidered in no other light than as mere moveables, partaking of the nature of theſe utenſils and adapted to the ſame uſe; and therefore the breaking open a cheſt in the houſe, or the door of a cupboard let into the wall of an houſe, is not burglary.

(B) What Entry.

ANY the leaſt entry, either with the whole or but with part of the body, or with any inſtrument or weapon (*a*), will ſatisfy the word *intravit* in an indictment of burglary; as if one do but put his foot over a threſhold, or his hand, or a hook or piſtol within a window, or turn the key of a door which is locked on the inſide, or diſcharge a loaded gun into a houſe, &c. Dalt. c. 99. H.P.C. 81. And. 115. Crom. 32, 32. Hawk. P. C. c. 38. Foſt. *Cr. Law*, 107, 108.

[(*a*) But it ſeems, that the inſtrument muſt actually be introduced for the purpoſe of committing the felony; and therefore, where thieves had bored a hole through the door with a centre-bit, and part of the chips were found in the houſe, but they had neither gotten in themſelves, nor introduced a hand or inſtrument for the purpoſe of taking the property, the entry was ruled to be incomplete. *O. B.* 1785. Hawk. P. C. 6th ed. 162. n. 1.]

Alſo in ſome caſes, an entry in law is ſufficient, though there be no actual entry; as where divers come to commit a burglary, and ſome ſtand in adjacent places, and the others enter and rob, they are guilty; for the act of one is the act of all. Crom. 32. H.P.C. 80, 81. Hawk. P. C. c. 38.

And upon this ground *Hawkins* argues, that a ſervant within a houſe, who, in confederacy with a rogue lets him in to him, is as much guilty of burglary as if he had been without the houſe. Hawk. P.C. c. 38. But *quære*; for Hale ſays it is only robbery in the ſervant. H. P. C. 81. H. H. P. C. 553., ſays it is burglary in both. See 2 Stra. 881.* 10 St. Tr. 434.

* Cornwal's caſe, ſimilar to the text; and at a meeting of all the Judges at Serjeants Inn, they were all of opinion it was burglary in both.

(C) Whether both be neceſſary.

THERE muſt be both a breaking and an entry; for both the words *fregit* and *intravit* are neceſſary in the indictment; and therefore if, on a bare aſſault upon a houſe, the owner fling out his money, it is no burglary. H.P.C. 80. 3 Inſt. 64. Hawk. P.C. c. 38. S. P. accord. But he ſays there are ſome looſe opinions to the contrary; for which, *vide* the authorities there cited.

(D) What ſhall be accounted Night-time for this Purpoſe.

THE word *noctanter* being preciſely neceſſary in every indictment for this offence, cannot therefore be ſatisfied in a legal ſenſe, if it appear upon the evidence that there was ſo much daylight at the time (*b*), that a man's countenance might be diſcerned thereby. Dalt. c. 99. S. P. C. 30. Crom. 33. H. P. C. 79. 3 Inſt. 63. 7 Co. 6. Hawk. P.C. c. 38.

But in ſome of theſe books, there are opinions, that burglary may be committed at any time after ſun-ſet, and before ſun-riſing. [(*b*) But this does not extend to moon-light; for then many midnight burglaries would go unpuniſhed; and beſides, the malignity of the offence doth not ſo properly ariſe from its being done in the dark, as at the dead of night, when all the creation, except beaſts of prey, are at reſt, when ſleep has diſarmed the owner, and rendered his caſtle defenceleſs. 4 Bl. Comm. 224.]

(E) In what Place this Offence may be committed.

H.P.C. 82. Hawk. P.C. c. 38. 4 Co. 40. a. 3 Inſt. 64. 67.; but

ACCORDING to the conſtant courſe of late precedents and opinions, it ſeems neceſſary to have the word *manſionalis* in the indictment; and therefore that the offence can be only committed in a dwelling-houſe.

And. 302. and S. P. C. mention precedents of indictments of burglary *in domo*, without adding *manſionali*. Alſo, it is agreed, that burglary may be committed in breaking churches, or the walls or gates of a walled town, in which the word *manſionalis* cannot be made uſe of; but theſe are ſaid to be diſtinct burglaries; though Lord Coke ſays, that as to a church, it may properly enough be alleged, being the manſion-houſe of God; *quære*. 3 Inſt. 64. Bro. *Coron.* 93. 22 Aſſ. 39. 95. Poph. 42. 27 Aſſ. 38. Dalt. c. 99. 4 Bl. Comm. 224. Burglary in an apartment in the *African*-houſe, it muſt be laid to be the *manſion*-houſe of the Company. Foſt. *Cr. Law*, 38, 39.

Crom. 33. b. Dalt. c. 99. H.P.C. 82. Mo. 660. pl. 903. 4 Co. 40. a. Cro. Car. 473.

A houſe which a man dwells in but for part of the year, or which he hath hired to live in, and brought part of his goods into, but hath not yet lodged in (*a*), or which his wife hath hired, though without his privity, and lives in without him, will ſatisfy the words *domus manſionalis* in an indictment of burglary, though no perſon were in it at the time of the offence.

Jones, 394. Kelynge, 52. Poph. 42. 52. 3 Inſt. 64., ſo agreed by all theſe books. Hawk. P.C. c. 38. Foſt. *Cr. Law*, 77. [(*a*) But it hath been determined, that a houſe under repair, but not yet inhabited, though the owner have depoſited part of his effects in it with a view to reſide in it, is not his dwelling-houſe, and therefore not the object of burglary. Lyon's caſe, *O. B.* Jan. 1778. Leach's Caſes, 169. So of an unfiniſhed houſe, though one of the workmen conſtantly ſlept in it for the purpoſe of protecting it. Fuller's caſe, *O. B.* Dec. 1782. *Ibid.* n.]

3 Inſt. 64. Dalt. c. 99. Bro. tit. *Coron.* 180. Crom. 32. b. H.P.C. 82. Hawk. P.C. c. 38.

Alſo all out-buildings, as barns, ſtables, dairy-houſes, &c. adjoining to a houſe, are looked upon as part thereof, and conſequently burglary may be committed in them; but if they be removed at any diſtance from the houſe, it ſeems that it has not been uſual of late to proceed againſt offences therein as burglaries.

[Garland's caſe. Leach's Caſ. 130.]

But it does not ſeem agreed that an apartment hired by a lodger

Alſo a chamber in one of the inns of court wherein a perſon uſually lodges, or a lodging in a part of a houſe actually divided from the reſt of the houſe, and having a door of its own to the ſtreet, are agreed to be called properly manſion-houſes.

for a certain time, and not divided from the reſt of the houſe, by having a different door, &c. can be called his manſion-houſe. Kelynge, 83., holds, that it cannot; but Hawk. P. C. c. 38. § 13. ſeems *cont.* [If the owner of the houſe inhabit any part of it, and there be no ſeparate outer door to ſuch part, the houſe ſhall be ſaid to be his dwelling-houſe; but if he do not ſleep under the ſame roof, then the different apartments ſhall be ſaid to be the reſpective dwelling-houſes of the ſeveral perſons renting them. Rex v. Rogers, Leach's Caſ. 84. Cowp. 1. Leach. 205. 333. Lofts over coach-houſes and ſtables, converted into lodging-rooms, and having an outer door common to the ſeveral inmates, may be ſaid to be the dwelling-houſes of their inhabitants, though not rated to the pariſh books as dwelling-houſes, but merely as appurtenances to the coach-houſe and ſtables. Leach, 205.]

Kelynge, 27. Hawk. P.C. 104.

If ſeveral perſons dwell in one houſe, as ſervants, gueſts, or tenants at will, and a burglary be committed in any of their apartments, it ſeems clear that the indictment ought to lay it in the manſion-houſe of the proprietor *.

[* This was determined in the caſe of *Somerſet-houſe*, belonging to the Queen-mother. If a burglary be committed in the apartments of a palace, it muſt be ſtated to be in the manſion-houſe of the king.

king. 1 Hal. 522. But Q. in whoſe houſe ſtealing in the Invalid-office at *Chelſea* ſhould be laid to be? If burglary be committed in one of two adjoining houſes belonging to two partners, it ought to be laid to be in the ſeparate manſion of the partner in whoſe houſe it was committed, if there be no internal communication between the two houſes, although the rent and taxes of the houſe are paid out of the partnerſhip fund. Martha Jones's caſe, Leach, 434.]

Burglary cannot be committed in a ſhop (*a*) or workhouſe which is leaſed to one for his uſe in the day-time only, nor in a ground encloſed, nor in a booth * or tent. H.P.C. 83. 22 Aſſ. 95. Bro. *Coro.* 93. S.P.C. 30. Dalt. c. 99. Crom. 31. 1 Hawk. P. C. c. 38. [(*a*) It hath been determined, that burglary may be committed in a ſhop adjoining to a houſe, if under the ſame roof, and within the curtilage, although there be no internal communication between the ſhop and the houſe, and no perſon ſleep in the houſe, and the ſhop, together with ſome apartments in the houſe, be rented out by the owner. Gibſon, Mutton, and Wigg's caſe, Leach, 287.]

* Clergy is taken away from thoſe who rob any perſon in their dwelling-houſe or booth, 5 and 6 Ed. 6. c. 9. 18 El. c. 7.

[By 13 *G.* 3. *c.* 38. burglary in any houſe, ſhop, *&c.* belonging to the plate-glaſs company, with intent to ſteal or deſtroy the ſtock or utenſils, is declared to be ſingle felony, and puniſhed with tranſportation for ſeven years.]

(F) Of the Intention to commit ſome Felony.

THE indictment muſt allege, and the verdict find, an intention to commit ſome felony, though it be not neceſſary that a felony be actually committed; for if it appear that there was only an intention to commit a treſpaſs, there can be no burglary: but it ſeems that an intention to commit a rape, or ſuch other crime, which was a treſpaſs only at law, and is made felony by ſtatute, will make a man guilty of burglary, as much as if ſuch offence were a felony at common law; becauſe, wherever a ſtatute makes any offence felony, it incidentally gives it all the properties of a felony at common law. Dyer, 99. pl. 58. Daliſ. 22. 3 Inſt. 65. Kely. 30. H.P.C. 83, 84. Crom. 32. *cont.* Dalt. c. 99. 1 Hawk. P. C. c. 38. § 19.

(G) How this Offence is puniſhed, and the Offender excluded his Clergy.

THIS offence has been puniſhed like all other felonies, by hanging, ſince the following ſtatutes, which ouſt the offenders of the benefit of their clergy. For,

By 1 *Ed.* 6. *cap.* 12. § 10. the principal is excluded in all caſes except that of challenging more than twenty, if any body be in the houſe at the time of breaking, and thereby put in fear, *&c.* *Vide* 2 Hawk. P.C. c. 33. § 89., *&c.* and the authorities there cited.

Alſo the principal in every burglary, whether any perſon were in the houſe at the time or not, is excluded from his clergy by 18 *Eliz. cap.* 7., upon a conviction by verdict, outlawry, or confeſſion.

Alſo by 3 & 4 *W.* & *M. cap.* 9., every perſon who ſhall counſel, hire, or command any perſon to commit any burglary, being thereof

thereof convicted or attainted, or being indicted, and ſtanding mute, or challenging peremptorily above twenty, ſhall not have his clergy; and by this ſtatute principals in burglary ſtanding mute, or challenging peremptorily more than twenty, are ouſted of their clergy.

[By 10 & 11 *W.* 3. *c.* 23. § 2., the proſecutor of a burglar to conviction is entitled to a certificate, which may be once aſſigned, and which diſcharges him or his aſſignee from all pariſh and ward offices. The 5 *Ann. c.* 31. hath added a reward of 40 *l.*; and an accomplice being out of priſon, diſcovering two or more felons, is entitled to the like reward and a pardon. And by the laſt act, the receivers of the goods ſtolen, and receivers of the burglars, are declared acceſſaries, and excluded from their clergy. And if the principals cannot be taken, they may be tried as for a miſdemeanor. By 10 *G.* 3. *c.* 48., the receivers of ſtolen jewels, gold, or ſilver plate, watches, where the ſtealing ſhall be accompanied with a burglary, or robbing on the highway, ſhall be triable as well before conviction of the principal, whether he ſhall be in or out of cuſtody, as after, and be tranſported for fourteen years. By 23 *G.* 3. *c.* 88., every perſon apprehended having upon him any implement of houſe-breaking, with intent feloniouſly to break and enter into any dwelling-houſe, ware-houſe, coach-houſe, ſtable, or out-houſe, ſhall be deemed a rogue, *&c.* within 17 *G.* 2. *c.* 5.]

By-Laws.

Moor, 583. 5 Co. 62. [The word *by-law* is derived by ſome from bunuz, bunz, bunh S. byr, I., a town or borough, and laza, S. law. By others from by, S. big, denoting private, and laza.]

A By-law is a private law made by thoſe who are (*a*) duly (*b*) authorized thereunto by charter, preſcription, or (*c*) cuſtom, for the (*d*) conſervation of order and good government within ſome particular place or juriſdiction.

(*a*) A power of making by-laws is included in the very act of incorporating, and incident to every corporation aggregate, without expreſs words in the charter: all by-laws muſt ever be ſubject and ſquared to the rule of the general law of the realm, as ſubordinate to it. Hob. 211. [Where the power of making by-laws is by charter given to a ſelect body, they do not repreſent the whole cummunity, and therefore cannot aſſume to themſelves what belongs to the body at large. But where the power is in the body at large, they may delegate their right to a ſelect body, who thus become the repreſentative of the whole community. 3 Burr. 1837. But where a power is given by charter to a ſelect number to make by-laws *in the ſtead, for, and in the name of, the whole*, and a by-law is returned as made by the body at large, ſuch by-law may be good, for it may have been made by the ſelect body acting in the name of the whole, and if found to be made *in due manner*, it ſhall be ſo intended. 1 Burr. 130, 1.] (*b*) By the 19 H. 7. c. 7. it is enacted, That no ordinance ſhall be made in diminution, or to the diſinheritance of the prerogative of the king, nor againſt the common profit of the people, unleſs they are examined and approved by the chancellor, treaſurer of *England*, chief juſtices of either bench, or three of them, or both juſtices of aſſiſe in their circuit, where the ordinance is, *&c.*; nor ſhall reſtrain any to ſue to the king againſt ſuch ordinances. [This ſtatute extends only to guilds, fraternities, *&c.*; not to cities, boroughs, *&c.* *Per* Att. *Quo W.* 41. And

if lawful and reaſonable, the by-law will be good, though not confirmed, or allowed according to this ſtatute.] Roll. Abr. 363. 5 Co. 63. Comb. 222. (*c*) Where a by-law, founded on a particular cuſtom before allowed, and become part of the common law, ſhall be operative by the cuſtom, though otherwiſe it would be void, *vide* head of *Cuſtoms*, and Raym. 294. Carter, 68. 114. Bridgm. 140. Brown. 177, 178. Skin. 375. (*d*) The inhabitants of a town, without any cuſtom, may make by-laws for the repair of their church, highways, or ſuch other thing as is for the publick good; and in ſuch caſe, the greater part, without any cuſtom, ſhall bind all. 5 Co. 63. Mo. 579. Brownl. 288. Hob. 212. Mod. 194. Of by-laws for the better regulation of commons, *vide* head *Common*, and Roll. Abr. 365. Leon. 190. And. 234. 3 Leon. 38. 264. Dalſ. 95. Palm. 396.

[The validity of a by-law cannot be queſtioned in a ſummary way upon motion, on the return to a *habeas corpus cum cauſâ*, from any other corporation but that of *London*: but the plaintiff muſt begin *de novo*, and declare over again in the ſuperior court. The reaſon (*a*) of this diſtinction between the city of *London*, and all other cities and corporations, may perhaps ariſe from particular methods of recovery being eſtabliſhed and allowed by the cuſtoms of *London*, which cannot be purſued in the ſuperior courts; ſo that the ſhewing that to be the cauſe, is a good cauſe of detainer. For upon theſe writs of *habeas corpus*, the perſon to whom they are directed muſt ſhew a good cauſe of detainer: and if the ſuperior courts cannot proceed, as the cuſtoms of *London* authorize their courts to proceed, it is a good cauſe of detainer; therefore the ſuperior court will there enter into the validity of the by-law to ſee whether that be the caſe or not; and if the by-law appears to be bad, the party ſhall be diſcharged, as being detained without cauſe.]

2 Burr. 777.

(*a*) *Per* Denniſon, J. *ibid.*

As every by-law muſt be reaſonable in itſelf, and agreeable to the general laws of the realm, and be framed ſo as to advance the benefit of that place where it is made to operate, I ſhall therefore conſider,

8 Co. 126. [It is ſaid to have been aſſerted by Holt, C. J. that every by-law, by which the benefit of the corporation is advanced, is, for that reaſon, good; ſuch common benefit being the true touch-ſtone of all by-laws. Carth. 482.

(A) Such By-Laws as relate to the appointing and electing of Members of a Corporation.

(B) Such as are made in Reſtraint of Trade.

(C) Such as are made to prevent Nuiſances.

(D) Such as affect Strangers.

(E) Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

But the true teſt of all by-laws, according to Mr. J. Wilmot, is the intention of the crown in granting the charter, and the apparent good of the corporation. 3 Burr. 1838. Perhaps the criterions are not ſufficiently marked out, and explicit, by either of theſe authorities.—It is not neceſſary to ſet out in the preamble all the reaſons of the by-law. 3 Burr. 1324.]

(A) Such By-Laws as relate to the appointing and electing Members of a Corporation.

IF there be a corporation made and incorporated by the name of *mayor and commonalty*, and by the charter the mayor be appointed to be choſen by the commonalty, and in the ſaid charter there

Vide head of *Corporations*, 4 Co. 78. Jenk. Rep.

273. S. C. [1 Str. 314. S. P. 3 Burr. 1833. S. P. But a by-law cannot ſtrike off an integral part of the electors; neither can it narrow the deſcription of perſons eligible, or ſuperadd a qualification not required by the charter. Rex v. Spencer, 3 Burr. 1827. See too, 4 Burr. 2204.]

there be a power given to them to make by-laws for the better order and government of the ſaid corporation (*a*), they may make a by-law, that a ſelect number of the commonalty ſhall be choſen, by whom the mayor ſhall be choſen for avoidance of popular confuſion.

(*a*) But where members of parliament are to be choſen by all the commonalty, the election cannot by a by-law be given to a ſelect number; for free elections for members of parliament are *pro bono publico*; and this is not to be compared to the caſe of elections of mayors, *&c.* 4 Inſt. 48, 49.

Raym. 446. Taverner's caſe. Comb. 221. A by-law by the company of Barber-Surgeons, that every one choſen ſteward ſhall forfeit 20*l.* on refuſal of his taking upon him the office, held good. 2 Lev. 252. *Vide* Lutw. 402.

If a by-law is made by the company of *Vintners* in *London*, that every freeman of the ſaid company who ſhall be choſen and admitted to be a liveryman, ſhall pay 31*l.* 13*s.* 4*d.*, *&c.*, this is a good by-law; for this being a degree of pre-eminence to which men of ſubſtance only are raiſed; and there being a neceſſity for money to ſupport the honour and reputation of the company, were the ſum more or leſs, it could not make the by-law void, while it binds only the members of the corporation; for when a man doth agree to be of a company, he doth thereby ſubmit himſelf to the laws thereof.

Salk. 142. pl. 1. Ld. Raym. 496. S. C. 12 Mod. 270. 686. S. C. Carth. 480. S. C. at large, and ſeveral exceptions taken to it. 5 Mod. 438. 440. S. C.

A by-law made in *London*, that no freeman choſen ſheriff, *&c.*, ſhall be excuſed, unleſs he voluntarily ſwear he is not worth 10,000*l.*, and bring ſix other citizens to vouch in like manner, on their oaths, that they believe it to be true; and if he openly refuſe to take the office, then to forfeit the ſum of 500*l.*; *viz.* 400*l.* to the city, and 100*l.* to the next man that ſhall hold the office; held (*b*) a good by-law.

(*b*) That every common-councilman who reſigns his office, ſhall forfeit 10*l.*, a good by-law. Lutw. 402. 405. * Of a company to elect upon their livery ſuch and ſo many of their members, as ſhould ſeem moſt meet and convenient to them, on pain to forfeit 25*l.* on refuſal to accept, or to pay the admiſſion-fee, is a good by-law. 1 Bur. 239.

Mayor, *&c.* of *Wokingham* v. Johnſon, Ca. Temp. Hardw. 284.

[Where a corporation having right to make by-laws to govern the inhabitants, and to make ſecondary burgeſſes out of the inhabitants, and capital burgeſſes out of the ſecondary burgeſſes, made a by-law, that every inhabitant choſen a burgeſs, and refuſing to ſerve, ſhould forfeit, *&c.*; this was holden to be a good by-law; though as framed, it could affect only an inhabitant refuſing to be a ſecondary burgeſs, not a ſecondary burgeſs refuſing to be a capital burgeſs.

Rex v. Breton, 4 Burr. 2260.

Where the title to the freedom of a borough as given by the conſtitution of the crown was by birth, ſervitude, or election, a by-law that any perſon (not ſo entitled) ſhould be admitted to the freedom of the borough, upon payment of the ſum of ten pounds, was holden bad.

Newling v. Francis, 3 Term Rep. 189.

Where the mode of electing officers is not particularly pointed out by charter or preſcription, the corporation may from time to time make by-laws to regulate their elections.]

(B) Such as are made in Reſtraint of Trade.

A New corporation not having any (*a*) preſcription to appropriate to themſelves, and exclude others, cannot make a by-law to exclude all perſons from uſing an art or trade in their town to which they were not apprentices in the ſame town, though they have ſerved as apprentices to it in another place. Roll. Abr. 364. Hob. 211, 212. Norris and Stapes. Hutton, 5, 6. S. C. Moor, 869.

(*a*) But a by-law, founded upon preſcription or cuſtom, may reſtrain a man from the exerciſe of his lawful trade, in a particular place. Lutw. 564. Carter, 86. 114. But a by-law ſhall not be carried farther than the preſcription warrants. *Vide* Raym. 294. 2 Brownl. 178. 182. Bridg. 140. A by-law founded on the cuſtom of *London*, that no perſon not being free of the city of *London*, ſhall keep any ſhop, or uſe any trade within the city, reſolved good in Waggoner's caſe. 8 Co. 129. And ſo the practice has been to this day.——So where the Corporation of Weavers claimed by cuſtom, that none ſhall intermeddle with their art within *London* and *Southwark*, but thoſe of their guild or fraternity, held good. Cro. Eliz. 803.

Therefore, if a corporation make a by-law, that no one ſhall uſe the art of weaving within the corporation who has not ſerved ſeven years as an apprentice there, or who has not exerciſed that trade there for five years before the making of the by-law, (*b*) nor unleſs he be allowed and approved of by the wardens of the company, this is a void by-law; for any perſon may lawfully follow what trade he pleaſes, and where he pleaſes, unleſs prohibited by the general law of the land. Hob. 211. Norris v. Stapes, or the Weaver of *Newbery*'s caſe. Hut. 6. S. C. Moor, 869. S. C. Brownl. 49. S. C.

(*b*) If the king creates a corporation, and by the ſame charter grants to the members, that none ſhall uſe a trade within the ſaid corporation, but ſuch as ſhall be approved by them, or any two of them; this grant is void, being againſt the liberty of the ſubject, and tending to a monopoly, and what the king cannot immediately do, cannot be done by any derivative authority from him. Godb. 252. Lutw. 564.

So where the Corporation of Taylors in *Ipſwich*, made a by-law, that none ſhould (*c*) exerciſe the trade of a taylor in *Ipſwich*, *qui non fuerit allocatus per legale warrantum vel authoritatem datam* by the ſaid corporation, or three of the maſters and wardens; nor ſhould ſet up any ſhop for this art, nor exerciſe it, until they preſented themſelves to the maſter, *&c.*, or three of them, or proved that they had ſerved in this trade as apprentices for ſeven years. 11 Co. 53, 54. The Taylors of *Ipſwich* caſe adjudged. Roll. Rep. 4, 5. S. C. adjudged. Godb. 252. S. C. adjudged. Roll. Abr. 364. 365. S. C. adjudged. [But a by-law that every candidate for the freedom of a city ſhall be called at three ſeveral meetings of the mayor, *&c.* and approved of by the majority, hath been holden good, as providing a method for previouſly examining into the right of thoſe who claim to be made free. Green v. Mayor of *Durham*, 1 Burr. 131.]

(*c*) That if a ſervant makes clothes for his maſter, miſtreſs, or their children, this is not exerciſing the trade of, *&c.*; but for this *vide* Roll. Rep. 4. 11 Co. 54. Hob. 211. Godb. 253. Bridg. 141. 8 Co. 129. and *vide* ſtat. 5 Eliz. c. 4., and 28 H. 8. c. 5. That no apprentice or journeyman ſhall, by oath or bond, be compelled not to keep any ſhop, *&c.* without licence of the maſter.

So where the town of *Bedford* made a by-law, that none, except freemen, ſhould exerciſe any art, trade, or myſtery, within the corporation, this, not being founded on any cuſtom they had of excluding foreigners, was holden void. Lutw. 562. Mayor of *Bedford* v. Fox, adjudged. See too, Com. Rep. 269.

If the Merchant-Taylors of *London* by virtue of their charter, make a by-law, that no merchant ſhall put his cloth to be dreſſed but at a cloth-worker's of their company, this is a void by-law; Roll. Abr. 364. Moor, 576, 577, *&c.* 591.

pl. 766. adjudged between Davenant and Hardis. for it is againſt reaſon and the general liberty of the ſubject, to be reſtrained from putting his work to whom he pleaſes. 2 Inſt. 47. S. C. 11 Co. 86. S. C. cited. Carth. 116. S. C. cited.

Godb. 106, 107. adjudged. Raym. 293. S. C. cited. So a by-law in *London*, that none ſhall bring any ſand, nor ſell nor uſe any within the city or ſuburbs, but only that which is taken out of the river of *Thames*, *&c.*, is void, becauſe it is againſt reaſon that a freeman ſhould be reſtrained from merchandizing and ſelling; and this may concern the inheritance of ſome who may have ſands in their land.

5 Mod. 104. The Chamberlain of *London* v. Groſcourt, adjudged. Comb. 373. S. C. If the city of *London* make a by-law, that no perſon ſhall follow the profeſſion of a dancing-maſter within the city, who is not free of the Company of Muſicians, this is a void by-law, for if he be free of any other company it is ſufficient; and the obliging a man to be free of a particular company, when he has no remedy to compel that company to admit him, is creating a kind of (*a*) monopoly in ſuch company, and putting a certain number of men under the final juriſdiction and power of others.

*Under a general power to make by-laws, without any particular cuſtom, a by-law cannot be made to reſtrain trade; therefore a by-law, that no freeman of the city of *London* ſhall exerciſe the trade of a butcher, without being free of the Butchers' Company, adjudged void. Harriſon v. Goodman, 1 Burr. 12. Heſketh v. Braddock, 3 Burr. 1847. But *vide* Rex v. Harriſon, T. 2 Geo. 3. 3 Burr. 1324., and 1 Bl. Rep. 372., where a by-law, that butchers, not free, ſhould take up their freedom in the Butchers' Company, and no butcher be admitted to the freedom of the city in any other company; and all butchers not free of the city, and entitled to their freedom of another company, ſhould be made free of the Butchers' Company, on paying the uſual fees and fine, was adjudged good. [And a by-law that no ſtranger ſhall uſe a particular trade within a city, is good, if founded upon a cuſtom, Woolley v. Idle, 4 Burr. 1951. Bodwic v. Fennel, 1 Wilſ. 233. *Secùs*, if there be no ſuch precedent cuſtom, 1 P. Wms. 184. But general cuſtoms, in aid and ſupport of by-laws, may include new things and objects, which have not exiſted beyond the time of memory, if they are within the reaſon of ſuch cuſtoms. 1 Ld. Raym. 499.] (*a*) A by-law made by the Merchant-Adventurers, that no man ſhould buy or ſell at four fairs within ſuch a prince's dominions, without firſt compounding with them, and paying a fine, was made void by the ſtatute 12 H. 7. c. 6., becauſe it was an infringement of the liberties of all others, not being free of that company. Roll. Abr. 363.

5 Co. 62. Chamb. of *London*'s caſe. Roll. Abr. 365. S. C. 3 Leon. 264. S. C. ill reported. But if an ordinance be made in *London* by the common-council, (who have power by cuſtom, which is among other cuſtoms confirmed by act of parliament by general words,) that if any freeman, citizen, or ſtranger within the city, ſhall put any broadcloth to ſale within the city of *London*, before it be brought to *Blackwell-hall* to be viewed and ſearched, ſo that it may appear to be ſaleable; and that hallage be paid for it, *ſcilicet*, one penny for every cloth, that he ſhall forfeit for every cloth 6*s.* 8*d.*; this is a good ordinance, as well to bind ſtrangers as freemen; becauſe it is made to prevent fraud and falſity in cloth, and for the better execution of the ſtatutes without deceit; and the one penny for hallage is but a reaſonable recompence or charge, for the benefit which the ſubject hath by it.

Palm. 305. *per Cur.* If in *London* there is an act of common-council made, that the bricklayers ſhall not plaiſter with lime and hair, but with lime and ſand only, and that plaiſtering with lime and hair ſhall belong to the plaiſterers, under the penalty of, *&c.* (admitting this before to have been part of the trade of a bricklayer) the by-law is void; for though they have *regimen perſonarum* in their manufactures,

manufactures, yet this power extends only to their demeanor in their trade, and not to annex that to one trade which before belonged to another.

But if a by-law is made by the Corporation of *Throwſters* in *London*, that none ſhall have above ſuch a number of ſpindles in one week, this is a good by-law, for it is not in reſtraint of trade, but to make a more equal diſtribution of it. Lev. 229. adjudged.

[A by-law of the Surgeons' Company in *London*, "That no "member ſhould take an apprentice who does not underſtand the "*Latin* tongue, his ability wherein ſhould be tried by the go- "vernors, or one of them, before his being bound," adjudged good. Rex v. Surgeons' Company, 2 Burr. 892.

A by-law requiring the indentures of apprenticeſhip of ſuch as are bound apprentices to freemen to be enrolled within four months from the date, in order to entitle them to their freedom, ſeemeth to be good.] Rex v. Marſhal, 2 Term Rep. 2.

(C) Such as are made to prevent Nuiſances.

IT ſeems clearly agreed, that wherever any trade by its exceſcence tends to a nuiſance, and thereby proves of publick inconvenience, it may be reſtrained by a by-law; therefore if the mayor, *&c.* of *London* having time out of mind had the right to order and diſpoſe of cars, *&c.*, to the end the ſtreets may not be peſtered with cars, *&c.*, make a by-law, that but 420, *&c.* ſhall be permitted to work for hire within the city and the liberties thereof, and that the preſident, *&c.* of *Chriſt's Hoſpital* ſhall have the regulation thereof; and that 20*s.* admittance, and 17*s.* and 4*d.* yearly, ſhall be paid, *&c.* to the uſe of the poor of the ſaid hoſpital; this *quoad* (*a*) the fine and rent is void, but in all things elſe a good by-law, becauſe a multitude of cars, by the ſtoppage of the ſtreets, may prove a publick nuiſance. Raym. 288. *&c.* 328., adjudged between Player and Vere. Sid. 284. S. C. adjudged. Keb. 463. 496. Vent. 21. 2 Keb. 27. S. P. adjudged between Player and Jenkins. *Vide* Vent. 195, 196. Like point between Player and Broadnox, admitted, ſuch by-law being founded on the cuſtom; and *vide* Skin. 371. pl. 19. to 384. 4 Mod. 228. A by-law to reſtrain the number of hackney-coaches, and that they ſhould not exceed 400, and objected, that coaches being of a new invention, a by-law founded on the cuſtom was void; but there is no reſolution; and now, *vide* the ſtatutes 5 W. & M. c. 22. 9 Ann. c. 23. 1 Geo. 1. c. 57. 26 Geo. 3. c. 72. (*a*) A by-law, that no carman within the city of *London* ſhould go with his cart without a licence from the guardians of ſuch an hoſpital, *&c.* is void; for this only tends to the private benefit of the guardians of the hoſpital, and is in nature of a monopoly. Roll. Abr. 364. *Vide* Bulſt. 11, 12.——And all by-laws ought to be for the common benefit of, *&c.*, and not for the private benefit of a particular man. Goldſb. 79. Moor, 580. Carth. 480. Ld. Raym. 496. Salk. 142. pl. 1. 5 Mod. 438. 12 Mod. 270. 686. 2 Will. Rep. 209.

So if the number of taverns, alehouſes, *&c.* increaſes to ſo great a number as to become nuiſances, they may be reſtrained by a by-law. Sid. 284. *per Cur.*

So if a trade becomes a nuiſance by its ſituation, it may be reſtrained by a by-law; and therefore a by-law to reſtrain (*b*) butchers and chandlers, and ſuch (*c*) others from ſetting up in *Cheapſide*, or ſuch other eminent parts of the city, is good, becauſe ſuch trades are offenſive, and may be apt to create diſeaſes; and therefore for fear of infection, and for the ſake of publick decorum Skin. 380. (*b*) Sid 284. *per Cur.* March, 15. S. P. (*c*) So of a brewhouſe. March, 15.

per Cur. A man reſtrained from ſetting up a tavern in *Birchin-lane*. March, 15.

and conveniency, ſuch kind of offenſive trades may be removed to places of more retirement.

Roll. Abr. 365. adjudged. * That brewers' drays ſhould not be in the ſtreets in *London* after eleven in the forenoon in ſummer, and one in winter, is good. Boſworth v. Hearne, H. 11 Geo. 2. Stra. 1085. Ca. Temp. Hardw. 405. Andr. 91.

So if a by-law be made in *London*, that none ſhall make a hot-preſs, nor uſe it within the city, under the penalty of 10*l.* for the making thereof, and 5*l.* for the uſe thereof, this is a good by-law; becauſe the uſe of thoſe preſſes is dangerous with regard to fire, and alſo deceitful, inaſmuch as they make cloth and ſtuffs look better to the eye than in truth they are *.

(D) Such as affect Strangers.

Bulſt. 11. adjudged. See Lucas, 131. 135. (*a*) For the general learning where ſtrangers ſhall be bound by by-laws, or not, *vide* Moor, 579. Dalſ. 103. Savil, 74. Godb. 180. Carter, 179. Salk. 142. pl. 1. Ld. Raym. 496.

IF the Corporation of Butchers in *London*, having power to make by-laws, make one, that no butcher, or perſon being a ſtranger, ſhall ſell any veal within the city of *London*, unleſs they dreſs the kidneys of their veal in ſuch a manner as the kidneys of ſheep are dreſſed, under the penalty of, *&c.*; a ſtranger, ſelling veal in *London*, is not (*a*) bound to take notice of this by-law.

Bulſt. 12. *per Cur.* [See *acc.* Pierce v. Bartram. Cowp. 269. Butchers' Company v. Morey, 1 H. Bl. 370.]

But if ſuch by-law is made to ſuppreſs fraud, or any general inconvenience uſed by a foreigner, as corruption, *&c.* in the ſale of meat, this is a good by-law, and ſuch of which he (*b*) muſt take notice.

(*b*) That ſtrangers coming into a corporation, muſt, at their peril, take notice of the by-laws of ſuch corporation. Skin. 350. pl. 19. Lutw. 404.

2 Jones, 144. *Vide* Bridg. 141. and 2 Vent. 33. Where the Univerſity of *Oxford* made a by-law, That whoever, *privilegiatus ſive non privilegiatus*, ſhould be taken walking in the ſtreets after nine at night, and having no reaſonable excuſe, to be allowed by the proctor, ſhould forfeit 40*s.*, and whether this could affect or extend to a townſman, *dubitatur*; and a prohibition granted, to the end the merits may be determined. 1 H. Bl. 375.

If the maſter, wardens, and aſſiſtants of the *Trinity-houſe* in *Deptford-ſtrand*, being incorporated by letters patent of *Car.* 2., and having thereby power to make by-laws, do make one, that every mariner, within twenty-four hours after anchorage in the river of *Thames*, ſhall ſend his gun-powder on ſhore, if the weather will permit, under the penalty of, *&c.*, though *quoad* the matter, this is a good by-law, becauſe for the publick good, and prevention of the danger which might otherwiſe accrue to the city of *London*; yet, becauſe the by-law extended beyond the juriſdiction of the makers, *dubitatur*.

3 Mod. 159. Adjudged.

If the Company of Horners of *London*, being incorporated by letters patent, and empowered to make by-laws for the better government of their corporation, make a by-law, that two men by them appointed ſhall buy rough horns for the ſaid company, and bring them to the hall, there to be diſtributed every month by the maſter, *&c.*, for the uſe of the company; and that no member

ber of the company ſhall buy rough horns within twenty-four miles of *London*, but only of thoſe two men appointed, under the penalty of, &c., this is no good by-law; for they being a company incorporated in the city of *London*, have no juriſdiction elſewhere; and may as well extend their power all over *England*, as for twenty-four miles.

A by-law, that all ſtrangers, coming into the port of *London*, ſhould employ city porters to carry their goods, &c. is naught; they may (*a*) indeed make a by-law, that none but freemen ſhall be porters: but to confine ſtrangers to none but ſuch as are city porters, is unreaſonable; for if the city will appoint no porters, they have no remedy againſt the city: alſo ſtrangers cannot know who are city porters, nor compel them to ſerve them.

(*a*) Salk. 143. pl. 7. *per Cur.* *Vide* Salk. 192. pl. 5. S. C. that they being a corporation cannot make a corporation, but may a fraternity. See 10 Mod. 338., &c.

(E) Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law.

BY-LAWS are uſually made with certain penalties, which regularly are to be recovered by (*b*) action of debt, or may be (*c*) levied by diſtreſs.

5 Co. 64. (*b*) A by-law by the City of *London*, and that the penalty ſhall be recovered by the chamberlain, is good. 5 Co. 63.——But if the mayor and commonalty limit the penalty of the by-law to themſelves, it cannot be recovered in the mayor's court, unleſs he be ſevered. Salk. 397. pl. 3. 398. Ld. Raym. 501. Where, upon a by-law made in *London*, the penalty was limited to be recovered by action of debt, wherein no eſſoin, protection, or wager of law ſhould be allowed; the juſtices ſaid, they were very preſumptuous in making by-laws in ſo legiſlative a ſtrain; and ſaid, they might be ſued in *B. R.* for their preſumption and inſolence. Godb. 107. 3 Mod. 193.——The action cannot be reſtrained to the court of the corporation in which the by-law is made; but debt, notwithſtanding, will lie thereupon in the ſuperior courts. 2 Sid. 105. 178. [A by-law, which declared that none but freemen ſhould keep a ſhop, and confined the action to the Portmote courts where the ſheriff or coroner (who muſt be freemen) arrayed the jury, was adjudged bad. Heſketh v. Broddock, 3 Burr. 1847.]——Where, under the penalty of ſuch a ſum, (not exceeding 40 *s.*) as by the makers of the by-law ſhould be aſſeſſed. Brid. 139. 142.—How the penalty muſt be aſcertained. 2 Lutw. 1324. (*c*) A penal ſum to be forfeited for non-performance of a by-law, cannot be levied by diſtreſs, without a preſcription, or expreſs limitation by the by-law. 5 Co. 64.

But a by-law with a penalty of (*d*) impriſonment, or forfeiture of goods and chattels, is void; for, by the general law of the kingdom, no man is to be impriſoned, or diſpoſſeſſed of his goods and chattels, *niſi per legale judicium parium ſuorum, vel per legem terræ*; and were by-laws with ſuch penalties allowed, it would be enabling corporations to ſet up private particular laws, in contradiction to the laws of the land; which would be againſt the very nature and eſſence of a by-law; which, though it may be *præter* the general law of the realm, it cannot be *contra*.

5 Co. 64. 8 Co. 127. S. P. Reſolved. 2 Inſt. 54. Moor, 411. S. P. (*d*) And there the by-law was, that if any gave opprobrious words to the mayor, he ſhould be impriſoned, &c. *Per Cur.* Such a by-law is not lawful; but a by-law to diſfranchiſe the offender had been good.—The city of *London* cannot ſet a fine, &c. for non-performance of a by-law. Comb. 10.

If the Company of Taylors in the city of *Exeter*, being incorporated by letters patent of *Edw.* 4., and having thereby power given them to make by-laws, make a by-law under a certain

2 Vent. 182. adjudged between Clerk and Tucker.

(a) So a by-law cannot be made upon pain of forfeiture of

penalty, to be (a) levied by diſtreſs and ſale of the offender's goods; this is no good by-law; for the forfeiture cannot be levied by ſale of the offender's goods.

the goods, &c. 2 Inſt. 47. 8 Co. 127. b. 2 Vent. 183. 1 Keb. 733. [though the corporation be created by act of parliament, if no ſuch power be expreſsly given. Kirk v. Nowill, 1 Term Rep. 118.]

Moor, 411.

If in *London* a by-law is made, that if any freeman takes the ſon of an alien to be his apprentice, the bonds and covenants ſhall be void; this is no good by-law; for though the common-council might have inflicted a fine or other puniſhment upon ſuch maſter, yet they cannot make the bonds and covenants void.

Totterdell v. Glaſby, 2 Wilſ. 266. 1 Wilſ. 237. 5 Co. 62. b.

[Although a by-law, in excluſion of foreigners from the exerciſe of a trade, may be good with a precedent cuſtom to ſupport it, yet it is void, if the penalty is made recoverable by a ſtranger, not a member of the corporation. It muſt be made recoverable by the corporation, or ſome perſon for their uſe, as, in *London*, by the chamberlain, elſe it would be like aſſigning a *choſe in action*.

Rex v. Dean of *Dublin*, 1 Str. 536.

Under a power by charter to make by-laws, a corporation cannot make a law requiring their members to take an oath for the due obſervance of their ſtatutes and ordinances, or to authoriſe themſelves to adminiſter an oath.]

Carriers.

(A) What Perſons come under the Denomination of Carriers.

(B) In what Caſes Carrier chargeable for a Failure in his Duty.

(C) Of his Intereſt in the Things delivered to his Charge.

(D) Of the Regulations Carriers are under by Acts of Parliament, with reſpect to their Carriages, and the Prices they are to take.

(A) What

(A) What Perſons come under the Denomination of Carriers.

ALL perſons carrying goods for hire, as (*a*) maſters and owners of ſhips, lightermen, ſtage-coach-men, &c. come under the denomination of common carriers, and are chargeable on the (*b*) general cuſtom of the realm, for their faults and miſcarriages.

Co. Lit. 89. Roll. Abr. 2. 338.

(*a*) For this *vide* head of *Merchant and Merchandize*, and *Maſter and Servant*. (*b*) And though a declaration againſt a carrier may be good without reciting the general cuſtom, yet the beſt and moſt uſual way is to bring a ſpecial action on the caſe, and declare *quod ſecundum legem & conſuetudinem Angliæ, &c.* Sid. 245. Hard. 485, 486. This cuſtom is not confined to a particular place, but extends to all the king's people. 3 Mod. 227. And therefore, in truth, it is the common law. Hob. 18. [And being ſo, it is at leaſt unneceſſary, if not improper, to recite it in the declaration. 1 Wilſ. 281.]——Are liable in reſpect of the reward, and not of the hundred's being anſwerable over to them. Salk. 17. pl. 8. 143. Ld. Raym. 646. 5 Mod. 455. Carth. 487. Comyns, 100. [The true ground of their liability is, the *publick employment* they exerciſe. 2 Ld. Raym. 917. 12 Mod. 487.]

Alſo if a perſon, who is no common carrier, takes upon himſelf to carry my goods, though I promiſe him no (*c*) reward, yet if my goods are loſt or damaged by his default, I ſhall have an action againſt him.

(*c*) If he be a common carrier, tho' there be no agreement or promiſe of payment, he ſhould recover his hire on a *quantum meruit*; and therefore liable. Alſo a private perſon undertaking, without any reward, to carry my goods, ſhall anſwer for his own neglect; for, by taking the truſt on himſelf, he is obliged to execute it; but if the goods are miſuſed by another, he is not liable. *Per* Holt, Ch. Juſt. in Cogg's and Barnard's caſe, Salk. 26. pl. 12. 2 Ld. Raym. 909. 3 Salk. 11. *Vide* his argument at large, head of *Bailment*, *ante*.

But the maſter of a ſtage-coach who (*d*) only carries paſſengers for hire, ſhall not be liable for the goods of his paſſengers that are loſt; and therefore (*e*) where *A.* delivered a trunk to the driver or ſervant, who loſt it out of his poſſeſſion, it was holden, that the maſter was not liable in an action upon the caſe on the cuſtom of the realm; for though the ſervant received money for it, yet that was but a gratuity; and the maſter ſhall not be chargeable with the acts of his ſervant, otherwiſe than he acts in execution of the authority given him.

Comyns, 25. pl. 16.

(*d*) But if he carries goods as well as paſſengers for hire, then he is a common carrier, and ſhall be liable. 2 Show. Rep. 128. Salk. 282. pl. 11. S. P. *per* Holt. (*e*) Ruled by Holt on evidence, and the plaintiff nonſuited. Salk. 282. pl. 11.

[The poſt-maſter general doth not come under the denomination of a carrier: he hath no hire; enters into no contract. The poſt-office is a branch of revenue, and a branch of police, created by act of parliament. The ſalary annexed to the office of poſt-maſter, is for no other conſideration, than the trouble of executing it. He is, therefore, not liable for any conſtructive negligence.]

Lane v. Cotton, 1 Ld. Raym. 646. Carth. 487. 12 Mod. 482. Whitfield v. Ld. Le Deſpencer, Cowp. 754. See *Law of Bailments*, 109, 110.

(B) In what Caſes Carrier chargeable for a Failure in his Duty.

Roll. Abr. 2. Hob. 17. Cro. Jac. 262.

IF a man delivers goods to a (*a*) common carrier, to carry them to a certain place, if he (*b*) loſes them, an action upon the caſe lies againſt him; for, by the common cuſtom of the realm, he ought to carry them ſafely.

(*a*) Though no common carrier, yet, if he takes hire, he may be charged upon his ſpecial *aſſumpſit*. Cro. Jac. 262. Sid. 245. Keb. 852. (*b*) So if damaged; and the declaration ſhall be good, though not particularly alleged how they were damnified. Palm. 523. Hern's *Plead.* 76, 77.

2 Show. Rep. 327. pl. 334.

Alſo, if a (*c*) common carrier, who is offered his hire, and who hath (*d*) convenience, refuſe to carry goods, he is liable to an action in the ſame manner as an inn-keeper who refuſeth to entertain a gueſt, or a ſmith who refuſeth to ſhoe a horſe.

(*c*) That an action will lie againſt a common ferryman, who refuſes to carry paſſengers. Hard. 163. *ſed arguendo.* *Vide* Rob. Ent. 103. A ſpecial declaration againſt a letter-carrier, for the non-delivery of a letter delivered out to him at the general poſt-office. (*d*) But if the porter puts up the box of a paſſenger behind a ſtage-coach, and the maſter, as ſoon as he knows of it, ſays, that he is already full, and refuſes to take the charge of it, the maſter ſhall not be liable; ruled upon evidence. 2 Show. Rep 128. For this is the ſame caſe with an hoſt who refuſes his gueſt, his houſe being full, and yet the party ſays he will ſhift, &c. if he be robbed, the hoſt is diſcharged; for this *vide* head of *Inns and Inn-keepers.*

Cro. Jac. 330. Hob. 17. S. C. adjudged.

If a man delivers goods to a common (*e*) hoyman, who is a common carrier of goods, to carry them to a certain place, and pays him according to the cuſtom for the carriage of them, and after for default of good keeping they are loſt; an action upon the caſe lies againſt him; for by the common cuſtom of the realm he ought to have kept and carried them ſafely.

(*e*) When goods of value are put into a lighter to be conveyed from the ſhip to the quay, it is uſual for the maſter to ſend a competent number of his men to look to the merchandize, ſo that if any of the goods are loſt or embezzled, the maſter is anſwerable, and not the wharfinger; but if ſuch goods are ſent aboard a ſhip, the wharfinger, at his peril, muſt take care to preſerve them. Molloy, 212. Said to be ruled at *Guildhall, per* Holt, Ch. Juſt. So if he does not pay him, or make any agreement; for the carrier may have his *quantum meruit.* Cro. Jac. 263. Sid. 36. Bro. *Action on the Caſe*, 78. 2 Show. 81. 129.

Roll. Abr. 2. Hob. 17. Cro. Jac. 330. S. C.

If a man delivers goods to ſuch common hoyman, to carry to a place, and after delivers them (being of good value) to another to keep ſafely in the boat, and does not diſcharge the hoyman, and after they are loſt through negligence, an action on the caſe lies againſt him.

Sid. 36. *Vide* Roll. Abr. 338. 2 Show. 129.

If *A.* delivers goods at *York* to *B.* (who is a water-carrier between *Hull* and *London*) to carry them from *Hull* to *London*; though the agreement is to carry the goods from *Hull* to *London*, and no mention is made of the carriage to *Hull*, yet if the goods are loſt *B.* ſhall anſwer for them; for upon his general receipt of them at *York*, he is liable.

Gartſide v. The Proprietors of the *Trent* Navigation, 4 Term Rep. 581.

[But if *A.* delivers goods to *B.* (who is a common carrier between *C.* and *D.*) to be carried from *C.* to *D.*, and then forwarded to *E.*, and *B.* carries them to *D.*, and there puts them in his ware-houſe, in which they are deſtroyed by an accidental fire, before he hath an opportunity of forwarding them, *B.* ſhall not be liable.

If

If *A.* delivers goods to *B.* to be carried from *C.* to *D.*, and *B.* charges and receives cartage of them to the conſignee's houſe at *D.*, from a warehouſe there where they are uſually unloaded, but which doth not belong to him; *B.* muſt anſwer for the goods if deſtroyed in the warehouſe by an accidental fire. Nor will it vary the caſe at all, that he allows all the profits of the cartage to another perſon, and that that circumſtance is known to the conſignee.] Hyde v. Trent and Merſey Navigation Company, 5 Term Rep. 389.

If a merchant lades goods aboard a ſhip, to be tranſported at a reaſonable reward of freight to be paid to the owners, and in the night-time, while the ſhip rides in the river *Thames*, notwithſtanding a competent number of men are left aboard for the guard of the ſhip and goods, ſeveral perſons, under the pretence of preſſing ſeamen, ſeize on the men abroad, and take away the goods; an action will lie againſt the maſter; for, in effect, he is paid by the merchant; for the merchant pays the owners, and the owners pay the maſter; ſo that the money of the merchant is but handed over by them to the maſter; adjudged and ſaid, that though by the admiralty law, the maſter is not chargeable *pro damno fatali*, as in caſe of pirates, ſtorm, *&c.*, where there is no negligence in him; yet becauſe the ſhip was *infra corpus comitatus* (*a*) this caſe muſt not be meaſured by the rules of that law. Vent. 190. 233. Mors and Sluce, adjudged upon a ſpecial verdict, *per totam Curiam.* Raym. 220. S. C. 3 Keb. 72. 112. 135. S. C. Mod. 85. S. C. ill reported. 2 Lev. 69. S. C. 2 Ld. Raym. 918. and 3 Lev. 259. S. C. cited, and Holt, Ch. Juſt. ſaid, the maſter is chargeable in reſpect of his wages, and the proprietors in reſpect of the freight. Molloy, Bk. 2. c. 2. § 2. S. C. For he muſt ſee all things forth-coming which are delivered to him, let what will happen; the act of God, or an enemy, perils, and dangers of the ſea only excepted; but for fire, thieves, *&c.* he muſt anſwer. [And *the act of God*, in this caſe, means ſuch act as could not happen by the intervention of man, as lightning and tempeſts. Inevitable accident, happening by any human means, irreſiſtible force, if not occaſioned by the king's enemies; will not excuſe; for the carrier is in the nature of an inſurer. Therefore, where a fire, not occaſioned by lightning, began at another booth in a fair, than that wherein the goods were placed, and afterwards ſpread thither, and conſumed the goods, the carrier was holden liable, though actual negligence was expreſsly negatived by the jury. Forward v. Pittard, 1 Term Rep. 27. So it was holden to be no excuſe, that the ſhip was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a ſmall hole, through which the water had guſhed. Dale v. Hale, 1 Wilſ. 281. But where a hoy, in good condition, ſhooting a bridge, *at a proper time*, was driven againſt a pier by a ſudden breeze, and overſet by the violence of the ſhock, the hoyman was holden not to be anſwerable, the accident being occaſioned by the act of God. Amies v. Stephens, 1 Str. 128. With reſpect to water-carriage, it is enacted by ſtat. 7 G. 2. c. 15., "That no owner of any ſhip or veſſel ſhall be "liable to make good any loſs or damage by reaſon of any embezzlement, ſecreting, or making away "with by the maſter, or mariners, or any of them, of any goods or merchandize put on board, beyond "the value of the ſhip and freight." If one of the mariners be acceſſary to a robbery by giving intelligence, the owner is within the protection of this act, and anſwerable no farther than to the extent of the value of the ſhip and freight. Sutton v. Mitchell, 1 Term Rep. 18.] (*a*) In an action againſt a common hoyman from *Walton* to *London*, the defendant pleads, that the boat and goods *ſupra Thamiſim*, were ſunk and loſt, *abſque hoc*, that they were loſt *pro defectu bonæ cuſtodiæ*, and iſſue thereupon joined.

If *A.* and ſeveral others take their paſſage in a ferry-boat, and being upon the water a tempeſt ariſes, ſo that they are in much danger of being drowned; upon which, to preſerve their lives, ſeveral of the goods are caſt over-board, among which, a pack of goods of *A.*'s of great value is thrown over; (*b*) *A.* ſhall have no (*c*) action againſt the bargeman. 2 Bulſt. 280. (*b*) But when, and how, by the marine law, he ſhall have average, *&c.* *vide* Molloy, Bk. 2. c. 6. § 13., and the head of *Merchants and Merchandize*. (*c*) So if any paſſenger, *ex neceſſitate*, for the ſafeguard of his life, throws it overboard, no action lies againſt the bargeman. 12 Co. 62. But it ſeems ſettled, notwithſtanding theſe caſes, that a ferryman who carries goods for hire, ſhall anſwer for the goods, though robbed of them, or though he throws them overboard to ſave the lives of the

the men in the boat, becauſe for his hire he runs the venture of the voyage. *Vide* Allen, 93. *Law of Bailments*, 108.

Co. Lit. 89. 4 Co. 84. Owen, 57. 2 Ld. Raym. 918.

It is clearly reſolved, that if a carrier be robbed he ſhall anſwer the value of the goods; for he hath his hire, which implies an undertaking for the ſafe cuſtody and delivery of them, which charges him at all events; and this political inſtitution was introduced, the better to ſecure people in their dealings, and to prevent carriers, who are often intruſted with things of the greateſt value, from confederating with robbers, &c.

Allen, 93. Kenrig and Eccleſton. [(*a*) It is true, that if the carrier accept *generally*, he is liable, be the value what it may. 1 Ventr. 238. 3 Keb. 133. But he may accept conditionally, as provided there be no money, or it do not exceed a certain amount; or, in caſe of ſuch exceſs, he may refuſe to accept, without an additional premium; and if there be proof that the bailor was appriſed of his intention, though there be no perſonal communication, the carrier ſhall be conſidered as a *ſpecial* accepter. Tichburne v. White, 1 Str. 145. Gibbon v. Paynton, 4 Burr. 2298. And the bailor, thus knowing the conditions, but concealing the real value, is guilty of a fraud and impoſition, and therefore, he ſhall not only, where there hath been an expreſs declaration on the part of the carrier, that he will not be anſwerable beyond a certain amount, without notice, not recover to that amount, but ſhall not even recover back the money he may have paid for the carriage. Clay v. Willan, 1 H. Bl. 298.]

So if *A.* delivers a box to a carrier to carry, and he aſks what is in it, and *A.* tells him a book and tobacco, and in truth there is 100*l.* beſides, yet if the carrier is robbed, he ſhall anſwer for the money; for *A.* was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made (*a*) a ſpecial acceptance: ruled by *Roll*, at the *niſi prius* at *Guildhall*; but in regard of the intended cheat to the carrier, he told the jury, they might conſider of it in damages; but yet the jury gave the plaintiff 97*l.* damages, abating 3*l.* only for carriage; *quod durum videbatur circumſtantibus.*

Carth. 485. Sir Joſeph Tyle and Morrice. And the like point ſaid to have been ſo ruled between others and the ſame plaintiff.

But if *A.*, being a common carrier, receives by his book-keeper from the ſervant of *B.* two bags of money ſealed up, containing, as was told him, 200*l.*, and the book-keeper gives a receipt for his maſter to this effect: *Received of*, &c. *two bags of money ſealed up, ſaid to contain* 200*l.*, *which I promiſe to deliver on ſuch a day at* Exeter, *unto* ——, *he to pay* 10*s.* per cent. *for carriage and riſk*; though the bags contain 450*l.*, and the carrier is robbed, he ſhall be anſwerable only for 200*l.*, for this is a particular undertaking; and as it is by reaſon of the reward that the carrier is liable, if the plaintiff endeavours to defraud him of it, it is but reaſonable he ſhould be barred of that remedy which is only founded on the reward.

(C) Of his Intereſt in the Things delivered to his Charge.

Co. Lit. 89. 4 Co. 83. 7 H. 6. 60. 2 Bulſt. 311. Sid. 438. Mod. 30. 2 Sand. 47. Yelv. 44. Dyer, 98.

A Carrier, who hath goods delivered to him, undertakes for his hire to deliver them ſafely, and he hath the poſſeſſion of them for no other purpoſe; yet he hath ſuch a ſpecial limited property, that he may bring trover and converſion againſt a ſtranger that takes them away, or he may ſue the hundred when robbed of them, becauſe he is anſwerable over in damages to the abſolute owner.

So

So a carrier by reaſon of his poſſeſſion, and this ſpecial kind of property, may have an appeal of larceny againſt one who robs him of the goods committed to his charge. 2 Hawk. P. C. c. 23. § 44.

Alſo a carrier by not delivering the goods, or by embezzling them, cannot be guilty of felony; but if he opens a pack and takes out part of the goods, with an intent to ſteal that part, he is guilty of felony; for a poſſeſſion of part diſtinct from the whole was gained by wrong, and not delivered by the owner; and it was alſo obtained baſely, fraudulently, and clandeſtinely, in hopes to prevent it from being diſcovered at all, or fixed upon any one when diſcovered. 13 E. 4. 10. S. P. C. 25. Dalt. c. 102. Kelynge, 35. Roll. Abr. 73. Hawk. P. C. c. 33. § 5.

So if a carrier, after he hath brought the goods to the place appointed, take them away again ſecretly *animo furandi*, he is guilty of felony, becauſe the poſſeſſion which he received from the owner being determined, his ſecond taking is in all reſpects the ſame as if he were a mere ſtranger. H. P. C. 62. 3 Inſt. 107. Bro. *Coron.* 160. S. P. C. 25. Hawk. P. C. c. 33. § 7.

Alſo if a ſtranger ſteals the goods delivered to a carrier, he may be indicted generally, as having ſtolen his goods; ſo by reaſon of this ſpecial property, if the owner, with an intent to make the carrier anſwer for them, fraudulently and ſecretly takes them away, he is guilty of felony, and may be indicted generally, as having ſtolen his goods; for the injury is altogether as great, and the fraud as baſe, where they are taken away by the owner, as by a ſtranger. 7 H. 6. 43. 5 H. 7. 18. b. Bro. *Coron.* 45. 160. Cro. El. 536. S. P. C. 26. a. 3 Inſt. 310. Mo. pl. 981. H. P. C. 67. Kelw. 70. 1 Hawk. P. C. c. 33. § 30.

(D) Of the Regulations Carriers are under by Acts of Parliament, with reſpect to their Carriages, and the Prices they are to take.

AS to the regulation of the prices of carriage of goods, by the 3 *W. & M. cap.* 12. *ſect.* 24. it is enacted, "That the juſtices of the peace of every county, and other place within the realm of *England*, or dominion of *Wales*, ſhall have power and authority, and are hereby enjoined and required at their next reſpective quarter or general ſeſſions after *Eaſter* day, yearly to aſſeſs and rate the prices of all land-carriage of goods whatſoever, to be brought into any place or places within their reſpective limits and juriſdictions, by any common carrier or waggoner; and the rates and aſſeſſments ſo made to certify to the ſeveral mayors, and other chief officers of each reſpective market-town, to which all perſons may reſort for their information; and that no ſuch common waggoner or carrier ſhall take for carriage of ſuch goods and merchandizes, above the rates and prices ſet, upon pain to forfeit for every ſuch offence the ſum of five pounds, to be levied by diſtreſs and ſale of his and their goods, by warrant of any two juſtices of the peace where ſuch waggoner or carrier ſhall reſide, in manner aforeſaid, to the uſe of the party grieved *."

[This act is repealed, as to highways, by 13 G. 3. c. 78. 84.] See penalty of taking more than the rates, 21 Geo. 2. c. 28. § 3. Juſtices of the City of *London* to aſſeſs the rates of carrying goods between *London* and *Weſtminſter*, 30 Geo. 2. c. 22. § 3. * Commiſſioners for regulating the navigation of the *Thames*, to rate the price of water-carriage, 24 Geo. 2. c. 8. § 9.—Penalty for taking above the price. *Ibid.*

[For

[For the regulations carriers are under with reſpect to the weight of their loads, and number of horſes, upon highways and turnpike roads, ſee 13 *Geo.* 3. *c.* [illegible] & *c.* 84. and 21 *Geo.* 3. *c.* 20., and tit. *Highways*.

For the ſtatutes reſpecting the poſt-office, ſee 12 *Car.* 2. *c.* 35. 9 *Ann. c.* 10. 6 *Geo.* 1. *c.* 21. § 51. 4 *Geo.* 2. *c.* 33. 26 *Geo.* 2. *c.* 13. 5 *Geo.* 3. *c.* 25. 7 *Geo.* 3. *c.* 50. 24 *Geo.* 3. *c.* 37.

Barnes v. Foley, and Stock v. Harris, 4Burr.2153. 5Burr.2709. Rowning v. Goodchild, 3 Wilſ. 443. 2 Bl. Rep. 906. S.C. Smith v. Powdich, Cowp. 182.

A poſt-maſter, it hath been determined, cannot only not demand, as a duty, any additional ſum to the *legal* rate of poſtage, for the delivery of letters to the ſeveral perſons to whom they are directed within a poſt-town or place, at their reſpective places of abode, but he is moreover bound to deliver them at ſuch places.

Jones v. Walker, Cowp. 624.

A place connected to *London* by a ſtreet of contiguous buildings, prior to the act of 9 *Ann. c.* 10., is within the ſuburbs of the city: the penny poſt-office, therefore, is entitled only to one penny for the carriage and delivery of a letter to any of the inhabitants thereof, *viz.* the penny paid upon putting the letter into the office.]

Certiorari.

(A) Out of what Court it iſſues; and therein of the Diſcretionary Power of the Court of King's Bench in granting, denying, and filing it.

(B) To what Courts it lies.

(C) Where it is neceſſary, or the Record may be removed without it.

(D) What the Party, who applies for it, muſt do before it is granted.

(E) Where by Acts of Parliament, the Court of King's Bench is reſtrained from granting it.

(F) To whom it ought to be directed.

(G) How far it is a *Superſedeas* to the Court below.

(H) In what Manner it is to be returned.

(I) Where the Record ſhall be ſaid to be removed.

(K) Of the Proceedings of the Superior or Inferior Court after the iſſuing out of the *Certiorari*.

(A) Out of what Court it iſſues; and herein of the Diſcretionary Power of the Court of King's Bench in granting, denying, and filing it.

A *Certiorari* is an original writ iſſuing out of Chancery, or the *King's Bench*, directed in the king's name, to the judges or officers of (*a*) inferior courts, commanding them to return the records of a cauſe depending before them, to the end the party may have the more ſure and ſpeedy juſtice before him, or ſuch other juſtices as he ſhall aſſign to determine the cauſe. F.N.B. 245. A. [To remove proceedings of a *civil* nature, it iſſues out of the other courts at *Weſtminſter*. 2 Ld. Raym. 836. 1 Salk. 148. 1 H. Bl. Rep. 552.] (*a*) The court of Chancery may iſſue a *certiorari* to the King's Bench; as if, in an action of debt brought in the Common Pleas, upon a judgment in *B. R.* the defendant pleads *nul tiel record*, the plaintiff may have a *certiorari* out of Chancery to ſend the record thither; and the ſame may be ſent after, by *mittimus*, into the Common Pleas, notwithſtanding the general rule, that records in *B. R.* ſhall not be moved out of that court into any other court. Cro. Car. 297. Semb. So if in an action of debt brought in an inferior court upon a bond, the defendant pleads, that the plaintiff had recovered in *B. R.* upon the ſame bond; and the plaintiff replies *nul tiel record*, and thereupon iſſue is joined *quod habetur tale recordum*, the record in *B. R.* may be certified into Chancery, and from thence ſent by *mittimus* to the inferior court. 1 Sand. 97. 99. 1 Sid. 223. 329. 2 Keb. 205. 249. 278.

The court of *King's Bench* hath a ſuperintendency over all courts of an inferior criminal juriſdiction, and may by the plenitude of its power (*b*) award a *certiorari*, to have any indictment removed and brought before itſelf; and where ſuch *certiorari* is allowable, ought of right to award it at the inſtance of the king, becauſe every indictment is at the ſuit of the king, and he hath a (*c*) prerogative of ſuing in what court he pleaſes. 1 Ld. Raym. 216. 1 Salk. 146. 2 Hawk. P. C. c. 27. § 27. [(*b*) And this is done, ſometimes, to conſider and determine the validity of the indictments, and to quaſh, or affirm them, as there is cauſe. Sometimes, to have the priſoner or offender tried either at the bar, or by *niſi prius*, before the king's juſtices of the courts of *Weſtminſter*. Sometimes, to examine, and affirm, or reverſe, proceedings and judgments given by inferior judges. Sometimes, to plead the king's pardon. Sometimes, to iſſue proceſs of outlawry againſt the offender, in thoſe counties and places where the proceſs of inferior juſtices cannot reach him. 2 H. H. P. C. 210. Sometimes too, to iſſue writs of execution upon judgments in inferior courts, where the defendant hath withdrawn his perſon and effects from the juriſdiction of thoſe courts. See the 19 Geo. 3. c. 70. § 4., with reſpect to inferior courts; and 33 Geo. 3. c. 19., with reſpect to *Wales*, and the counties palatine. 1 H. Bl. 552. In the caſe of outlawry, as ſoon as the object is attained, by the coming in of the offender, the court will remit the record. Rex v. Perry, 5 Term Rep. 478. (*c*) But there is a diſtinction between thoſe caſes, in which the crown is ſpecially concerned, and proſecutes by the attorney-general, and thoſe which are nominally at the ſuit of the crown, but, in reality, are proſecuted by a private perſon. In the former, the crown hath a right to *demand* a *certiorari*; the court are *bound* to grant it: in the latter, it iſſues, indeed, of courſe; but, upon good cauſe, a *procedendo* may be awarded. 4 Burr. 2458.]

But though the court is to grant it at the ſuit of the king, yet it hath a diſcretionary power in granting or refuſing it at the ſuit of the defendant; and agreeably hereto it is laid down as a general rule, that the court will never grant it for the removal of an indictment before juſtices of gaol-delivery, without ſome ſpecial cauſe; as where there is juſt reaſon to apprehend that the court below may be unreaſonably prejudiced againſt the defendant; or where there is ſo much difficulty in the caſe, that the judge below deſires that it may be determined in the *King's Bench*; or where the king himſelf gives ſpecial direction that the cauſe 2 Hawk. P. C. *ibid.* Salk. 144. pl. 2. 149. pl. 15. 150. pl. 18. 151. pl. 20. Keb. 4. [1 Mod. 41. 1 Ventr. 63. 2 Ld. Raym. 937. 2 Term Rep. 89.]

cauſe ſhall be removed; or where the proſecution appears to be for a cauſe not properly criminal.

Sid. 54. 2 Hawk. P. C. c. 27. § 28. Neither will the court of *King's Bench* ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury or forgery, or other heinous miſdemeanor; for ſuch crimes deſerve all poſſible diſcountenance, and the *certiorari* might delay, if not wholly diſcourage, the proſecution.

[To remove an indictment from *Hicks's-hall*, for bigamy, the conſent of the proſecutor muſt be had. Cowp. 283. So, from the *Old Bailey*, for forgery, 2 Str. 717. 877.—But the court have granted it, on the application of the defendant, in perjury, from the *Old Bailey*, upon affidavit that he had twice paid coſts for not going on to trial, the judges being gone away. 2 Str. 1049. This, however, is not uſual; and was, in this inſtance, done upon the extraordinary circumſtances of the caſe. Ca. Temp. Hardw. 369, 370. They have alſo granted it at the inſtance of the defendant, upon affidavit that the proſecutor's attorney was under-ſheriff of *Middleſex*, and attended the grand jury on finding the bill. 2 Str. 1068. So, where the defendant appeared to be a man of good repute, and the proſecution on ſlight grounds. 1 Str. 549. So, where it was proved that the proſecution was malicious. 1 Barnard. K. B. 7. 41. So, in the caſe of a conviction for compounding felony, where the objections, in arreſt of judgment, were ſerious and weighty. *Id.* 415. So, in the caſe of a nuiſance at the aſſizes, where a view was neceſſary. 2 Barnard. K. B. 214.]

2 Hawk. P. C. c. 27. § 29. Salk. 145. pl. 5. S. P. and that it was never done but in the Duke of *York*'s caſe. Nor will the court of *King's Bench* grant it for a conviction of recuſancy on a default at the ſeſſions, becauſe by the ſtatute ſuch convictions are to be removed into the *Exchequer*, and proceſs on them is to go from thence. *Vide* head of *Papiſt and Popiſh Recuſants.*

Rex v. Ritſon, 2 Term Rep. 184. [Nor will the court of *K. B.* grant it to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amerciament, where the fine hath been eſtreated into the duchy chamber of *Lancaſter* and paid.]

2 Hawk. P. C. c. 27. § 30. 16 E. 4. 5. Alſo it is ſaid to be a good objection againſt granting a *certiorari*, that iſſue is joined, and a *venire* awarded for the trial in the court below.

Salk. 149. pl. 15. 6 Mod. 17. 8 Mod. 319, 320. Ld. Raym. 137. 2 Ld. Raym. 991. 1372. Stra. 610. 2 Burr. 749. A *certiorari* ſhall not be granted to remove an indictment or appeal after a conviction, unleſs for ſome ſpecial cauſe; as where the judge below is in doubt what judgment to give.

Sid. 296. 2 Keb. 81. 2 Hawk. P. C. c. 27. § 32. But it hath been adjudged, that a *certiorari* for the removal of a preſentment before juſtices in *eyre*, of a matter which is inquirable and puniſhable by the foreſt law only, ſhall not be granted before, but only after conviction; for if it ſhould be granted before, the offence ſhould be diſpuniſhed: but it may be granted after conviction, in order to give the party, the right of whoſe freehold is concerned in it, an opportunity ſo far to traverſe it.

2 Hawk. P. C. c. 27. § 33. The court hath refuſed to grant a *certiorari* to remove a recognizance of appearance before juſtices of *oyer* and *terminer*, &c., becauſe the court below is moſt proper to judge upon the whole circumſtances of the caſe, which are equitably to be conſidered, whether it ought to be eſtreated or not.

[2 Hawk. P. C. c. 27. § 34. 1 Salk. 145. By a rule of the *King's Bench*, no order of commiſſioners of ſewers is to be filed without notice to the parties concerned; neither will the court ſuffer the return of a *certiorari* for ſuch order

order to be filed, without hearing (*a*) affidavits of the facts; whereon if the matter appear doubtful, it is uſual in order to a trial of feigned iſſues, and after ſuch trial, either to file the return, or ſuperſede the *certiorari*, and grant a *procedendo*, and give (*b*) coſts, &c. as ſhall appear to be moſt reaſonable.

2 Keb. 157. ſeems contrary.

(*a*) A *certiorari* to bring up an order for the removal of their clerk is of common right, and not diſcretionary. 1 Str. 609.] (*b*) *Vide* 2 Keb. 500.

[The court of King's Bench will not grant a *certiorari* to remove a conviction before juſtices of the peace, where they ſee that the juſtices have drawn the proper concluſion from preſumptive evidence.

Rex v. Baſs, 5 Term Rep. 251.

They will not grant it, where an appeal is given, if the objection be not to the want of juriſdiction but to the merits, for that is more properly the ſubject of appeal: *a fortiori* they will not grant it, pending an (*c*) appeal.

Rex v. Whitbread, Dougl. 549. Rex v. Francis Abbot, *id.* 553.

(*c*) Rex v. Sparrow, 2 Term Rep. 169. n. a. With reſpect to appeals, there is this diſtinction: if one party only has a right of appeal, or no time is limited for bringing the appeal, the *certiorari* ſhall be immediately granted; for in the one caſe, the party having the right, may wave it; and in the other, if the objection were to be allowed, the *certiorari* might never iſſue: but if both parties have a right to appeal, and the time is fixed; in that caſe, it ſhall not be granted, until after the appeal hath been made, or the time for making it hath elapſed. Rex v. Harman, Andr. 343. But, notwithſtanding an appeal depending, if the order muſt be obeyed before the validity of it can be determined, a *certiorari* will lie. 2 Str. 991. Advantage muſt be taken of this rule, in the caſe of an order, before the order is filed. 1 Salk. 144.

They will not grant it, upon the ground of publick inconvenience, to remove (*d*) a poor's rate, or the aſſeſſments (*e*) of the land-tax, or proceedings before commiſſioners (*f*) of ſewers.

(*d*) Rex v. Uttoxeter, 2 Str. 932. Rex v. the Juſtices of *Shrewſbury*, *Id.* 975. (*e*) Rex v. King, 2 Term Rep. 234. (*f*) Rex v. Commiſſioners of Sewers in *Yorkſhire*, 1 Str. 609.

The writ of *certiorari* is uſed for the purpoſe of removing not only *legal*, but likewiſe *equitable* proceedings; for when an equitable right is ſued for in an inferior court of equity, and by reaſon of the limited juriſdiction of the court, the defendant cannot have complete juſtice, or the cauſe is without the juriſdiction of the inferior court; the defendant (*g*) may file a bill in Chancery praying this writ to remove the cauſe into the court of Chancery. And when the bill is filed, he muſt enter into a bond with one ſurety in the penalty of 100*l.* to the Maſter of the Rolls and the ſenior Maſter in Chancery, to prove the ſuggeſtions of the bill within fourteen days: and in default of proof, a *procedendo* may be applied for of courſe.]

2 Ch. Rep. 109. Pr. Reg. 41. Boh. *Priv. Lond.* 291. Car. Rep. 48. 1 Vern. 178. Eq. Abr. 80.

(*g*) The *plaintiff* below, it ſeems, is not at liberty to make this application. Harriſon's Ch. Pr. 119.

(B) To what Courts it lies.

THE courts of *Chancery* and *King's Bench* may award a *certiorari* to remove the proceeding from any inferior courts, whether they be of an ancient or newly created juriſdiction, (*b*) unleſs the ſtatute or charter, which creates them, exempts them from ſuch juriſdiction.

2 Hawk. P. C. c. 27. § 22. S. P. C. 70. Salk. 144. pl. 3. 146. pl. 7. 148. pl. 13. Ld. Raym. 113. 252. 454. Carth. 421. 491. Comyns, 76. See 12 Mod. 386. 613. 2 Ld.

2 Ld. Raym. 836. 7 Mod. 138. 3 Salk. 79. pl. 4. 2 Lev. 86. Lev. 312. Cro. Car. 265. 3 Mod. 93. 12 Mod. 145. (*b*) As the ſtatutes concerning the commiſſioners of *Cambridgeſhire Fens*, *&c.* are ſaid, by ſome, to have done. Sid. 296. *cont.* 2 Keb. 43. 722. [But there muſt be expreſs words in the ſtatute to take away the juriſdiction of the court of King's Bench. 2 Burr. 1041. For, *per* Holt, C. J., this court will examine the proceedings of all juriſdictions erected by act of parliament. 1 Ld. Raym. 580.]

(*a*) Sid. 226. 2 Keb. 81. 4 Inſt. 294. (*b*) Salk. 144. pl. 3. (*c*) 3 Mod. 229. 2 Lev. 223. Salk. 146. pl. 7. Roll. Abr. 395. Allen, 49. (*d*) Salk. 144. pl. 3. (*e*) 3 Mod. 93. 12 Mod. 145. pl. 5.

And therefore it is agreed, that the *King's Bench* may award ſuch *certiorari* to juſtices in (*a*) *eyre*, or of (*b*) gaol-delivery, or of a (*c*) county palatine, and to the (*d*) college of phyſicians, having a ſpecial power by ſtatute to impoſe fines, *&c.*, and to juſtices of the peace, *&c.*, even in thoſe (*e*) caſes, which they are empowered by ſtatute finally to hear and determine; and to (*f*) commiſſioners of ſewers, for the clauſe in 13 *Eliz. cap.* 9. *That ſuch commiſſioners ſhall not be compelled to make any return of their ordinances*, (*g*) hath been conſtrued to intend only to exempt them from returning their orders into Chancery, as by the ſtatute of 23 *H.* 8. *c.* 5. they were obliged to do.

(*f*) Salk. 145. pl. 6. Keb. 129. March, 196. Raym. 186. (*g*) Mod. 44, 45. Lev. 288. Vent. 66. [It is to be obſerved, however, that a *certiorari* to remove proceedings from the courts of the counties palatine, and great ſeſſions, cannot be ſued out as of courſe, without laying ſome ſpecial ground. Zink v. Langton, Dougl. 749. Williams v. Thomas, *id.* 751. note (2).]

Cro. Car. 252. 291. Roll. Abr. 395. Sile, 14. 2 Lev. 86. 3 Keb. 154. (*b*) Cro. Eliz. 910.

Alſo it ſeems ſettled at preſent, that a *certiorari* lies to the courts of the *cinque ports*, to remove an indictment from thoſe courts, and that the privilege of the *cinque ports*, which they have enjoyed time out of mind, that the king's writs do not run there, is to be intended only of civil (*b*) cauſes between party and party.

Palm. 54. Cro. Jac. 531. Sid. 432. Hard. 475.

2 Hawk. P. C. c. 27. § 25. 1 Str. 704. 3 Term Rep. 658. 4 Burr. 2456.

Alſo a *certiorari* lies from the *King's Bench* to the courts of grand ſeſſions, and to other courts in *Wales*, whether in the old *Welch* counties, or in the lordſhips marches; and whether ſuch indictments be for inferior crimes or for felony.

Vide Courts, and their juriſdiction in general.

2 Burr. 856.

[It lies alſo to *Berwick* and other dominions of the crown.]

2 Hawk. P. C. c. 27. § 26.

Alſo it lies to remove an indictment from any court of criminal juriſdiction in *London* or *Middleſex*; but by the city charter, it is ſaid, only the tenor of the indictment ſhall be removed.

2 Ld. Raym. 1452.

[It lies to the quarter-ſeſſions of a corporation.

Cowp. 458.

It lies to remove a preſentment in a court-leet; and the preſentment, when removed, is traverſable.

Rex v. Bolton, M. 26 G. 3. 2 Hawk. P. C. c. 27. § 23. note.

It lies to remove examinations taken before juſtices of the peace in purſuance of 2 *&* 3 *P. & M. c.* 10.

(*i*) Andr. 27. (*k*) 10 Mod. 278.

It lies (*i*) to remove an information before juſtices of aſſize againſt a parſon for non-reſidence, for they have no juriſdiction. But (*k*) not to juſtices of oyer and terminer to remove a recognizance of appearance.

It lies (*a*) to remove orders of conviction on the conventicle act, 22 *Car.* 2. *c.* 1.; and orders (*b*) on appeal from a ſcavenger's rate; and orders (*c*) of baſtardy, if applied for in ſix months.

(*a*) 2 Burr. 1040.
(*b*) 3 Burr. 1458.
(*c*) 2 Wilſ. 35.

It lies to remove an inquiſition taken by the ſheriff under a private act of parliament, and the verdict and judgment thereon.] 4 Burr. 2244.

(C) Where it is neceſſary, or the Record may be removed without it.

IF a juſtice of peace, or other judge of record, having taken a recognizance or inquiſition, or recorded a riot, or done any other executory matter, ſtill continue in the commiſſion without interruption, the *King's Bench* may, without any *certiorari*, receive the record from his hands: alſo the clerk of the aſſiſes may, without *certiorari*, bring in the records of *niſi prius* on the death of the juſtices: but the executor of the judge cannot do it without writ: neither can a record executed, as by acquittal, *&c.*, be brought into a higher court without writ: neither can a juſtice who is out of the commiſſion at the time, nor one who hath been out, and is reſtored, certify any record without writ.

Vide 2 Hawk. P.C. c. 27. § 44. and ſeveral authorities there cited.

(D) What the Party, who applies for it, muſt do before it is granted.

BY the 21 *Jac.* 1. *cap.* 8. § 6, 7., "All *certioraris* for indictments of riots, forcible entry, or aſſault and battery, at any quarter ſeſſions of the peace, or otherwiſe, ſhall be delivered in open court, and the defendant ſhall, before the allowance, become bound to the proſecutor in 10*l.*, with ſuch ſureties as the juſtices at their quarter ſeſſions ſhall think fit, to pay to ſuch proſecutor ſuch coſts and damages as the juſtices of the county, *&c.* ſhall think fit; and in default thereof it ſhall be lawful to proceed, ſuch *certiorari* notwithſtanding."

And the like recognizance in the ſum of 40*l.* is required by 13 & 14 (*d*) *Car.* 2. *cap.* 6. on *certioraris* for indictments on that ſtatute concerning the highways.

(*d*) But this ſtatute is repealed by 13 Geo. 3. c. 78.

Theſe ſtatutes do not extend to all indictments at ſeſſions in general, but only to thoſe particular ones therein mentioned: but this defect was in a great meaſure ſupplied by the rules of the court of *King's Bench*, which, upon the removal of an indictment from *London* to *Middleſex*, required a recognizance from the defendant, to carry down the record to trial the ſame term on which the *certiorari* was returnable, or the ſittings after, and, on the removal of an indictment from other counties, required ſuch recognizance for a trial at the next aſſiſes.

Keb. 225. 2 Salk. 526. pl. 8. 2 Hawk. P. C. c. 27. § 47.

And agreeably hereto it is enacted by 5 *W.* & *M. cap.* 11. and 8 & 9 *W.* 3. *cap.* 33. "That all parties indicted at a gene-

" ral or quarter-ſeſſions of the peace, proſecuting a *certiorari*,
" before the allowance thereof ſhall firſt find two ſufficient
" manucaptors, who ſhall enter into a recognizance in the
" ſum of 20*l.* before one or more juſtices of the peace of the
" county or place, (or elſe before one of the judges of the *King's*
" *Bench*, in which caſe ſuch judge ſhall make mention of it
" under his hand on the back of the writ,) and the recognizance
" ſhall be with condition, at the return of ſuch writ, to appear
" and plead to the indictment or preſentment in the court of
" *King's Bench*, and at his own coſts to procure the iſſue that
" ſhall be joined upon the ſaid indictment or preſentment, or
" any plea relating thereto, to be tried at the next aſſiſes for the
" county wherein the indictment was found, after ſuch *certiorari*
" ſhall be returnable, if not in *London*, *Weſtminſter*, or *Middle-*
" *ſex*; and if there, then to cauſe it to be tried the next term
" after wherein ſuch *certiorari* ſhall be granted, or at the ſitting
" after the ſaid term, if the court of *King's Bench* ſhall not ap-
" point any other time for the trial thereof; and if any other
" time ſhall be appointed by the court, then at ſuch other time
" and to give due notice to the proſecutor, or his clerk in court
" and alſo that the party or parties proſecuting ſuch *certiorari*
" ſhall appear from day to day in the ſaid court of *King's Bench*
" and not depart till he or they ſhall be diſcharged by the ſaid
" court; and ſuch recognizances, *certioraris*, and indictments
" ſhall be filed in the *King's Bench*, and the name of the proſe-
" cutor, (if he be the party grieved or injured,) or ſome public
" officer, endorſed on the back of the indictment; and if the
" perſon proſecuting ſuch *certiorari*, being the defendant, ſhall
" not before allowance thereof procure ſuch manucaptors to be
" found as aforeſaid, the juſtices of the peace ſhall and may
" proceed to trial of the indictment notwithſtanding ſuch *cer-*
" *tiorari*."

[This act, it is ſaid, relates only to quarter-ſeſſions of the peace, not to indictments from the court of *oyer and terminer* at *Hicks's-hall*. For the ſeſſions ſit there in both capacities, and draw up their orders, with one title, or with the other, according to the offence, and the *certiorari* is directed accordingly. 1 Burr. 11. 3 Burr. 1462.]

And it is further enacted by the ſaid ſtatute of 5 & 6 *W.* & *M.* *cap.* 11. and 8 & 9 *W.* 3. *c.* 33., " That if the defendant pro-
" ſecuting ſuch *certiorari* be convicted, the *King's Bench* ſhall
" give reaſonable coſts to the proſecutor, if he be the party
" grieved or injured, or be a civil officer who ſhall proſecute
" on account of any fact that concerned him as officer to pro-
" ſecute or preſent; which coſts ſhall be taxed according to
" the courſe of the ſaid court; and the proſecutor, for the
" recovery of ſuch coſts, ſhall within ten days after demand
" made of the defendant, and refuſal of payment on oath, have
" an attachment granted againſt the defendant by the ſaid court
" for ſuch his contempt, and the ſaid recognizance ſhall not
" be diſcharged till the coſts ſo taxed ſhall be paid."

And the like in effect is enacted by the ſaid ſtatute of 5 & 6 *W.* & *M.* *cap.* 11. concerning the removal of indictments by *certiorari*, within the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*.

In the conſtruction of theſe ſtatutes, the following points ſeem moſt remarkable:

That notwithſtanding the expreſs words are, that juſtices may proceed to trial, &c. if a proper recognizance be not given, notwithſtanding ſuch *certiorari*, yet they will be in contempt if they make no return to it; for all writs muſt be obeyed, unleſs good cauſe ſhewn to the contrary. Keb 225. Sid. 70. 2 Hawk. P. C. c. 27. § 51.

That theſe ſtatutes extend only to *certioraris* procured by defendants, and therefore thoſe procured by proſecutors remain as they were at common law. 6 Mod. 246.

That theſe ſtatutes being in the affirmative, as to the taking of recognizances, do not take away the power which the juſtices of the *King's Bench* had before; and therefore, if ſuch a juſtice take a recognizance variant from the form preſcribed by the ſtatute, it will be as effectual as before: but it is ſaid, that in ſuch caſe the *certiorari*, if procured by the defendant, will be no *ſuperſedeas*, becauſe the ſtatutes ſeem to be expreſs, that the ſeſſions may proceed notwithſtanding any *certiorari* procured by a defendant, whereon ſuch recognizance is not given as is preſcribed. 2 Hawk. P.C. c. 27. § 53. 2 Salk. 564. pl. 3. 2 Ld Raym. 756.

That if the perſons offering to be ſureties appear to be worth twenty pounds, the juſtices cannot refuſe them. March, 27. 2 Hawk. P. C. c. 27. § 54.

That if there be ſeveral defendants, and ſome find ſureties, and others not, the indictment ſhall be removed as to thoſe at leaſt who find ſureties, becauſe they ſhall not be prejudiced by the fault of others; and, as (*a*) ſome ſay, it ſhall be removed as to all. 2 Hawk. P.C. c. 27. § 55. March, 27. (*a*) Keb. 231. Salk. 55. pl. 5.

That in the taxing of coſts, thoſe only are to be conſidered that were ſubſequent to the *certiorari*. 2 Ld. Raym. 854.

That the proſecutor, by accepting the coſts ſo taxed, is not reſtrained from aggravating the fine, becauſe he has a right to them by the expreſs words of the ſtatute: but in other caſes, if a proſecutor accept coſts from a defendant, he cannot afterwards aggravate the fine, becauſe having no right to the coſts, if he takes them at all, he muſt take them in ſatisfaction of the wrong; after which it is unreaſonable for him to haraſs the defendant. 2 Hawk. P.C. c. 27. § 57. Salk. 55. pl. 5. 2 Ld. Raym. 854.

That notwithſtanding the condition of the recognizance be, that the defendant ſhall procure a trial at the next aſſiſes, yet the recognizance ſhall not be forfeited unleſs the proſecutor give rules, &c. Salk. 370. pl. 4.

That after the recognizance is forfeited for not procuring a trial, &c. no motion ſhall be made to quaſh the indictment. Salk. 380. pl 26. 2 Hawk. P. C. c. 27. § 59. *ſed qu.*

[That the ſtatute of 5 & 6 *W.* & *M.* *c.* 11., reſpecting coſts, doth not extend to a proſecutor, even when bound over by the magiſtrate to proſecute, unleſs he be either a civil officer, or the party injured. But (*b*) if it be proved that he is ſo, it is immaterial whether the name be on the back of the indictment or not. 1 Wilſ. 130. 1 Burr. 431. (*b*) 1 Burr. 54.

2 Str. 1165. 1 Burr. 11. (a) 3 Burr. 1463.

That coſts being given only by the ſtatute, if the recognizance be taken as at common law, and not upon the ſtatute, the proſecutor is not entitled to them. But if the defendant (a) forfeit his recognizance under the ſtatute, ſuch recognizance ſhall ſtand as a ſecurity to the proſecutor for his coſts (if taxed) for the defendant's not going to trial purſuant to the condition, notwithſtanding he was afterwards acquitted, and the proſecutor had taken him in execution for the amount of them.

4 Burr. 2125. Rex v. Oſborn, Say. *Law of Coſts*, 267.

That as the ſtatute of 5 & 6 *W.* & *M.* empowers the court to give *reaſonable* coſts, if the proſecutor hath received a part of the fine, and then applies for his coſts under the recognizance, they will order what he hath received to be deducted from the amount of the taxation. But the payment of a fine doth not diſcharge the defendant's recognizance for coſts.

1 Term Rep. 103.

That the repreſentatives of the proſecutor are entitled to the coſts taxed during his life, though no perſonal demand were ever made by him.

It is enacted by ſt. 16 *Geo.* 3. *c.* 30., againſt deer-ſtealers, "That no *certiorari* ſhall be allowed to remove any proceedings "on that act, unleſs the party convict ſhall become bound to "the perſon proſecuting, with ſufficient ſureties in one hundred "pounds, to pay full coſts and damages, within thirty days after "ſuch conviction confirmed, or a *procedendo* granted; and ſhall "alſo have become bound to the juſtice before whom the of"fender was convicted, in ſixty pounds for each offence; to pro"ſecute ſuch *certiorari* with effect, and to pay the forfeitures, or "to ſurrender in thirty days, &c." But by § 23., "If the party "convicted, giving ſix days notice to the proſecutor, and ſe"curity to a juſtice, appeals to the quarter ſeſſions, a *certiorari* "ſhall be allowed." And the like in effect is enacted by 4 & 5 *W.* & *M.* *c.* 23. and 5 *Ann. ſeſſ.* 2. *c.* 14. in relation to convictions on thoſe acts of offences concerning the game.

And whereas in many caſes his majeſty's juſtices of the peace by law are empowered to give or make judgments or orders, and divers writs of *certiorari* have been procured to remove ſuch judgments or orders into his majeſty's court of King's Bench at *Weſtminſter*, in hopes thereby to diſcourage and weary out the parties concerned in ſuch judgments or orders by great delays and expences; it is therefore enacted by 5 *Geo.* 2. *c.* 19. § 2., "That no "*certiorari* ſhall be allowed to remove any ſuch judgment or or"der unleſs the party or parties (*b*) proſecuting ſuch *certiorari*, "before the allowance thereof, ſhall enter into a recognizance, "with ſufficient ſureties, before one or more juſtices of the peace "of the county or place, or before the juſtices at their general "quarter ſeſſions, or general ſeſſions, where ſuch judgment or "order ſhall have been given or made, or before any one of his "majeſty's juſtices of the ſaid court of King's Bench, in the ſum "of fifty pounds, with condition to proſecute the ſame at his or "their own coſts and charges with effect, without any wilful or "affected delay, and to pay the party or parties, in whoſe "favour, and for whoſe benefit ſuch judgment or order was "given

(b) This requiſition cannot be diſpenſed with. 4 Term Rep. 281.

" given or made, within one month after the ſaid order or judg-
" ment ſhall be confirmed, their full coſts (*a*) and charges, to
" be taxed according to the courſe of the court where ſuch
" judgments or orders ſhall be confirmed; and in caſe the
" party or parties proſecuting ſuch *certiorari* ſhall not enter into
" ſuch recognizance, or ſhall not perform the conditions afore-
" ſaid, it ſhall and may be lawful for the ſaid juſtices to proceed
" and make ſuch further order or orders for the benefit of the
" party or parties for whom ſuch judgment ſhall be given, in
" ſuch manner as if no *certiorari* had been granted."

(*a*) But coſts are not to be paid where any material part of an order is quaſhed. 2 Str. 1108.

And it is further enacted, § 3. " That the recognizance ſhall
" be certified to the King's Bench, and there filed with the *cer-*
" *tiorari*, and order or judgment thereby removed; and if the
" ſaid order or judgment ſhall be confirmed by the ſaid court,
" the perſons entitled to ſuch coſts, for the recovery thereof
" within ten days after demand made of the perſon or perſons
" who ought to pay the ſaid coſts, upon oath made of making
" ſuch demand or refuſal, ſhall have an attachment for contempt,
" and the recognizance ſhall not be diſcharged until the coſts
" ſhall be paid and the order ſo confirmed complied with and
" obeyed."

And for the better preventing of vexatious delays and expences occaſioned by ſuing forth writs of *certiorari* for the removal of convictions, judgments, orders, and other proceedings before juſtices of the peace; it is further enacted by 13 *Geo.* 2. *c.* 18. § 5. " That no writ of *certiorari* ſhall be granted, iſſued forth, or
" allowed to remove any conviction, judgment, order, or other
" proceeding had or made by or before any juſtice or juſtices of
" the peace of any county, city, borough, town corporate, or
" liberty, or the reſpective general or quarter ſeſſions thereof,
" unleſs ſuch *certiorari* be moved or applied for within ſix calen-
" dar months next after ſuch conviction (*b*), judgment, order,
" or other proceedings ſhall be ſo had or made (*c*), and unleſs
" it be duly proved upon oath, that the ſaid party or parties
" ſuing forth the ſame hath or have given ſix days (*d*) notice
" thereof in writing to the juſtice or juſtices, or to two of them,
" (if ſo many there be,) by and before whom ſuch conviction,
" judgment, order, or other proceedings ſhall be ſo had or made,
" to the end that ſuch juſtice or juſtices, or the parties therein
" concerned, may ſhew cauſe, if he or they ſhall ſo think fit,
" againſt the iſſuing or granting of ſuch *certiorari*."

(*b*) The *certiorari* muſt be applied for within ſix months after the *date* of the conviction. 4 Term Rep. 281.

(*c*) Theſe words give the act a retroſpective operation. 1 Wilſ. 35.

(*d*) This notice muſt be given before moving for a rule to ſhew cauſe why the *certiorari* ſhould not be granted. 5 Term Rep. 279.

If no recognizance hath been entered into, the court have no power under the above act of 13 *Geo.* 2. to award coſts upon the removal of ſummary proceedings: but to obviate this miſchief, they have reſolved, before they allow the *certiorari*, to oblige the party applying for it to enter into ſuch recognizance.

Rex v. Jenkinſon, 1 Term Rep. 82.

By the 12 *Ann. ſt.* 1. *c.* 2. it is provided, " That if any malt
" happens to be burnt after the duty paid, the proprietor may
" apply to the next quarter ſeſſions, who are to adjuſt the *quantum*,
" and give him a certificate, which entitles him to receive back

The caſe of Mayo and Parſons, 1 Str. 391.

" the duty." The proceedings of the ſeſſions in this caſe cannot be removed by *certiorari*: their granting or denying the certificate cannot be conſidered as an order of ſeſſions; and the *certiorari* goes only to fetch up their orders.]

(E) Where, by Acts of Parliament, the Court of King's Bench is reſtrained from granting it.

(*a*) If a *certiorari* be taken out in vacation, and teſted of the precedent term, the *fiat* for it muſt be ſigned by ſome judge of the court

BY the 1 & 2 *Ph. & Ma. c.* 13. it is enacted, " That no " writ of *habeas corpus* or *certiorari* ſhall be granted to remove " any priſoner out of any gaol, or to remove any recognizance, " except the ſame writs be (*a*) ſigned with the proper hands " of the chief juſtice, or, in his abſence, of one of the juſtices " of the court out of which the ſame writ ſhall be awarded " or made, upon pain that he that writeth any ſuch writs, not " being ſigned as is aforeſaid, to forfeit for every ſuch writ five " pounds."

ſome time before the eſſoin day of the ſubſequent term, otherwiſe it is irregular; and the court, upon motion, will order a *procedendo*; but it is ſaid, that there is no need for any judge to ſign the writ of *certiorari* itſelf, but only in ſuch caſes wherein it is required by ſtatute. Salk. 150. pl. 19.

[On this ſtatute no coſts are payable, unleſs the indictment be preferred by the party grieved, or by juſtices, mayors, &c. or other civil officers proſecuting as ſuch. 1 Burr. 431.]

And by 5 *W. & M. cap.* 11., " No *certiorari* in term-time, " at the proſecution of the defendant, ſhall be granted out of the " *King's Bench*, to remove any indictment or preſentment from " any general or quarter ſeſſions before trial, but on motion " and rule in open court: but in vacation, ſuch writ may be " granted by any judge of the ſaid court, whoſe name ſhall be " endorſed thereon; and alſo the party's name at whoſe inſtance " it is granted."

[It is enacted by 13 *Geo.* 3. *c.* 78. § 24. " That the juſtices " ſhall make preſentment of any highway, cauſeway, or bridge, " at their reſpective aſſizes or ſeſſions, wherein the ſame do lie, " and not elſewhere; and that no ſuch preſentment, nor any in- " dictment ſhall be removed by *certiorari*, or otherwiſe, out of " ſuch juriſdiction till ſuch indictment or preſentment be tra- " verſed, and judgment thereupon given, except where the duty " or obligation of repairing ſuch highways, cauſeways, or bridges " may come in queſtion."—And by § 81. it is further enacted, " That no proceedings to be had or taken in purſuance of this " act ſhall be quaſhed or vacated for want of form, or removed " by *certiorari*, or any other writ or proceſs whatſoever (except " as therein before excepted) into any of his majeſty's courts at " *Weſtminſter*."

But it is enacted by 5 & 6 *W. & M. c.* 11. " That if the " right or title to repair ſuch cauſeways, &c. may come in queſ- " tion, upon ſuggeſtion and affidavit of the truth thereof, a *cer-* " *tiorari* may be granted to remove ſuch indictment into the " King's Bench," upon the like recognizance which is required by this ſtatute for the removal of indictments from ſeſſions. It

It hath been adjudged, that if the ſeſſions manifeſtly exceed their authority in making orders concerning the highways, ſuch orders may be removed by *certiorari* into the King's Bench, and quaſhed. 2 Str. 944. Say. Rep. 128.

It hath been adjudged too, that theſe acts relate only to *certioraris* applied for on the part of the defendants: that a *certiorari* lies for the proſecutor without affidavit, or recognizance, and before traverſe and judgment. 2 Str. 1209. Cowp. 78.

And it is enacted by 12 *Car.* 2. *c.* 23. § 35., concerning the exciſe, "That no writ of *certiorari* ſhall ſuperſede execution or "other proceedings, upon any order by juſtices of peace, in "purſuance of that ſtatute, but that execution, and other pro-"ceedings ſhall and may be had thereupon, any ſuch writ or al-"lowance thereof notwithſtanding." And the like is generally enacted by other ſtatutes concerning the revenue.

If a new offence be created by ſtatute, and a ſpecial juriſdiction out of the courſe of the common law be preſcribed, in that caſe, though there be no words of excluſion, yet the ſuperior courts are ouſted, becauſe they never could have juriſdiction. Not ſo, where a new offence is created, and directed to be tried in an inferior court eſtabliſhed according to the courſe of the common law, for in that caſe the inferior court tries the offence as a common law court, ſubject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the conſequences of common law courts. In this laſt caſe, therefore, the court of King's Bench cannot be ouſted of its juriſdiction without expreſs negative words. But if a ſtatute creating an offence take away the *certiorari*, and another ſtatute be afterwards paſſed inflicting heavier puniſhment upon the offender, but not expreſsly taking away the *certiorari*; the clauſe in the former act for taking away the *certiorari*, cannot be extended to proceedings under the latter act.] Cowp. 524. Rex v. Terret, 2 Term Rep. 735.

By the 7 & 8 *W.* 3. *cap.* 6., made for the recovery of ſmall tithes before juſtices of the peace, it is enacted, "That no pro-"ceedings, or judgment by virtue thereof, ſhall be removed or "ſuperſeded by any writ of *certiorari* out of any court what-"ſoever, unleſs the (*a*) title of the tithes, &c. ſhall come in "queſtion." 7 & 8 W. 3. c. 34. § 4.

(*a*) If the party inſiſts on any matter of law before the juſtice of peace, which is any way doubtful; as on a cuſtom in a pariſh, to be diſcharged of a certain kind of tithe, &c. the order may be removed, within the intent of the ſtatute. 2 Hawk. P. C. c. 27. § 38. A *certiorari* is not grantable on the following proceedings:—Bridges; 1 An. ſt. 1. c. 18. § 5. Hides; 9 Ann. c. 11. § 47. Coaches; 1 G. c. 57. § 6. Malt; 12 Ann. ſt. 1. c. 2. § 37. Coffee; 10 G. c. 10. § 42. Woollen manufacture; 13 G. c. 23. § 6. Seamen; 1 G. 2. c. 25. § 15. Attornies; 2 G. 2. c. 23. § 25. Turnpikes; 8 G. 2. c. 20. § 16. County rates; 12 G. 2. c. 29. § 21. Houſes of correction; 17 G. 2. c. 5. § 31. Swearing; 19 G. 2. c. 21. § 8. Havens; 19 G. 2. c. 22. § 5. Coals; 19 G. 2. c. 35. § 23. Wages; 20 G. 2. c. 19. § 6. Artificers; 23 G. 2. c. 13. § 9. Sope, &c. 23 G. 2. c. 21. § 33. Small debts; 23 G. 2. c. 33. § 4. Bawdy-houſes; 25 G. 2 c. 36. § 10. Clocks and watches; 27 G. 2. c. 7. § 4. Stealing lead, &c. 29 G. 2. c. 30. § 7. *London* bridge; 29 G. 2. c. 40. § 39. Gaming; 30 G. 2. c 24. § 20. [For obtaining goods by falſe pretences; 30 G. 2. c. 24. § 1. Cowp. 24. 2 Term Rep. 472.] Militia; 30 G. 2. c. 25. § 58., &c. Bread; 31 G. 2. c. 29. § 37., &c. The *Thames*; 32 G. 2. c. 16. § 24. 27. 2 G. 3. c. 28. § 11. *London* ſtreets; 33 G. 2. c. 30. § 31. See further, the Tables to the Statutes, title *Certiorari*.

(F) To whom it ought to be directed.

2 Hawk. P. C. c. 27. § 41.

REGULARLY a *certiorari* ought to be directed to the judge of the inferior court: but in ſome caſes it may be directed to the officer known to have the cuſtody of the record; and in ſome other caſes to others, as ſhall be moſt agreeable to the courſe of approved precedents; which ſeems to be the beſt guide in this matter.

(*a*) 2 Keb. 750. 8 H. 4. 3. Cro. Jac. 669. (*b*) Dyer, 163. Raſt. Ent. 439.

If the perſon who ought to certify a record, as a juſtice of (*a*) peace, who hath taken a recognizance; or (*b*) a judge of *niſi prius*, who hath taken a verdict; or a (*c*) coroner, who hath taken an inqueſt, die with the record in his cuſtody, the *certiorari* may go to his executor, *&c.*

2 Inſt. 424. 2 Roll. Abr. 629. (*c*) Bro. *Certiorari*, 9. *Indictment*, 23.

11 H. 7. 5. Bro. *Receipt*, 81. 2 Hawk. P. C. c. 27. § 42.

Alſo it hath been adjudged, that it may be directed to a juſtice of aſſiſe, to certify a record of aſſiſe taken before his companion in his abſence.

Regiſter Origin. 90. F. N. B. 81. Hob. 135. (*d*) *Vide* 2 Hawk. P. C. c. 27. § 43. leaves it a doubt whether it can be certified by him, unleſs he does it as juſtice of peace.

Certiorari for the removal of indictments, *&c.* from ſeſſions of the peace, are commonly directed either to the juſtices of the peace of the diſtrict generally, or to ſome of them in particular by name, and not to the *cuſtos rotulorum*; yet it hath been holden, that after a recognizance is brought in to him he ſhall (*d*) certify it.

Rex v. Inhabitants of *Warminſter*, 1 Str. 470.

[A *certiorari* to remove an order of two juſtices may be directed to the ſeſſions and returned by them.

Daniel v. Phillips, 4 Term Rep. 499.

If a *certiorari* be miſdirected, no third perſon can object to it, if the proper officer in whoſe keeping the record was, waves the objection, and returns the record upon the writ.]

(G) How far it is a *Superſedeas* to the Court below.

Cro. Car. 261. Salk. 148. pl. 13. Cro. Eliz. 915. Dyer, 98. Mo. 677. 2 Ld. Raym. 836. 7 Mod. 138. 12 Mod. 643. 3 Salk. 79. pl. 4.

IT is clearly ſettled, that after a *certiorari* is allowed by the court below, all ſubſequent proceedings on the record are erroneous. Alſo before 21 *Jac.* 1. *c.* 8. (which requires that all *certioraris* for indictments, forcible entries, at ſeſſions, ſhall be delivered in court,) the delivery of ſuch *certiorari* to any one juſtice of the peace of the ſame place, made all ſubſequent proceedings erroneous; and if any proceſs had been before awarded on the indictment, the juſtice to whom the *certiorari* was delivered, ought immediately to have awarded a *ſuperſedeas* to the ſheriff, in order to have ſtopped the execution of it: and it ſeems that the delivery of ſuch a *ſuperſedeas* to the ſheriff before he hath begun to put a proceſs in execution, makes his ſubſequent execution of it wholly void,

void, becauſe it is but a miniſterial act: but if it be not delivered till after the execution is begun, he may afterwards go through with it, by virtue of a (*a*) writ of *venditioni exponas*.

(*a*) But 2 Hawk. P. C. c. 27. § 63. queſtions whether without ſuch writ he can proceed.

It is ſaid that the bare delivery of a *certiorari* makes all ſubſequent proceedings on the record, whether before or after the return of the *certiorari*, erroneous, by force of the words *coram nobis terminari volumus & non alibi;* in which reſpect a *certiorari* is of greater force than a writ of *error:* for that becomes of no effect if the record be not certified in a reaſonable time: alſo it hath been holden that the very iſſuing of a *certiorari* is of itſelf a *ſuperſedeas*, though it be never delivered, in the ſame manner as an appearance in the court above; and a *ſuperſedeas* purchaſed there, though not delivered to the ſheriff till after the *quinto exactus*, will avoid an outlawry pronounced after: but it ſeems the better opinion, that if a *certiorari* be not delivered before iſſue is joined, or at leaſt before the return of it is expired, it is of no effect: however it is of no force at this day as to indictments at ſeſſions, as appears *ſupra*, letter (D).

Vide 2 Hawk. P. C. c. 27. § 64. and the authorities there cited.

[A *certiorari* removes all things done between the *teſte* and return.]

2 Ld. Raym. 835. 1305.

A *certiorari* for the removal of a recognizance for the good behaviour, or for an appearance at the ſeſſions, will not ſuperſede its obligation; becauſe it would be highly inconvenient that the party, againſt whom there may be very juſt matter of complaint, ſhould be let looſe upon the bare bringing of a writ.

Cro. Jac. 282. Yelv. 207. Skin. 244. 2 Hawk. P. C. c. 27. § 64.

2 Roll. Abr. 492. *cont.* and Dalt. c. 75. *cont.*

(H) In what Manner it is to be returned.

THE return of a *certiorari* ought to be under the ſeal of the (*b*) inferior court, or of the juſtice or juſtices to whom it is directed; and if ſuch court have no proper ſeal, it may be under any (*c*) other ſeal. Alſo it muſt be made, by the perſon to whom the *certiorari* is directed; for if to the juſtices of peace of ſuch a place, and the (*d*) clerk of the peace only return it; or to the conſtable, or to the recorder of *B.* and the (*e*) deputy conſtable or deputy recorder return (without ſhewing in the return, that the principal had power to make a deputy); or to the ſteward of St. *Paul*'s, and the ſteward of the church of (*f*) St. *Peter* and St. *Paul* return it; nothing is removed.

(*b*) Cro. Eliz. 821. (*c*) Lev. 311. (*d*) 2 Salk. 479. pl. 27. (*e*) Roll. Abr. 752. 2 Keb 385. (*f*) 2 Keb. 385. cited.

But if it be directed to the juſtice of *Cheſter*, it may be (*g*) returned by *A. B.*, chief juſtice; for the ſame officer is known to be meant in the writ and return, and his deſcription in both is in ſubſtance the ſame.

Sid. 64. Lev. 50. Keb. 165. 2 Salk. 452. pl. 3.

(*g*) But if a *certiorari*, directed to ſeveral juſtices, be returned by one of them only, *quære* what ſhall be done? *Vide* 2 Hawk. P. C. c. 27. § 71.

A recognizance taken by a juſtice of peace, ought to be certified by ſuch juſtice only till it be made a record of the ſeſſions, after

Cro. Jac. 669.

after which it ſhall be certified in the ſame manner as the other records of the ſeſſions.

2 Hawk. P. C. c. 27. § 73. The return to a *certiorari*, directed to juſtices of the peace for the removal of an indictment, ought to have the clauſe *nec non ad diverſas felonias, &c.* in the deſcription of the juſtices who make the return, where ſuch clauſe is neceſſary in the caption of an indictment.

Carth. 223. The King v. Berry. See the form of returns to *certiorari*, Lamb. B. 2. c. 2. 107. Dalt. c. 73. and 134. A *certiorari* iſſued to remove an indictment upon the ſtatute 5 *Eliz. c.* 4. for exerciſing a trade in a borough, to which the mayor made this return, *viz. humillime certifico quod ad ſeſſionem pacis, &c. per juratores præſentatum exiſtit quod billa ſequens eſt vera, viz. quod prædict.* S. J. did exerciſe, omitting the clauſe *juratores pro domino rege preſentant quod, &c.* and though the court held that without theſe words no indictment was returned, yet they would not quaſh it, but ordered the mayor to amend his return: alſo the court held, that *humillime certifico* was not a good return.

6 Mod. 90. (*a*) 2 Hawk. P. C. 295. (*b*) But an action on the caſe lies for a falſe return at the ſuit of the injured party, or there may be an information at the ſuit of the king. 6 Mod. 90. 2 Hawk. P. C. c. 27. § 74. See 1 Str. 63. The perſon to whom a *certiorari* is directed, may make what return to it he pleaſes, and the court will not ſtop the filing of it, on affidavit of its (*a*) falſity, except only where the publick good requires it; as in the caſe of the (*b*) commiſſioners of ſewers, or for ſome other ſpecial reaſon.

2 Salk. 402. pl. 58. 2 Hawk. P. C. c. 27. § 75. Whatſoever is put into the return to a *certiorari*, by way of explanation or otherwiſe, beſides what is ordered to be returned, is put in without warrant, and not to be regarded.

2 Hawk. P. C. c. 27. § 76. and *vide* ſeveral authorities there cited, and note in F. N. B. 242. B. 2 Atk. 318. Generally the record itſelf, or the tenor of it, or the tenor of the tenor, is to be certified in the return of a *certiorari*, according as the writ requires; for if, on a *certiorari* to return an order of juſtices of the peace, the tenor of it be only certified, the return is naught; but the return of the tenor of an indictment from *London* is good, by the city charter: alſo it is ſaid to be ſufficient to certify the tenor only in all caſes where the purport of the *certiorari* is not to proceed on the record removed, but only to try the iſſue of *nul tiel record*. However it ſeems clear, that if the court, which awards a *certiorari*, have no juriſdiction to proceed on the record ordered to be removed, as where the court of Common Pleas award a *certiorari* for an indictment, the tenor only ſhall be removed, leſt there ſhould be a failure of juſtice.

(I) Where the Record ſhall be ſaid to be removed.

For which *vide ſupra* (F), (G), and (H). WHERE the writ of *certiorari* is improperly directed or returned, nothing can be removed by it.

Salk. 148. pl. 13. 2 Ld. Raym. 836. A *certiorari* may remove a record coming within its deſcription, before the time of its return, though there were no ſuch record at

at the time of its teſte, or at the time of its delivery to the court below. [A *certiorari* to remove an indictment, will not remove a conviction. 2 Ld. Raym. 971.] It will remove an indictment, though there were a diſcontinuance below, in the ſame manner as a *recordare* will remove a plaint that was diſcontinued below. 2 Hawk. P. C. c. 27. § 79. [A verdict cannot be removed from the ſeſſions before judgment. 2 Str. 763. 819.]

But it removes no record which materially varies from the record deſcribed in it; as where the writ deſcribes a record taken before *A. B. juſticiario noſtro* and eight others, and the record certified was taken before *A. B.* and ſeven others only, or before him and others, beſides the eight, or before *C. D.* and the other eight, or before juſtices of a former reign; or where the writ deſcribes an indictment for ſtealing two horſes, or an order concerning foreign ſalt, or the manor of *Aneſley;* and the record certified mentions one horſe only, or ſalt in general, or relates only to the manor of *Anſley*, without ſhewing in the return, that *Anſley* and *Aneſley* * are the ſame, *&c.;* or where the writ mentions orders of indictments againſt *A. B.* and *C.*, and thoſe certified are againſt *A.* only, or againſt *A.* and *B.* only. *Vide* 2 Hawk. P.C. c. 27. § 81, 82, 83, 84. and the ſeveral authorities there cited, moſt] of which were on the returns to writs of *error*, for which *vide* head of *Error*. * See *poſt* next clauſe but one.

But a writ for the removal of all indictments againſt *A.* may remove an indictment againſt *A.* and twenty others, ſo far at leaſt as it (*a*) concerns him; becauſe in judgment of law it is a ſeveral indictment againſt each defendant. Salk. 146. pl. 9. 2 Hawk. P. C. c. 27. § 85. See 1 Str. 116. (*a*) But *per* 2 Hawk. P. C. *ibid.* it is not agreed whether, in ſuch a caſe, the indictment ſhall be removed, ſo far as it concerns the other twenty.

A variance between the *certiorari* and the record certified in the ſpelling only, where the words are of the ſame ſound, as *Bird* and *Burd*, ſeems not to be material, becauſe it appears not by any record of the court, but that the name in the *certiorari* may be the true one, and that in the record, being in the ſame ſound, ſhall be intended to mean the ſame perſon: neither doth it ſeem to be a material variance that the *certiorari* omits an addition which the record gives the party: but if the *certiorari* give the party an addition which the record doth not, the variance is fatal: and ſo *a fortiori* is a variance in giving the party names of a different ſound, or additions of a different kind in the *certiorari* and record certified; as where the one calls him *William Giggure*, and the other *William Giggeer;* or the one calls him *Henry Coachman, quocunque nomine cenſeatur*, and the other *Henry Murton Coachman;* or the one calls him *John of S.* and the other *John S.;* or the one calls him knight and baronet, and the other baronet only; or the one calls him *Garret* and the other *Gerrard;* or the one *J. S. nuper de B.*, and the other *J. S. nuper de C.;* or the one *J. S. de B., ſadler*, the other *J. S. de B., ſalter.* *Vide* 2 Hawk. P.C. c. 27. § 86. and the authorities there cited. *Vide* head of *Miſnomer*. [A *certiorari* will remove an indictment upon a ſtatute, tho' it do not ſo deſcribe it. 2 Str. 845. But to remove an indictment after conviction, it muſt give the party a day in court. 2 Ld. Raym. 971.]

(K) Of the Proceedings of the Superior or Inferior Court, after the iſſuing out of the *Certiorari*.

Raym. 186. Vent 66. Salk. 144.

AFTER the *certiorari* delivered, if the inferior court proceeds, where by law it ought not, it is a contempt, for which the court will grant an attachment.

2 Hawk. P. C. c. 27. § 66.

But if an indictment be removed after iſſue joined and remanded, the inferior court (*a*) ſhall proceed as if no *certiorari* had been granted.

(*a*) But by the common law, if a *certiorari* be once filed, the proceedings below can never be revived by any *procedendo*. 2 Hawk. P. C. c. 27. § 68. [It is true, that while it continues on the file, the court cannot award a *procedendo*. But it may be taken off the file, if it have iſſued *improvidè*; and when that is done, a *procedendo* will be granted. 1 Burr. 488. 4 Burr. 2459. 2522.]

(*b*) 12 H. 7. 25. Sid. 193. 2 Keb. 142. (*c*) Keb. 101. Salk. 147. (*d*) 2 Hawk. P. C. c. 27. § 87. (*e*) 12 H. 7. 25. 3 Aſſ. pl. 3. 2 R. 2. 9. 2 Keb. 14. Carth. 223.

Alſo if a *certiorari* iſſues, and the record is not thereby removed, the court (*b*) above cannot proceed upon it, but will (*c*) quaſh the writ, and award (*d*) a new one, or ſuffer the court below to proceed, and take ſuch (*e*) order in relation to the defendant's appearance, either in the one court or the other, to anſwer the further proſecution of the cauſe againſt him, as ſhall in diſcretion appear to be moſt proper.

6 Mod. 264. Salk. 61. (*f*) But if two *nihils* are returned, *quære* what is to be done? 2 Hawk. P. C. 297. 2 Burr. 749.

If the defendant, againſt whom a record is removed into the *King's Bench*, do not appear, the like proceſs ſhall go from thence as if the cauſe had been commenced there; but ſince the record is put without day, by the removal, there is no way to nonſuit the plaintiff before he has appeared there, but by taking out a *ſcire facias* to warn him to proſecute, whereon if the ſheriff (*f*) return a *ſcire feci*, he may be nonſuit.

[If the defendant is convicted by confeſſion, and the proſecutor brings a *certiorari*, the defendant ſhall have a *procedendo*.]

Champerty.

1 Hawk. P. C. c. 84. 2 Inſt. 208. Co. Lit. 368. b. Stat. of *Conſpirat.* 33 E. [(*g*) That is, *campum partire*. Champerty is derived immediately from the *French champart*, which ſignifies a diviſion of the profits of the land, being a part of the crop annually due to the landlord by bargain or cuſtom. In our ſenſe of the word, it ſignifies the purchaſing of a ſuit, or right of ſuing. This was an offence extremely abhorred by our law. Nor was it leſs ſo by the laws of

CHAMPERTY is the unlawful maintenance of a ſuit, in conſideration of ſome bargain to have part (*g*) of the thing in diſpute, or ſome profit out of it.

of other countries. By a ſtatute of Robert I. of *Scotland*: "*Nec terram ſeu aliquam rem aliam capiat "ad champarte, ad defendendum, differendum, ſeu prolongandum jus alterius extra formam juris. Du "Freſne, verbo Campiparticeps.*" And, by the *Roman* law, "*qui improbè cœunt in alienam litem, "ut quicquid ex condemnatione in rem ipſius redactum fuerit inter eos communicaretur, lege Julia de vi "privata tenentur.*" F. 48. 7. 6. and the offenders were puniſhed by the forfeiture of a third part of their goods, and perpetual infamy. 4 Bl. Com. 135.]

As there is little ſaid in our modern books on this head, I ſhall only ſet down the acts of parliament relating to it, and thoſe reſolutions which are to be met with in the old ones.

By *Weſt.* 1. or 3 *E.* 1. *cap.* 25. it is enacted, "That no officers of the king, by themſelves or by other, ſhall maintain "pleas, ſuits, or matters, hanging in the king's (*a*) courts, for "lands, tenements, or (*b*) other things, for to have part or "(*c*) profit thereof by (*d*) covenant made between them; and he "that doth ſhall be puniſhed at the king's pleaſure."

(*a*) Courts of record only are intended. 2 Inſt. 208. 1 Hawk. P. C. c. 84. § 4.

(*b*) Maintenance in an action perſonal, to have part of the debt or damages, is within the ſtatute. 47 Aſſ. pl. 5. 1 Hawk. P. C. c. 84. § 6. (*c*) A grant of rent out of the lands in queſtion, is within the ſtatute; but not a grant of rent out of other lands. F. N. B. 172. 1 Hawk. P. C. c. 84. § 7. (*d*) Any contract, whether by writing or parol, is within the ſtatute. 2 Inſt. 209. 563. F. N. B. 172.

The maintenance of the tenant or defendant, is as much within the meaning of the ſtatute, as the maintenance of a demandant or plaintiff. 1 Hawk. P. C. c. 84. § 9.

A grant of part of a thing in ſuit, made in conſideration of a precedent debt, is not within the meaning of the ſtatute, but ſuch only as is made in conſideration of maintenance. 2 Roll. Abr. 113. pl. 3. 15 H. 7. 2. a. Bro. tit. *Champerty*, 6.

In a proſecution on this ſtatute, it doth not ſeem material whether the plea, wherein the maintenance is alleged, be determined or not; or whether the party did, or did not ſuffer any prejudice by it. 1 Hawk. P. C. c. 84. § 8.

By the ſtatute *Weſtm.* 2. *cap.* 49. it is enacted, "That the "chancellor, treaſurer, juſtices, nor any of the king's counſel, "nor clerk of the Chancery, nor of the Exchequer, nor any juſ"tice, or (*e*) other officer, nor any of the king's houſe, clerk "nor lay, ſhall not receive any church, nor advowſon of a "church, land, nor tenement in fee, by gift or by purchaſe, or "to farm, nor by champerty nor otherwiſe, ſo long as the thing "is in plea before the king, or before any of his officers, nor "ſhall take no reward thereof; and that he that doth contrary "to this act, either by himſelf or by another, or make any bar"gain, ſhall be puniſhed at the king's pleaſure, as well he that "purchaſeth as he that doth ſell."

(*e*) This ſtatute extendeth only to the officers therein named. 2 Inſt. 484. It hath been holden, that it ſo ſtrictly reſtrains all ſuch officers from purchaſing any land, pending a plea, that they cannot be excuſed by any conſideration of kindred or affinity, and that they are within the meaning of the ſtatute, by barely making ſuch a purchaſe, whether they maintain the party in his ſuit or not; whereas ſuch a purchaſe, for good conſideration, made by any other perſon, or any ter-tenant, is no offence, unleſs it appear that he did it to maintain the party. 1 Hawk. P. C. c. 84. § 13. and the authorities there cited.

And it is further enacted by 28 *E.* 1. *cap.* 11., in the following words: "Becauſe the king hath heretofore ordained by ſtatute, "that none of his miniſters ſhall take no plea for maintenance, "by which ſtatute other officers were not bounden before this "time, the king will that no officer, nor any other, (for to have "part

" part of the thing in plea,) ſhall not take upon him the buſineſs " that is in ſuit, nor none, upon any ſuch covenant, ſhall give " up his right to another; and if any do, and be attainted " thereof, the taker ſhall forfeit unto the king ſo much of his " lands and goods as doth amount to the value of the part that " he hath purchaſed for ſuch maintenance; and to obtain this, " whoſoever will ſhall be received to ſue for the king, before " the juſtices before whom the plea hangeth, and the judgment " ſhall be given by them; but it may not be underſtood hereby " that any perſon ſhall be prohibited to have counſel of pleaders, " or of learned men in law, for his fee, or of his parents or " next friends."

1 Hawk. P. C. c. 84. § 16. Champerty in any action at law, ſeems to be agreed to be within this ſtatute, and a purchaſe of land, pending a ſuit in equity concerning it, hath alſo been holden to be within it: alſo a leaſe for life or years, or a voluntary gift of land, pending a plea, is as much within the ſtatute as a purchaſe for money.

Hawk. P. C. c. 84. § 15. 18, 19, 20. But neither a conveyance executed, pending a plea, in purſuance of a precedent bargain, nor any ſurrender by a leſſee to his leſſor, nor any conveyance or promiſe thereof made by a father to his ſon, or by any anceſtor to his heir apparent; nor a gift of land in ſuit, after the end of it, to a counſellor for his fee or wages, without any kind of precedent bargain relating to ſuch gift, are within the meaning of the ſtatute.

Charitable Uſes and Mortmain.

(A) Of the ſeveral Statutes prohibiting to purchaſe in Mortmain.

(B) Of Things exempt from, or out of the Statutes of Mortmain.

(C) What is a good charitable Uſe within the Statute 43 *Eliz.*

(D) What is a ſuperſtitious Uſe to which the King is entitled.

(E) How charitable Diſpoſitions have been conſtrued. [And how far favoured in Equity.]

(F) Of the Commiſſioners of charitable Uſes, purſuant to the Statute 43 *Eliz.*

* (G) Of the Statute 9 *Geo.* 2. *c.* 36. for regulating Deviſes in Mortmain, *&c.*

(A) Of the ſeveral Statutes prohibiting to purchaſe in Mortmain.

THE clergy in former days had ſo great an aſcendant over the people, by inſtilling in them the notions of purgatory, and had ſo wrought on them by their art and management, that they prevailed on them to be very liberal of their poſſeſſions, and eſpecially at their deaths, to diſpoſe of them to thoſe only who could promiſe them happineſs in another world: this proving very prejudicial to the lords, who thereby loſt the advantages of wardſhips, marriage, relief, eſcheat, &c., (lands in the hands of a religious houſe or perſon being conſidered as in a *dead hand*, yielding no fruits to the lord,) occaſioned the clauſe in the ſtatute of *Magna Charta* (*a*), by which it is enacted, *That it ſhall not be lawful for any to give his lands to any religious houſe, and to take the ſame lands again to hold of the ſame houſe*, &c.

See too, 2 Bl. Com. 268.

9 H. 3. c. 36.

[(*a*) Licences in mortmain were neceſſary, before the granting of *Magna Charta*, both from the king, as ultimate lord of the fee, and from the intermediate lord between the king and the alienor. And if no ſuch licence was obtained, the king, or other lord, might reſpectively enter on the lands aliened in mortmain, as a forfeiture. The neceſſity of this licence from the crown was acknowledged by the conſtitutions of Clarendon, in reſpect of advowſons, which the monks always greatly coveted, as being the ground-work of ſubſequent appropriations. "*Eccleſiæ de feudo domini regis non poſſunt in perpetuum dari ſine aſſenſu et conceſſione ipſius.*" MS. Cotton. Claud. B. fol. 26. When a licence could not be obtained, the clergy ſeem to have had this contrivance: that, as the forfeiture for ſuch alienations accrued, in the firſt place, to the immediate lord of the fee, the tenant who meant to alienate, firſt conveyed his lands to the religious houſe, and inſtantly took them back again to hold as tenant to the monaſtery; which kind of inſtantaneous ſeiſin was probably holden not to occaſion any forfeiture; and then, by pretext of ſome other forfeiture, ſurrender, or eſcheat, the ſociety entered into thoſe lands in right of ſuch their newly acquired ſignory, as immediate lords of the fee. And this was the miſchief, which the clauſe in *Magna Charta* was intended to provide againſt. 2 Bl. Comm. 269.]

But religious men found means to avoid this ſtatute, by purchaſing lands holden of themſelves, and by taking long leaſes: alſo all eccleſiaſtical perſons regular, as abbots, &c., thought themſelves out of this ſtatute: to meet therefore with theſe evaſions, the 7 *Ed.* 1. *ſtat.* 2., called the ſtatute of *mortmain*, was made.

By this ſtatute it is provided, *That no corporation, civil or religious, ſhall purchaſe lands in mortmain; and that if they do, the immediate lord may enter within a year after ſuch purchaſe made, and the ſuperior lords, up to the king, in half a year afterwards; and if all ſuch lords, immediate and mediate, being of full age, within the four ſeas, and out of priſon, are negligent, the king may enter and enfeoff a tenant by ſervices to the king, ſaving the wardſhip and eſcheat to the lord of the fee*, &c.

Co. Lit. 2. Burn's Eq. tit. *Mortmain.*

The clergy, when they found themſelves prohibited by *Magna Charta* from purchaſing lands, and perceived that their evaſion of that law was provided againſt by 7 *E.* 1. *ſtat.* 2., which prohibited them not only from purchaſing, but alſo *ullâ arte vel ingenio terras ſibi ipſis appropriare ſub pœnâ forisfacturæ earundem*, began to apply the judgments of the courts, againſt the intention of the law, to their own advantage; for they brought their

2 Inſt. 75. *Comp. Incumb.* 374.

præcipe againſt the tenant, who had agreed either to give or ſell them the lands in demand, and proſecuted the ſuit, as if it had been really an adverſary one, till the tenant, according to the precedent agreement, made default, which was always looked upon as ſufficient ground for a judgment in favour of the demandant; and the judges preſuming all recoveries juſt and lawful, which were proſecuted in the uſual courſe of law, would not bring thoſe covinous ones within the ſtatute, though they were apparently *in fraudem legis*, and attended with all thoſe inconveniencies which thoſe ſtatutes were made to prevent: but the clergy were quickly ſtopped in this courſe, for (*a*) the ſtatute of *Weſtm.* 2. made theſe recoveries by default to be mortmain; and the expoſition of this ſtatute by the judges hath been carried as far beyond the letter, as their expoſition on 7 *E.* 1. ſeems to have fallen ſhort of the meaning and intention of that law; for though the letter of this act extends only to recoveries by default, yet they, and with good reaſon too, have extended it to all other recoveries, whether by demurrer or verdict, or otherwiſe; for if theſe ſhould not be within the meaning of the act, an iſſue might be taken ſo much in favour of the clergy, and the evidence offered might be ſo weak, that the whole intention of the ſtatute would be eluded.

(*a*) 13 E. 1. c. 32.

2 Inſt. 429, 430.

Afterwards they found out the method of conveying to uſes, which was firſt introduced to evade the ſtatutes of mortmain; and this ſerved them effectually; for they generally ſitting in Chancery, where uſes were ſolely cognizable, obliged the feoffee to execute the uſe according to the truſt and confidence repoſed in him; but this miſchief was provided againſt by the ſtatutes of 15 *Rich.* 2. *cap.* 5. and 23 *H.* 8. *cap.* 10.

15 Rich. 2. c. 5. 23 H. 8. c. 10.

(B) What Things are exempt from, or out of the Statutes of Mortmain.

Co. Lit. 99.

WHERE the (*b*) king (*c*) licenceth any corporation civil or religious, they may purchaſe, notwithſtanding the above mentioned ſtatutes of mortmain. This power the king ſeems always to have had; but the diſpenſing power having been carried too high, and greatly abuſed in a late reign, it was thought proper to reſtrain it by 1 *W.* & *M. ſt.* 2. *c.* 2. *ſ.* 12. (alſo *vide* 3 *W.* & *M. c.* 2. *ſ.* 17.) but now,

(*b*) Formerly this licence or diſpenſation was to have been made by the king and all the lords mediate and immediate; but now by 7 & 8 W. 3. it may be granted by the king alone, of whomſoever the lands are holden. (*c*) And it hath been holden, that ſuch licence is good without any clauſe of *non obſtante*. Co. Lit. 99. Plow. 502. Dyer, 269.—Alſo if the king dies before execution thereof, it may be executed afterwards. Co. Lit. 52. b.

7 & 8 W. 3. c. 37. [See the note in Co. Lit. 99. a. 13th ed.]

By the 7 & 8 *W.* 3. *cap.* 37. it is enacted, "That it ſhall "and may be lawful to and for the king, his heirs and ſucceſſors, when and as often, and in ſuch caſes as his majeſty, "his heirs or ſucceſſors, ſhall think fit, to grant to any perſon or "perſons, bodies politick or corporate, their heirs and ſucceſſors, "licence

" licence to alien in mortmain, and alſo to purchaſe, acquire, " take, and hold in mortmain, in perpetuity, or otherwiſe, any " lands, tenements, rents, or hereditaments, whatſoever, of " whomſoever the ſame ſhall be holden; and it is hereby de- " clared that lands, tenements, rents, or hereditaments ſo aliened " or acquired, and licenſed, ſhall not be ſubject to any for- " feiture, for or by reaſon of ſuch alienation or acquiſition."

By 17 *Car.* 2. *cap.* 3., *for the augmentation of poor benefices with cure*, it is enacted, " That every owner or proprietor of any " impropriation, tithes, or portion of tithes, ſhall be enabled " and empowered to give or beſtow, unite or annex the ſame, " or any part thereof, unto the parſonage or vicarage of the " pariſh or chapel where the ſame do lie or ariſe, or ſettle " the ſame in truſt for the benefit of the ſaid parſonage or " vicarage, or of the curate or curates there ſucceſſively, where " the parſonage is impropriate, and no vicar endowed, accord- " ing to his or their reſpective eſtates, without any licence of " mortmain. And it is furtheir enacted, That if the ſettled " maintenance of ſuch parſonage, vicarage, churches, or chapels " ſo united, or of any other parſonage or vicarage, with cure, " ſhall not amount to the full ſum of 100*l. per ann.*, clear and " above all charges and reprizes; that then it ſhall be lawful for " the parſon, vicar, and incumbent of the ſame, and his ſucceſ- " ſors, to take, receive, and purchaſe to him and his ſucceſſors, " lands, tenements, rents, tithes, or other hereditaments, with- " out any licence of mortmain."

" By the 2 *Ann. cap.* 11. A corporation is erected for the diſ- " poſing of the firſt-fruits to the clergy, with power to take " lands and tenements for the uſe of the clergy, having no ſettled " competent proviſion, by bargain and ſale enrolled, according " to the ſtatute 27 *H.* 8. *cap.* 16. or by laſt will and teſtament " in writing, duly executed according to law, without any li- " cence or writ *ad quod damnum*, notwithſtanding the ſtatute of " mortmain." 2 Ann. c. 11.

Alſo by the cuſtom of *London*, any citizen being a freeman of *London*, and being reſident there, and taxable to ſcot and lot, may by will, in writing, deviſe his lands lying (*a*) in the ſaid city in mortmain, notwithſtanding the above ſtatutes. Doct. & Stud. c. 10. Bridgm. 103. Bro. *Cuſtoms*, 7. 38 Aſſ. pl. 18. 45 Ed. 3. 26. Roll. Abr. 556.

[(*a*) But he cannot ſo deviſe lands lying *out* of *London*. 4 Br. Ch. Rep. 409.]

Alſo ſince the (*b*) ſtatute of charitable uſes, it hath been holden, that a deviſe to the principal, fellows, and ſcholars of *Jeſus College* in *Oxford*, and their ſucceſſors, for maintenance of a ſcholar, is good, though ſuch deviſe had been mortmain, by the ſtatute 23 *H.* 8. *cap.* 10. Hob. 136. Flood's caſe. Lev. 284. S. P. (*b*) 43 Eliz. c. 4. which *vide infra*.

(C) What is a good Charitable Uſe within the 43 *Eliz.*

Vide 35 Eliz. c. 7. 39 Eliz. c. 5. 1 Co. 24. 11 Co. 70. That a diſpoſition to any of thoſe uſes will be good at this day, without any licence, notwithſtanding the ſtatutes of mortmain.

THE ſtatute 43 *Eliz. cap.* 4. enacts, "*That the commiſſioners* "*empowered by the lord chancellor ſhall inquire*, &c. *as to* "*the lands*, &c. *given by well-diſpoſed people*, for relief of aged, "impotent, and poor people; for maintenance of ſick and "maimed ſoldiers and mariners, ſchools of learning, free-"ſchools, and ſcholars of univerſities; for repair of bridges, "ports, havens, cauſeways, churches, ſea-banks, and high-"ways; for education and preferment of orphans; for, or to-"wards the relief, ſtock, or maintenance of houſes of correc-"tion; for marriages of poor maids; for ſupportation, aid, "and help of young tradeſmen, handicraftſmen, and perſons "decayed, and others; for relief or redemption of priſoners "or captives, and for aid or eaſe of any poor inhabitants; con-"cerning payment of fifteens, ſetting out of ſoldiers, and other "taxes."

In the conſtruction of this ſtatute, it has been holden,

Duke's Char. 109. That lands, *&c.* given for the building of an hoſpital, for the relief of poor people, is a charitable uſe within the equity of the ſtatute.

Duke's Char. 109. So for the building of a ſeſſions-houſe for a city or county; the making of a new or repairing of an old pulpit in a church, or the buying of a pulpit-cuſhion or pulpit-cloth, or the ſetting up of new bells, where none are, or the amending them where they are out of order.

Poph. 139. decreed. Duke's Char. 109. S.C. 1 Vez. 321. It ſeems ſettled, that money given for the maintenance of a preaching miniſter, though not a charitable uſe (*a*) mentioned in the ſtatute, yet comes within the equity of it; for *ſumma eſt ratio quæ pro religione facit.*

(*a*) A gift of lands, *&c.* to a chaplain or miniſter, to celebrate divine ſervice, is neither within the letter or meaning of this ſtatute; for it was on purpoſe omitted in the penning of the act, leſt the gifts intended to be employed in purpoſes grounded on charity, might, in change of time, contrary to the mind of giver, be confiſcated into the king's treaſury; for religion being variable, according to the pleaſure of ſucceeding princes, that, which at one time is held for orthodox, may, at another, be accounted ſuperſtitious; and then ſuch lands are forfeited, as appears by the ſtatute of 1 Ed. 6. c. 14. Sir Francis Moor's Reading on the Statute 43 Eliz. c. 4.

2 Vern. 387. But if a ſchool-houſe is erected by the voluntary contributions of the inhabitants of *A.* on the waſte of the lord of the manor, and the lord enfeoffs truſtees, in truſt that the inhabitants of *A.* may for ever have a ſchool, as of the gift of the lord of the manor; this is not a free-ſchool, and ſo not a charity within the ſtatute of 43 *Eliz.*, for which the inhabitants have a right to ſue in the attorney-general's name.

2 Vern. 387. So if the lord of the manor ſhould erect a mill, and convey it to truſtees, to the intent that the inhabitants might have the convenience of grinding there, this would not be a charity within the ſtatute.

[Augment-

[Augmentations made by eccleſiaſtical perſons to ſmall vicarages and curacies under the act of 29 *Car.* 2. *c.* 8. are to be conſidered by § 7. of that act, as charities within the intent of ſtat. 43 *Eliz.*: therefore an information may be filed in the name of the attorney-general to eſtabliſh a right to a curacy ſo augmented.] Attorney-General v. Breton, 2 Ves. 425.

(D) What is a ſuperſtitious Uſe to which the King is entitled.

A Superſtitious uſe is deſcribed to be where lands, tenements, rents, goods, or chattels are given, ſecured, or appointed, for and towards the maintenance of a prieſt or chaplain to ſay maſs (*a*); for the maintenance of a prieſt, or other man, to pray for the ſoul of any dead man, in ſuch a church, or elſewhere; to have or maintain perpetual obits, lamps, torches, *&c.* to be uſed at certain times, to help to ſave the ſouls of men out of purgatory; theſe, and ſuch like uſes, are declared to be ſuperſtitious, to which the king, by force of ſeveral (*b*) ſtatutes, and as head of the church and ſtate, and entruſted by the common law, to ſee that nothing is done in maintenance or propagation of a falſe religion, is entitled, ſo as to direct and appoint all ſuch uſes to ſuch as are truly charitable. 4 Co. 104. Bridg. 105. Cro. Jac. 51. Salk. 162. pl. 1.

[(*a*) Since the Reformation, a charitable foundation for ſaying maſs, praying for the ſouls, &c. is adjudged to be performed by ſaying the ſervice according to the liturgy. Co. Lit. 95. b.] (*b*) *Vide* 1 E. 6. c. 14. 15 Rich. 2. c. 5. 23 H. 8. c. 10. 37 H. c. 4.

And all limitations of land, *&c.* in fee-tail, for life or years, to any of the above-mentioned uſes, are ſaid to be ſuperſtitious, and to belong to the king, who is to direct and appoint them *in eadem genere*; ſo that they cannot revert to the donor, his heirs or repreſentatives, during the time that they were to continue to the purpoſes aforeſaid. Duke's Char. 107.

So if lands be given on condition to find a prieſt, *&c.*, though no prieſt be found, yet this is a ſuperſtitious uſe, to which the king is entitled. 4 Co. 104. Duke's Char. 106.

But if there be a charitable uſe intermixt with the ſuperſtitious uſe, ſo that they may be diſtinguiſhed, the king ſhall have only ſo much as is limited to the ſuperſtitious uſe. 4 Co. 104. Duke's Char. 107.

It was found by inqueſt, that *A.* deviſed to *J. S.* and his heirs abſolutely, without a truſt; that he did it for the good of his ſoul; and that the deviſee owned that this eſtate was not his, but belonged to God, and his Saints: the court of *King's Bench* held, that this could not be averred to be a ſuperſtitious uſe, by reaſon of the ſtatute of frauds and perjuries; and ſaid that a *monk* might now take by purchaſe, and ſeemed to think ſo of a *nun*: but an information being exhibited in the Exchequer, for a diſcovery, and that an application might be made of the deviſe to a uſe truly charitable, it was holden there, that the ſtatute of frauds did not bind the king; that he, as head of the commonwealth, is entruſted and empowered to ſee that nothing is done to the diſheri- Salk. 162. pl. 1. The King and Lady Portington.

ſon of the crown, or the propagation of a falſe religion, and to that end entitled to pray a diſcovery of a truſt to a ſuperſtitious uſe; and that this being a ſuperſtitious uſe, the king ſhall order it to be applied to a proper uſe.

De Coſta v. De Pas, Ambl. 228. *Per* Lord Hardwicke.

[Where the deviſe is to a ſuperſtitious uſe, and made void by ſtatute; or to a charity, and made void by the ſtatute of mortmain; there, it ſhould belong to the heir at law, or next of kin: but where it is in itſelf a charity, but the mode in which it is to be diſpoſed is ſuch, that by the law of *England*, it cannot take effect, as, for inſtance, where it is for the promoting of a religion adverſe to chriſtianity; there, the crown by ſign-manual directed to the attorney general, may give orders in what charitable manner it ſhall be diſpoſed.]

Vern. 248. Attorney-General v. Baxter. Decreed by North, Lord Keeper; but this decree was reverſed 1 W. & M. by the Lords Commiſſioners. 2Vern. 105.

A., being a beneficed clergyman, deviſed 600*l.* to Mr. *Baxter*, to be diſtributed by him among ſixty *pious ejected miniſters*, and added, that he did not give it to them for the ſake of their nonconformity, but becauſe he knew many of them to be pious and good men, and in great want: he alſo gave Mr. *Baxter* 20*l.*, and 20*l.* to be laid out in a book of his, entitled, *Baxter's Call to the Unconverted*; and this was holden a ſuperſtitious uſe, which though void, yet the charity is good, and ſhall be applied *in eodem genere*; and it was decreed for the maintenance of a chaplain in *Chelſea* college.

[It was reverſed on the ground of its not being a ſuperſtitious uſe: but nothing ſaid as to the Lord Keeper's opinion, that the power of directing came to the crown, if the truſt was not ſupportable as a charitable uſe.—That charitable gifts, in favour of Proteſtant diſſenters, are good, is now, ſince the toleration act, unqueſtionable. 2 Vez. 273. 3 P. Wms. 346.]

2Vern. 266. Paſch. 1692. Attorney-General and Guiſe.

A., by will, charged his eſtate with an annual ſum for the maintenance of *Scotchmen* in the univerſity of *Oxon*, to be ſent into *Scotland*, to propagate the doctrine of the church of *England* there; and *preſbyteries* being ſettled in *Scotland* by act of parliament, the queſtion was, Whether this deviſe ſhould be void, and ſo fall into the eſtate and go to the heir, or ſhould be applied *cy pres?* But the matter doth not appear by the report to have been determined.

(E) How Charitable Gifts and Diſpoſitions have been conſtrued; [and how far favoured in Equity.]

Duke's Char. 109, 110. [The uniform rule of a court of equity, before, at, and after the ſtatute of Elizabeth, hath been, that where the uſes are charitable, *and the perſon hath, in himſelf, full power to convey*, it will aid a defective conveyance to ſuch uſes. *Per* Lord Henley, Keeper. 1 Bl. Rep. 90.—Where a donor hath expreſſed himſelf ſo obſcurely, as to leave it quite doubtful whether he intended to give a principal ſum to a charity, or only the intereſt and produce of it, a court of equity, it ſeems, will not confine it to the latter. 2 Atk. 328.]

OUR chancellors have been very liberal in their conſtructions as to charitable diſpoſitions, ſo as to make them anſwer the intention of the donors, and for that purpoſe have diſpenſed with ſeveral ceremonies required in other grants; and therefore it has been holden, that an appointment to a charity without livery of ſeiſin, or attornment, is good.

So

So a deed of bargain and ſale to a charitable uſe, though not good by 27 *H.* 8. *c.* 16. for want of enrolment, yet ſhall be good as an appointment within the ſtatute 43 *Eliz. c.* 4. Preced. Chan. 391.

So if copyhold lands are diviſed to a charity, they ſhall paſs without any ſurrender, and ſhall bind the heir, but the lord ſhall not loſe his fine. Duke's Char. 110. 1 Vez. 225. [But where there are prior limitations of the copyhold to ſeveral perſons, a court of equity will not interfere in favour of a charity. Attorney-General v. Lady Downing, Ambl. 573.]

Tenant in tail, without levying a fine or ſuffering a recovery, may deviſe to a charity, and ſuch diſpoſition ſhall be good, by way of appointment within the ſtatute 43 *Eliz. c.* 4., which being ſubſequent in time, hath ſo far repealed and abrogated the ſtatute *de donis*. Duke's Char. 110. 2 Vern. 453. S. P. Preced. Chan. 390. S. P.

[If a deviſe be to a charitable uſe, though the object be not *in eſſe*, and though it depend on the will of the crown whether it ſhall be ever called into exiſtence, equity will eſtabliſh it. Attorney-General v. Lady Downing, Hig-more, 134. Ambl. 572.

An appointment to a charity, made precedent to the ſtat. of *Eliz.*, and ſo void, was holden to be made good by the ſtatute.] Smith v. Stowel, 1 Ch. Ca. 195.

But if *A.* deviſes lands by will, not duly executed within the ſtatute of *frauds and perjuries*, ſuch diſpoſition is void, and cannot operate as an appointment; for the ſtatute of *frauds* is ſubſequent to the 43 *Eliz. c.* 4.; and requires, that all deviſes of lands, *&c.* ſhould be in writing duly atteſted, *&c.*, without making any exceptions as to charitable diſpoſitions. 2 Vern. 597. Salk. 163. pl. 3. S. P. Preced. Chan. 270. 390. [But where *copyhold* lands were ſurrendered to the uſe of a will, and deviſed in charity, Lord Hardwicke held the will, though not ſigned in the laſt ſheet, and without witneſſes, to be a good appointment of the eſtate for the charity, under the ſtat. 43 Eliz. Attorney-General v. Sawtell, 2 Atk. 497.]

Alſo if an infant, lunatick, or feme covert, by will or deed, give any thing to a charitable uſe, it ſhall be void in the ſame manner as all other acts of theirs are. Duke's Char. 110. Moor, 822.

But *choſes in action*, as ſtatutes, bonds, *&c.*, though not aſſignable at law, yet a gift of them is good; as an appointment to a charity. Duke's Char. 79.

Alſo if lands are given to churchwardens of a pariſh, to a charitable uſe, although the deviſe be void in law, they not being a corporation capable of taking lands in ſucceſſion, yet they ſhall be capable for this purpoſe. Duke's Char. 82. ſaid to be decreed. [Where a conveyance was to certain officers of a corporation, and not to the body corporate, equity ſupplied the defect. 1 Bl. Rep. 91.] A deviſe to the principal, fellows, and ſcholars of *Jeſus College* in *Oxford*, and their ſucceſſors, for maintenance of a ſcholar, is good, and they ſhall be in nature of truſtees for this purpoſe; though before 43 Eliz. c. 4. ſuch diſpoſition would have been mortmain, by 22 H. 8. c. 10. Hob. 136. Lev. 284. S. P.

So where an impropriator deviſed to one who ſerved the cure, and to all that ſhould ſerve the cure after him, all the tithes and other profits, *&c.*, though the curate was incapable of taking by this deviſe, in ſuch manner, for want of being incorporate, and having ſucceſſion; yet it was holden, that the heir of the deviſee ſhould be ſeiſed in truſt for the curate for the time being. 2 Vent. 349.

Where there hath been an uncertainty in the deſcription of the perſons to take, the courts have been very liberal in their expoſitions; as where a deviſe of lands to a charity was to a corporation by a wrong name; as to the mayor and chamberlain, inſtead of the mayor and commonalty.

Duke's Char. 82. Mayor of *London*'s caſe. So where money was given generally to a pariſh, it was holden, that it muſt be intended to the poor of the pariſh. Chan. Ca. 134. So where lands were deviſed to *A.* for life, remainder to the church of St. *Andrew*'s, *Holborn*, it was holden, that the parſon of the church ſhould have this remainder. Duke's Char. 115. [So a legacy to the poor inhabitants of Saint *Leonard*, *Shoreditch*, was deemed to go to the poor not receiving alms. Attorney-General v. Clarke, Ambl. 422. So where a legacy was given *to the poor*, the court directed it to be given to the poor *French* refugees, it appearing that the teſtator was a *French* refugee. Attorney-General v. Rance, cited, *ibid.* So where a bequeſt was for the benefit of poor diſſenting miniſters living in any of the counties of *England*, it was holden to be good; and it being in proof, that there are three diſtinct ſocieties of diſſenters, and that collections are made for the poor miniſters of each, it was directed to be ſo applied. Walker v. Childs, Ambl. 524. If the gift is for the poor of any city, and other pariſhes are afterwards admitted within the precincts of the city, and added thereto; the poor of the pariſhes admitted, ſhall have a proportion of the charity. Attorney-General v. Corp. Rocheſter, Finch. 194. A legacy of 5*l.* was bequeathed to the poor of two hoſpitals in *Canterbury*, naming them; and, by a codicil, an annuity of 5*l.* *to all and every the hoſpitals*: it appearing that the teſtatrix lived at *Canterbury* many years, and died there; and that ſhe had taken notice by her will, of two *Canterbury* hoſpitals; the charity was holden not to be void for uncertainty, but to have been intended *for all the hoſpitals* in *Canterbury*; but not to extend, as was preſſed, to an hoſpital about a mile out of *Canterbury*, though founded by the ſame archbiſhop, and governed by the ſame ſtatutes. Maſters v. Maſters, 1 P. Wms. 425. One Penning, of *Saffron Walden*, and ſeveral others, ſubſcribed to a charity-ſchool there, of twelve boys and girls, which ſubſcription was only during the pleaſure of the benefactors. Penning, pleaſed with ſeeing theſe children, declared he would leave them ſomething at his death: there was alſo a free-ſchool in the ſame town; and Penning made his will, giving "500*l.* to the charity-ſchool." Lord Chancellor Parker ſaid, that though the free-ſchool be a *charity-ſchool*; yet the charity ſchool for boys and girls went more commonly by that name: and, as the teſtator was fond of the latter, and declared he would leave them a legacy; therefore, *that*, and not the free-ſchool, was entitled thereto. Attorney-General v. Hudſon, 1 P. Wms. 674. A ſum of money was bequeathed to be diſtributed every year, on certain days, to the poor of the pariſh of *L.* in the county of *M.*, in which county there was no ſuch pariſh; but there was in the county of *D.*: the court eſtabliſhed the will, becauſe it appeared that the teſtator was born there, and that both he and his parents lived and died there. Owen v. Bean, Finch. 395.]

Finch. 353. [*Noel* Lord *Carron*, formerly ambaſſador here from the States General, being ſeiſed in fee of a great houſe in *Lambeth*, called *Carron-houſe*, and the lands thereto belonging called the Park, and having built an alms-houſe in that pariſh, wherein he placed ſeven poor women of *Lambeth*, of ſixty years of age and upwards, whilſt he lived, and appointed 4*l.* to be paid to them every year quarterly, did, in order to eſtabliſh the ſame as a perpetual charity, by his will, charge the premiſes with 28*l.* *per ann.*, to be diſtributed equally among *ſeven poor women*; and directed that when one or more of them died, their places ſhould be ſupplied, at the appointment of the owners of *Carron-houſe*, by other poor women, who, as it was ſuggeſted, and as had always been the caſe during his life, he intended ſhould be poor women of that pariſh. It appeared that the owners of *Carron-houſe* had for ſome time paid the charity, but of late had refuſed, ſo that it was become in arrear; neither did they fill up the vacant places, pretending that the charity was not payable in ſucceſſion, there being no ſuch direction in the will of the donor, but only to *ſeven* poor women who were in poſſeſſion at his death; or that if it muſt be paid, yet it might be to other poor women out of any other pariſh at their own appointment. A bill, therefore, was brought againſt the owners of *Carron-houſe*, to have the charity eſtabliſhed for

for ever, and the arrears thereof paid by the defendants, and the growing payments duly made for the time to come, and the poor women to be choſen in ſucceſſion out of *Lambeth* pariſh, and not out of any other pariſh; for otherwiſe the charity would rather be an injury than a kindneſs to *Lambeth*; becauſe, if taken out of other pariſhes, *Lambeth* muſt maintain them, the 4*l. per ann.* being not ſufficient. It was decreed as prayed, and a charity was eſtabliſhed in the hands of the churchwardens in ſucceſſion, though not given ſo in direct words.

If a charity is deviſed to the poor indefinitely, the king ſhall have the diſpoſal thereof. Rep. Temp. Finch. 248. 1 Eq. Caſ. Abr. tit. *Charity*, pl. 7. See *acc.* Attorney-General v. Herrick, Ambl. 712.

A. having deviſed 100*l.* to be applied to ſuch charitable uſes as he had, by writing under his hand, formerly directed, and no ſuch writing being to be found, it was holden that the king ſhould appoint, who gave it to the mathematical boys in *Chriſt's Hoſpital*; which was decreed accordingly; and that the parties ſhould be indemnified againſt the writing referred to. Attorney-General v. Syderfin, 1 Vern. 224.

A., by his will, deviſed all his lands and tenements, in the event of his ſon's dying under age or without iſſue, to the defendant and four others by name, for ſuch charitable uſes and purpoſes as he ſhould direct by codicil or otherwiſe. By his codicil, he ordered and directed, purſuant to that clauſe in his will, that the ſaid lands and tenements ſhould, at the diſcretion of his ſaid truſtees, be ſold and diſpoſed of, or kept in their hands and poſſeſſion; and that the purchaſe-money ariſing thereby, or the rents and profits thereof, ſhould be applied and diſtributed to and amongſt ſuch perſons, or to and for ſuch uſes or purpoſes, in ſuch manner as he ſhould by any writing appoint; and for want of ſuch direction and appointment, then to ſuch perſon or perſons, or to ſuch uſes and purpoſes, as they the ſaid truſtees, or the major part of them, or, in caſe of death, the ſurvivors or ſurvivor of them, or the heirs of ſuch ſurvivor, ſhould judge fit and convenient. The teſtator's ſon died under age and without iſſue. The teſtator left no directions by writing or memorandum as to the application of the eſtates deviſed. The truſtees inſiſted upon the beneficial intereſt in them: the heir at law of the teſtator claimed them as a reſulting truſt. But Lord *Hardwicke* decreed, that, as the intention of the teſtator was clear in favour of charity, a ſcheme ſhould be laid before the maſter for applying the eſtate to ſuch charitable uſes and purpoſes as ſhould anſwer his intention, and alſo for the application and diſtribution of the money that ſhould be coming in out of the growing rents and profits, or out of the money that ſhould ariſe by any future ſale. Cook v. Duckenfield, 2 Atk. 562.

A., by will, gives to *Bread-ſtreet* ward 200*l.*, according to Mr. ——'s will: Lord *Hardwicke* decreed, that the money ſhould be diſpoſed of in ſuch charities as the aldermen and inhabitants of the ward ſhould think moſt beneficial. Baylis and Church v. Attorney-General, 2 Atk. 239.

The

White v. White, 1 Br. Ch. Ca. 12. A legacy was given to *B.* for the benefit of non-conforming miniſters, with the advice of the legacy.

The teſtator, by his will, gave a moiety of the reſidue of his eſtate to ſuch of the *lying-in hoſpitals* as his executor ſhould appoint. Afterwards he ſtruck out of his will the name of his executor, but did not appoint any other executor. It was decreed by Lord *Thurlow*, that the court would appoint; and it was accordingly referred to a maſter, to which of the *lying-in hoſpitals* the legacy ſhould be paid.

C. and *D.*: at the teſtator's death, *B. C.* and *D.* were all dead; yet the court ſuſtained Attorney-General v. Hickman, 2 Eq. Ca. Abr. tit. *Charity*, p. 14. So, where a reſidue was given to *J. V.* to ſuch charitable uſes as he ſhould appoint, recommending poor clergymen, &c. and *J. V.* died in the lifetime of the teſtatrix, yet the charity was ſuſtained, and executed by the court. Moggridge v. Thackwell, 3 Br. Ch. Caſ. 517. See Wheeler v. Shove, Moſ. 288. 301. *contr.*

Attorney-General v. Lady Downing, Ambl. 575.

Sir *George Downing* deviſed an eſtate to truſtees for the purpoſe of founding a college; and directed them to form a plan for the government of it: the truſtees died in the teſtator's lifetime; and Lord *Camden* held the heirs at law entitled to the conduct of the charity.

Attorney-General v. Gleg, 1 Atk. 356.

W. left money to be diſtributed in charity at the diſcretion of his three executors, one of whom died before the information was filed. Lord *Hardwicke* held, that this not being a bare authority, but coupled with an intereſt, ſurvived to the other two executors: but that the executors, in this caſe, could not divide the charities into three parts, and each executor nominate a third abſolutely, becauſe the determination of the property of every object was left by the teſtator to the direction of all the executors.

Attorney-General v. Biſhop of *Cheſter*, 1 Br. Ch. Ca. 444.

Archbiſhop *Secker*, among many charitable legacies, gave to his truſtees, the defendant and Dr. *Stinton*, ſince dead, 1000*l.* ſtock, for the purpoſe of eſtabliſhing a biſhop in his majeſty's dominions in *America*, and ordered, that if any charity to which he had given a legacy, ſhould no longer ſubſiſt, ſuch legacy ſhould fall into the reſidue. It was contended, that there being no biſhop in thoſe parts of *America*, nor any likelihood that there ever would be one, the legacy was void, and fell into the reſidue. But by Lord *Thurlow*, the money muſt remain in court, till it ſhall be ſeen whether any ſuch appointment ſhall take place.

Id. ibid.

Archbiſhop *Secker* alſo gave 1000*l.* to be laid out upon repairing parſonage-houſes. The counſel for the Biſhop of *Cheſter* ſaid, that the archbiſhop's other truſtee being dead, the ſelection of the objects belonged to his client alone. But, by Lord *Thurlow*, it muſt be referred to the maſter, and propoſals of proper objects be laid before him.

Widmore v. The Corporation of Q. *Anne*'s Bounty, Ambl. 636. 1 Br. Ch. Ca. 13. in not. S. C.

The teſtator gave 200*l.* to the corporation of *Q. Anne's Bounty*, to augment poor livings, and directed his executors to divide the reſidue of his perſonal eſtate into three parts, and to pay one third either to the corporation of *Q. Anne's Bounty*, or the ſociety for propagating the goſpel, and another third to ſome publick charity. The legacy to the corporation of *Q. Anne's Bounty* was holden to be void, as, by the rules of that inſtitution, it muſt have been laid out in lands. The legacy which was given to the

ſame

ſame charity, or to the ſociety for propagating the goſpel, was, on the ſame account, ordered to be paid to the latter. And the legacy to ſome publick charity was declared to be good, but that the executors ought to diſpoſe of it under the eye of the court, and therefore were to propoſe a charity to the maſter.]

If one diſpoſe of lands worth 10*l.* a year, to maintain a preacher, ſchoolmaſter, and poor people in *Deal*, and the lands after come to be worth 100*l.* a year, it muſt be all employed to increaſe the ſeveral charities. 8 Co. 130. School of *Thetford*'s caſe, that the price of lands increaſing, the rents ſhall be raiſed, and laid out in augmentation of the charity. See *acc.* Duke's *Charitable Uſes*, 71. 112. [Attorney-General v. Mayor of *Coventry*, 2 Vern. 397. 2 Br. P. C. 236. S. C. Where lands were ſet at an under-value, and had been for a long time ſo enjoyed; the leaſe was ſet aſide, and the tenant decreed to pay the arrears of the rent according to the full value. Beverly v. Farrer, 2 Vern. 414. If there are ſeveral uſes, the court is not bound to direct that they ſhall all be augmented proportionably; but may uſe its diſcretion as to the method in which the ſurplus ſhall be diſtributed. Ambl. 191.] Preced. Chan. 225.

If in the conſtitutions for founding an hoſpital, it be ordained, that no leaſe ſhould be made for above twenty years, and the rent not to be raiſed, nor above three years rent taken for a fine, though the tenant of the hoſpital lands is entitled to a beneficial leaſe upon renewal, yet this conſtitution is not to be followed according to the letter; but as times alter, and the price of proviſions increaſeth, ſo the rent ought to be raiſed in proportion. 2 Vern. 596. 746. S. P.

Where *A.*, ſeiſed of a manor of the yearly value of 240*l.*, deviſed ſeveral legacies, and particularly to his heir at law 40*l.*, and then added, *that being determined to ſettle for the future, after the death of me and my wife, the manor of* F., *with all lands, woods, and appurtenances, to charitable uſes, I deviſe to* M. *and* N., *upon truſt, that they ſhall pay yearly and for ever, ſeveral particular ſums to charitable uſes, amounting in the whole to* 120*l.* per ann.; and gave the truſtees ſomething for their pains; there being an overplus, it was decreed to go in augmentation of the charities, it appearing to be the teſtator's intent to ſettle the whole manor, and that the heir ſhould have no more than 40*l.* Show. P.C. 22. [Attorney-General v. Johnſon, Ambl. 190. Attorney-General v. Sparks, *id.* 201. Attorney General v. Tonna, 2 Vez. jun. 1. 4 Br. Ch. Ca. 103. S.C. Theſe deciſions have proceeded upon the manifeſt intention of the donor, that the whole ſhould be applied to the charity: if, therefore, it turn out to be more than adequate to the number of objects for which it may have been originally provided, it muſt be diſpoſed of to ſimilar purpoſes. Attorney-General v. Earl of *Winchelſea*, 3 Br. Ch. Rep. 373. Where, indeed, the object of the donor is definite, and that cannot take place, the court will not look for another object, but let the property go to the next of kin, or the heir at law. Attorney-General v. Biſhop of *Oxford*, 1 Br. Ch. Rep. 444. So where a teſtator diſcovers no general intention beyond that ſpecified in his will, and that is diſappointed. Attorney-General v. Goulding, 2 Br. Ch. Rep. 428.]

Neither will the courts ſuffer a charity to be diverted to other uſes than the donor intended it; and therefore where money was given for the relief of the poor, and the truſtees laid it out in building a *conduit*, this was holden a miſemployment. Duk.'s Char. 94.

So where ſeveral diſtinct charities were given to a pariſh, *viz.* 12*l. per ann.* for repairing the church, 6*l. per ann.* for mending the highways, and ſo much to the poor, in all 40*l. per ann.*, and the truſtees having paid 10*s.* for every day's lecture to a lecturer, and laid out other parts of it for the ſervice of the pariſh, but not according to the directions of the donor; it was holden by Vern. 42. Man and Ballet.

my lord chancellor, that if it ſhould be admitted that pariſhioners might change and apply parochial charities as they thought fit, it would deſtroy all charities; and therefore ordered, that for what was paid the parſon, they ſhould not be allowed a farthing, but that for the other payments they ſhould be allowed the money, being promiſcuouſly paid for ſeveral years before; but for the future, that it ſhould be paid according to the terms of the charity.

Attorney-General v. Rigby, 3 P. Wms. 145.

[One ſeiſed in fee of a manor grants a rent in fee out of it, as a charity, for the ſupport of ſeveral poor perſons, and afterwards grants the manor to *J. S.* in fee: the nomination of the poor perſons belongs to the heir of the grantor, and doth not go with the manor. But foraſmuch as the grantees and owners of the lands had for upwards of ſixty years enjoyed the nomination of the perſons, who had partaken of the charity, the court allowed to them all the payments they had made to any of the poor, though nominated by themſelves, and would not diſturb any thing that had been already done.

Attorney-General v. Governors of *Harrow* School, 2 Vez. 552.

Where truſtees of a charity had a diſcretionary power to lay out money on a road, the court ſaid they would not interpoſe to control them, unleſs it had been ſhewn that they had acted corruptly or partially; at the ſame time they would not diſmiſs the information, but retained it, in order to keep a hand over them.

Attorney-General v. Stephens, 2 Jur. Eccl. 157. Burn's E. L. tit. *Charitable Uſes*. 1 Atk. 358. S. C. 2 Eq. Ca. Abr. tit. *Charity*, (A), pl. 17.

Dr. *Radcliffe*, by his will, deviſed 300*l.* a-year to two perſons to be choſen by the archbiſhop of *Canterbury*, and certain other truſtees out of Univerſity College in *Oxford*, which ſum he ordered to be paid to them for ten years for their maintenance; five years whereof they were to ſpend in *England* in the ſtudy of phyſick, and the other five abroad. The defendant was one ſo choſen, and ſtudied here according to the directions of the will, and for that time he received his five years' ſalary; but afterwards did not go abroad on account of the ill ſtate of his health; and thereupon in the year 1730 reſigned to the truſtees, who accepted his reſignation, and choſe another in his room; and in the year 1735 an information was exhibited againſt him, that he might account for the five years' ſalary thus received. For the defendant it was argued, that in a late caſe which came before the Houſe of Lords, between *Gaudy* and *Anſtis*, upon an appeal, their lordſhips were of opinion, that the word *maintenance* included education; and therefore, though that word was uſed in the preſent will, *education* muſt be intended by it, as implied; and when the defendant had ſpent half of the time in his education here in *England*, and was prevented by ill health from going abroad, and thereupon had reſigned, and his reſignation had been accepted, and another choſen in his ſtead, it was ſubmitted that the preſent bill muſt be thought an unreaſonable one. And the lord chancellor was of that opinion, and diſmiſſed the information.]

Vern. 55.

The courts will not be eaſily prevailed on to change the terms of a charity, though by the conſent of all the parties intereſted;

as

as where *A.* deviſed 50*l. per annum* for a lecturer in polemical or caſuiſtical divinity, ſo as he was a bachelor or doctor in divinity, and fifty years of age, and would read five lectures every term, and at the end of the term deliver fair copies of the ſame, to be kept in the univerſity; and in default of ſuch lecturer he gave the 50*l. per annum* to ——— *College* in *Oxon*, with conſent of the heir. Application was made to mitigate the rigour of the qualifications, *viz.* that a man of forty might be capable, that three lectures may be ſufficient every term, and that if fair copies were delivered in every year, it may ſuffice: but my lord chancellor refuſed to intermeddle, though no oppoſition was made, and ſaid, that it was not in the power of the heir to alter the diſpoſition of his anceſtor.

[By a private act of parliament for regulating *Bolton* ſchool, the number of truſtees was limited to 12, of whom 7 were to conſtitute a *quorum;* and there was a clauſe in the act, that if any of the conſtitutions or proviſions in the act ſhould be found inconvenient or impracticable, the truſtees might apply by petition to the lord chancellor, who might in a ſummary way, vary ſuch conſtitution or proviſions. It having been found impracticable to collect together ſo many as 7 out of 12 truſtees, inſomuch that no meeting had ever been had, application was made to the lord chancellor, either to increaſe the number of the truſtees, or to reduce the number of the *quorum*. But his lordſhip thought this not within his juriſdiction; that, though it might extend to varying by-laws, or particular proviſions, it did not comprize a power to alter the general conſtitution of the truſt itſelf; and, therefore, that the application muſt be to parliament.

Ex parte Bolton School, 2 Br. Ch. Rep. 662.

Where a charity is ſo given that there can be no objects of it, the court will order a different ſcheme to be laid before it: but if the objects may exiſt (*a*), though they do not at preſent, it will not. *Per* Lord *Thurlow*. And where (*b*) the truſts of a charity ceaſe for want of objects, the charity muſt be applied *de novo*.

Attorney-General v. Oglander, 3 Br. Ch. Rep. 166.

(*a*) If it happen there are no perſons ſufficient to anſwer the deſcription of the charity, the land charged with the payment of the charity ſhall not be diſcharged in the interim, but the money ſhall accumulate, and be applied towards the advancement and increaſe of the charity. Aylet v. Dodd, 2 Atk. 238. (*b*) Attorney-General v. City of *London*, 3 Br. Ch. Rep. 171.

The college of *William* and *Mary* in *Virginia*, who were appointed adminiſtrators of certain charities, having become ſubject to a foreign power, it was ordered that a new ſcheme ſhould be laid before the court for the adminiſtration of the charities.

3 Br. Ch. Rep. 171.

Whether a charity be a publick one, or not, depends upon its extenſiveneſs; not upon the charter of the crown; for this can only make it more permanent than it otherwiſe would be. A deviſe to the poor of a pariſh is a publick charity. Where teſtators have not any particular perſon in their contemplation, but leave it to the diſcretion of a truſtee to chooſe out the object; though ſuch perſon is private, and each particular perſon may be ſaid to be private, yet in the extenſiveneſs of the benefit ariſing from them, they may very properly be called publick charities. A ſum to be diſpoſed of by *A. B.*

2 Atk. 87. *Per* Lord Hardwicke.

and his executors, at their diſcretion, among poor houſe-keepers, is of this kind.

1 Atk. 355. 2 Vez. 426. 1 Vez. 43. 72. A court of equity will give a proper direction as to a charity, without any regard to the propriety or impropriety of the prayer of the information; and though the relator be miſtaken in the title he hath ſet up, yet if in the cauſe a title in fact comes out, that title muſt be eſtabliſhed. For it is a rule of equity, that an information for a charity is not to be diſmiſſed; but there muſt be a decree for its eſtabliſhment.

2 Atk. 328. It is not abſolutely neceſſary that the relators in an information ſhould be the perſons principally intereſted, for the court will take care at the hearing to decree in ſuch a manner as ſhall beſt anſwer the purpoſes of the charity; and, therefore, any perſons, though the moſt remote in the contemplation of the charity, may be relators.

Pickering v. Earl of *Stamford*, 4 Br. Ch. Rep. 214. Although a court of equity gives a very unwilling ear to an application to declare void a charitable bequeſt as within the ſtatute of mortmain, after a long acquieſcence in the party applying; yet it doth not think itſelf in ſuch caſe warranted immediately to diſmiſs the bill, but will direct a reference to the maſter to inquire into the circumſtances.

1 P. Wms. 675. 2 P. Wms. 25. If there be a deficiency of aſſets, charity legacies muſt abate in proportion as well as other legacies, notwithſtanding that by the civil law they have preference to all others.

But where a teſtator, among other bequeſts to charities, gave 3 *l.* a piece to the poor of three ſeveral pariſhes; the court looked upon them as part of the funeral, and as doles at the funeral; and therefore held, that no abatement ought to be made out of them. 2 P. Wms. 25.

Makeham v. Hooper, 4 Br. Ch. Ca. 153. Attorney-General v. Tyndall, Ambl. 614. It was formerly the practice of the court to marſhal aſſets in favour of a charity; but this hath been over-ruled by the more recent determinations, inaſmuch as it enables a man to do that *per obliquum*, which he could not do *per directum*.]

Foſter v. Blagden, *id.* 704. Hillyard v. Taylor, *id.* 713.

(F) Of the Commiſſioners of Charitable Uſes, purſuant to the Statute 43 *Eliz.*

(*a*) *Vide* the uſes before mentioned, letter (C). Note: The ſame power is given to the chancellor of the duchy of *Lancaſter*, for lands lying within the duchy. *Vide* 2 Inſt. 710.

BY the 43 *Eliz. cap.* 4. it is enacted, "That where lands, &c. "are given to any (*a*) charitable uſe, the lord chancellor or "keeper of the great ſeal, may award commiſſions under the "great ſeal, unto any parts of the realm, directed to the biſhop "and his chancellor, in caſe there ſhall be any biſhop of the "dioceſe at the time, and to other perſons of good behaviour, "authorizing them, or any four or more of them, to inquire, as "well by the oaths of twelve men or more of the county, as by "all other good and lawful ways and means, of all and ſingular "ſuch gifts, limitations, &c., of lands, tenements, &c., and of "all abuſes, breaches of truſt, negligences, miſemployments, not "employing, concealing, defrauding, miſconverting, or miſ-"governing any lands, &c., heretofore or hereafter to be given "to

" to any charitable uſe; and after calling before them the parties " intereſted in any ſuch lands, &c. ſhall make inquiry by the " oaths of twelve men or more of the county, (to which the par- " ties intereſted may make their challenges,) and upon ſuch in- " quiry, hearing, and examination, ſet down ſuch orders, judg- " ments, and decrees, as the ſaid lands, &c. may be faithfully " employed to the intent for which they were given; which " orders, decrees, or judgments, being agreeable to the inten- " tion of the donors or founders, ſhall ſtand good and be af- " firmed until the ſame be undone or altered by the lord chan- " cellor, upon the complaint of any party grieved; which ſaid " orders, judgments, and decrees of the ſaid commiſſioners, ſhall " be certified under the ſeal of the ſaid commiſſioners, or any " four of them, within the time limited in the commiſſion, to " the lord chancellor, who ſhall take ſuch order for the due ex- " ecution of all or any the ſaid judgments, orders, or decrees, " as ſhall be fit and convenient; and may upon the hearing " thereof, at the application of any party grieved, annul, dimi- " niſh, alter, or enlarge the ſaid orders, judgments, and decrees " of the commiſſioners, and may tax and award good coſts againſt " perſons complaining without cauſe."

Vide the ſtatute, and the exceptions thereto, as to lands given to colleges, where truſtees are appointed by the founder, &c.

By virtue of this act the commiſſioners may appoint truſtees, and enable a certain number of them to demiſe lands, &c. for the beſt advantage of the charity; and that when ſuch a number of them die, the ſurvivors may elect others, and ſo continue the number appointed. Duke's Char. 124.

They may likewiſe turn out truſtees who miſbehave themſelves, as by making leaſes at low fines and ſmall rents, &c. and may decree ſuch leaſes void. 2 Inſt. 710. Duke's Char. 124.

If one who hath a leaſe of lands charged with a charity, commits waſte, this is ſuch a miſemployment for which the commiſſioners may decree the leaſe void. Duke's Char. 116.

If a rent-charge is granted to a charitable uſe out of lands in ſeveral counties, the commiſſioners are to charge this rent, by their decree, upon all the lands in every county, according to an equal diſtribution, having a regard to the yearly value of all the lands charged; and (*a*) cannot by their decree charge one or two manors with all the rent, and diſcharge the reſidue in other counties or places; for that would be decreeing contrary to the intent of the donors. Duke's Char. 65.

(*a*) The town of *A.* was, upon a commiſſion of charitable uſes, decreed liable to a charity, and the grantees diſtrained for the whole on one who held only part of the lands chargeable; and it was holden, that, the whole town being made chargeable, they might ſue for the whole, or any part; but a commiſſion was awarded to apportion each man's ſhare. Chan. Rep. 91. It hath been holden, that all the tertenants of lands liable to a charity, need not be made parties to the ſuit, for this would put the charity to too great difficulty; 1 P. Wms. 599. But yet, thoſe who are ſued, may make the others parties to the information, and compel them to a contribution.

The commiſſioners of charitable uſes cannot decree coſts on this ſtatute; but if there be an appeal from their decree, my lord chancellor may decree the coſts, not only of the appeal, but likewiſe of the Salk. 163. [1 Eq. Ca. Abr. 126. That the

commiſſioners have no power to award coſts was expreſſly determined

the commiſſion; and, though they decree coſts, yet that ſhall not, upon an appeal, be ſufficient to reverſe the decree; for my lord chancellor may either increaſe or leſſen the coſts, or exempt the party from them entirely.

in Wharton v. Charles, Ch. Ca. Finch. 81. See too, 2 Atk. 239. Lord Coke thought, that the power of the courts of appeal to give coſts, being limited by the act *againſt ſuch perſons as they ſhould find to complain without juſt cauſe*, no coſts (if the order, judgment, or decree be annulled, diminiſhed, or enlarged) ought to be given by the lord chancellor to the party complaining. 2 Inſt. 712. But in the caſe of the Corporation of *Burford* v. Lenthall, Lord Hardwicke, on conſideration of precedents, allowed coſts to the exceptants upon thoſe exceptions in which they had prevailed; and to the reſpondents upon the exceptions in which the reſpondents had prevailed; and this, he ſaid, the courts of equity had always done, not from any authority, but from conſcience and honeſt diſcretion, as to the ſatisfaction on one ſide or other, on account of vexation. 2 Atk. 552. 739.]

2 Atk. 552. 1 Ch. Ca. 135. 158. 193. 267. 3 Bl. Comm. 428.

[The decree of the commiſſioners is returned into the petty-bag office; and then the defendant is ſerved with a writ of execution, upon which he may file exceptions, and pray to ſtay proceedings till they are heard.—It was formerly doubted, whether the court of Chancery could proceed in the manner here chalked out. It is now ſettled, however, that a ſuit may be inſtituted in that court either prior, or ſubſequent to ſuch decree; and if ſubſequent, it is treated as an original cauſe, in which neither party is bound by what appeared before the commiſſioners, but may ſet forth new matter. For the court of Chancery mix the juriſdiction of bringing informations in the name of the attorney-general, with the juriſdiction given them under the ſtatute, and proceed either way, according to their diſcretion.

Cro. Car. 40.

It was reſolved, in the 2 *Cha.* 1. That a determination once made by the chancellor under this act, could not be re-examined upon a bill of review, as is uſual in other caſes in Chancery; but that here the decree is concluſive, becauſe it takes its authority by the act of parliament, which mentions but one examination; and it is not like the caſe where the chancellor makes a decree by his ordinary authority. But in the year 1643, it was reſolved by the judges and king's counſel, aſſiſtants in the houſe of peers, that in ſuch caſe, the party grieved may petition the king in parliament, and have his complaint examined there; and ſo the decree may be confirmed, altered, or annulled; and then be final. All which was actually done, in the aforeſaid year, and purſuant to the aforeſaid reſolution, on occaſion of a decree of the Lord Keeper *Coventry*, in the caſe of *Eaſt Ham* in *Eſſex*.

Duke, 62. 3 Bl. Comm. 428.

Where land is given to perſons in truſt to perform a charitable uſe, and the donor hath appointed ſpecial viſitors to ſee that the truſtees perform the uſe according to his intent; in that caſe, if the truſtees defraud the truſt, the commiſſioners cannot meddle, but the viſitors are to perform it. But where the viſitors are truſtees alſo, there the commiſſioners may, by their decree, reform the abuſe of the charity; for, otherwiſe, ſuch breach of truſt would eſcape unpuniſhed, unleſs in Chancery or in parliament, which would be a tedious and diſagreeable ſuit for poor perſons.]

Duke, 68, 69. See too, 2 P. Wms. 325. The conſtruction of § 3. of the 43 of El. ſaith Lord Hardwicke, is, that where a college, hoſpital, or ſchool is founded, and a ſpecial viſitor appointed, or a viſitor by operation of law, the commiſſion by virtue of that ſtatute, ſhall not interpoſe. But this doth not extend to a diſtinct, collateral charity. 2 Atk. 554. That the court of Chancery will not interfere, where there are local viſitors, or where the charities are eſtabliſhed by charter, unleſs the perſons, appointed as viſitors or governors, have alſo the management of the revenues, is ſettled in a variety of caſes. 1 Vez. 72. 2 Vez. 328. 3 Atk. 108. 2 Vez. jun. 47.

*(G) Of the Statute 9 *Geo.* 2. *c.* 36. for regulating Gifts in Mortmain by Will, &c.

BY the above ſtatute it is enacted, "That no manors, lands, "tenements, rents, advowſons, or other hereditaments, cor- "poreal or incorporeal whatſoever, nor any ſum or ſums of mo- "ney, goods, chattels, ſtocks in the publick funds, ſecurities for "money, or any other perſonal eſtate whatſoever, to be laid out "and diſpoſed of in the purchaſe of any lands, tenements, or he- "reditaments, ſhall be given, granted, aliened, limited, releaſed, "transferred, aſſigned, or appointed, or anyways conveyed or ſet- "tled to or upon any perſon or perſons, bodies politick or corpo- "rate, or otherwiſe, for any eſtate or intereſt whatſoever, or any- "ways charged or incumbered by any perſon or perſons whatſo- "ever, in truſt, or for the benefit of any charitable uſes whatſo- "ever; unleſs ſuch gift, conveyance, appointment, or ſettlement "of any ſuch lands, tenements, or hereditaments, ſum or ſums of "money, or perſonal eſtate (other than ſtocks in the publick "funds), be, and be made by deed indented, ſealed and delivered "in the preſence of two or more credible witneſſes, *twelve* calen- "dar months at leaſt before the death of ſuch donor or grantor "(including the days of the execution and death), and be en- "rolled in his majeſty's high court of Chancery, within *ſix* ca- "lendar months next after the execution thereof; and unleſs ſuch "ſtocks be transferred in the publick books, uſually kept for the "transfer of ſtocks, ſix calendar months at leaſt before the death "of ſuch donor or grantor (including the days of the transfer and "death), and unleſs the ſame be made to take effect in *poſſeſſion* "for the charitable uſe intended, immediately from the making "thereof, and be without any power of revocation, reſervation, "truſt, condition, limitation, clauſe, or agreement whatſoever, for "the benefit of the donor or grantor, or of any perſon or perſons "claiming under him."

§ 2. "*Provided always*, that nothing herein before mentioned "relating to the ſealing and delivering of any deed or deeds, "twelve calendar months at leaſt before the death of the grantor, "or to the transfer of any ſtock *ſix* calendar months before the "death of the grantor, or perſon making ſuch transfer, ſhall ex- "tend, or be conſtrued to extend, to any purchaſe of any eſtate "or intereſt in lands, tenements, or hereditaments, or any transfer "of any ſtock, to be made really, and *bonâ fide*, for a full and va- "luable conſideration actually paid at, or before the making of "ſuch conveyance or transfer, without fraud or colluſion."

By § 3. "All gifts, grants, conveyances, appointments, aſſur- "ances, transfers, and ſettlements whatſoever of any lands, &c. "made in any other manner or form than by this act is directed "and appointed, ſhall be abſolutely null and void."

But by § 4., not to prejudice the two univerſities, or the col- leges of *Eton*, *Wincheſter*, or *Weſtminſter*.

 § 5. ["*Pro-*

§ 5. ["*Provided neverthelefs*, that no ſuch college, or houſe of "learning, which doth or ſhall hold or enjoy ſo many advowſons "of eccleſiaſtical benefices, as are or ſhall be equal in number to "one moiety of the fellows, or perſons uſually ſtiled or reputed "as fellows; or where there are or ſhall be no fellows, or perſons "uſually ſtiled or reputed as fellows, to one moiety of the ſtu- "dents upon the foundation, whereof any ſuch college or houſe "of learning doth, or may, by the preſent conſtitution of ſuch "college or houſe of learning conſiſt—be capable of purchaſing, "acquiring, receiving, taking, holding, or enjoying any other ad- "vowſons of eccleſiaſtical benefices by any means whatſoever: "the advowſons of ſuch eccleſiaſtical benefices as are annexed to, "or given for the benefit or better ſupport of the headſhips of "any of the ſaid colleges or houſes of learning, not being com- "puted in the number of advowſons hereby limited."]

This act not to extend to eſtates in *Scotland*.

Aſhburnham v. Bradſhaw, Burn's E.L. tit. *Mortmain*.

[A will, deviſing lands to charitable uſes, was made before this ſtatute paſſed; but the teſtator did not die till after it had commenced: it was determined by eleven judges, that the deviſe was good in law, notwithſtanding the ſtatute.

Willet v. Sandford, 1 Vez. 178. 186. Ambl. 453. S. C.

A will, deviſing lands in truſt for a charity, was made *before* the ſtatute; and *after* the ſtatute, the teſtator made a codicil, deviſing the ſame lands, together with another piece of land, to the ſame truſtees, and to two others, for the ſame charity, making ſome ſlight alterations in other parts of the will, confirming it in the reſt, and declaring, that the codicil ſhould be annexed to, and taken as part of his will. Lord *Hardwicke* held, that as to the lands given by the will, the deviſe was good, as the codicil did not revoke either the beneficial or truſt eſtate, but was intended by the teſtator as a confirmation of the will; and, both from the nature of the inſtrument, and the words, was to be taken as a part of it. But as to the additional land given by the codicil, the deviſe was void, it being deviſed only by the codicil, which was ſubſequent to the ſtatute.

Attorney-General v. Hartwell, Ambl. 451.

But a will of perſonal eſtate admits of a different conſideration; for where a teſtator, by a will dated prior to the ſtatute, deviſed the reſidue of his perſonal eſtate to be laid out in land, and ſettled to certain charitable uſes; and after the ſtatute, made a codicil, by which, after giving a few legacies, he confirmed the will; Lord *Northington* declared ſo much of the will as related to the reſidue, to be void by the ſtatute; the codicil, in this caſe, by altering the diſpoſition of the reſidue, and confirming the will, making a new publication of it.

Attorney-General v. Hartley, 4 Br. Ch. Rep. 412.

A. (before the ſtatute) gave real and perſonal eſtate to a uſe that would be within the ſtatute, and to another uſe that would not be affected by it: *B.* (after the ſtatute) gave perſonal eſtate to the uſe of *B.*'s will: the eſtate of *A.* being ſufficient for the firſt uſe, the whole of the ſecond giſt ſhall go to the valid uſe.

(*a*) Screſby v. Holias, Burn's E.L.

As land itſelf cannot be deviſed to a charitable uſe, ſo neither can perſonal eſtate to be laid out in land; but (*a*) if money is given

to be laid out in lands *or otherwiſe, as the executors ſhall be adviſed; or if* (a) *the teſtator directs money to be placed in the funds, until it can be laid out in lands to the ſatisfaction of his truſtees;* it hath been determined, that ſuch deviſe is good, by reaſon of the election given to the truſtees. But the latter (b) part of this doctrine hath been conſiderably ſhaken by a late caſe, wherein it was adjudged, that a deviſe of money to be laid out in land, *and until an eligible purchaſe could be made, to be placed out at intereſt,* is void, becauſe land ultimately is the thing intended to be given.

tit. *Mortmain.*
(a) Grimmet v. Grimmet, Ambl. 210. Highmore, 79. S. C.
(b) Grieve v. Caſe, 4 Br. Ch. Ca. 67.

A deviſe of money to truſtees *to erect* (c) *an hoſpital, in ſome convenient place in or near the city of Y.; or, in* (d) *order to and towards erecting a ſchool;* was thought by Lord *Hardwicke* not to be within the ſtatute; there being no expreſs direction to lay it out in the purchaſe of land; for that *erect* as much imports foundation as building. And where (e) indeed it was manifeſtly the intention of the teſtator, that the money ſhould be laid out in land; his Lordſhip held, that though it could not be lawfully ſo applied, yet it might be lawfully applied in building upon land already appropriated to charity, or which the truſtees could get by the generoſity of any perſon. But later (f) determinations have ſaid, that if a building be expreſsly directed to be built upon ground purchaſed with the teſtator's money, a court of equity is not at liberty to direct it to be built upon ground acquired by other means; even though there be a clauſe in the will empowering the truſtees, in caſe the declared intention cannot take effect by law, to lay out the money to other charitable uſes as near ſuch intention as the law will admit.

(c) Vaughan v. Farrer, 2 Vez. 182.
(d) Gaſtril v. Baker, cited in 2 Vez. 185. A gift of perſonalty to *eſtabliſh* a ſchool, was holden good by Lord Thurlow. Attorney-General v. Williams, 4 Br. Ch. Rep. 526.
(e) Attorney-General v. Bowles, 3 Atk. 806. 2 Vez. 547.

S. C. (f) Attorney-General v. Tyndall, Ambl. 614. Pelham v. Anderſon, 1 Br. Ch. Rep. 444. note. Attorney-General v. Naſh, 3 Br. Ch. Rep. 588.

And where money (g) was bequeathed to erect a ſchool-houſe in a pariſh, and there was a piece of waſte ground belonging to the pariſh, on which an old ſchool-houſe formerly ſtood, yet, as the will did not point to this particular ground, the court would not order the money to be laid out upon it.

(g) Attorney-General v. Hyde, Ambl. 751. 1 Br. Ch. Ca. 444. note. S. C.

That a bequeſt of money to build or repair upon land already in mortmain, is not within the ſtatute. See Brodie v. Duke of Chandois, 1 Br. Ch. Rep. 444. note. Attorney-General v. Biſhop of *Cheſter*, *id.* 444. Glubb v. Attorney-General, Ambl. 373. Harris v. Barnes, *id.* 651.

A deviſe of money to the corporation of *Queen Anne's Bounty*, was holden void, becauſe they are bound by their rules to lay out the money in land; and though the crown has power to make new rules, the deviſe could not be ſupported, becauſe it muſt be regulated by the rules in being at the time of the teſtator's deceaſe.

Widmore v. Woodroffe, Ambl. 636.

If a man deviſe his land to truſtees *to be turned into money, and that money laid out in a charity*, it is not good within this act; for it is an intereſt ariſing out of land.

Burn's E. L. tit. *Mortmain.* Gravenor v. Hallum, Ambl. 641. Attorney-General v. Lord *Weymouth*, *id.* 20. Durour v. Motteux, 1 Vez. 320.

So a deviſe *of a mortgage*, or *of a term of years*, to a charity, is not good; for the words of the ſtatute are, that the lands ſhall not

Attorney-General v. Meyrick,

2 Vez. 44. Attorney-General v. Graves, Ambl. 155. be *conveyed or ſettled, for any eſtate or intereſt whatſoever, or any ways charged or incumbered, in truſt or for the benefit of any charitable uſe.*

Attorney-General v. Tomkins, *id.* 216. Attorney-General v. Caldwell, *id.* 635. A leaſe from the crown for years, of the right and power of laying chains in the river *Thames*, for mooring ſhips, and of all profits ariſing therefrom, is an intereſt in land, and, therefore, within the ſtatute. Negus v. Coulter, Ambl. 367.

Arnold v. Chapman, 1 Vez. 108. If a man gives a legacy to his executors by name, and then deviſes a copyhold to *A.*, he paying his *executors* 1000*l.*, and gives the reſidue of his eſtate to a charity; this 1000*l.* will go to the executors, not for their private benefit, but in their capacity of executors, for the purpoſes of the will; and being a charge on the real eſtate, is within the ſtatute, and a void bequeſt.

Campbell v. Earl of *Radnor*, 1 Br. Ch. Rep. 271. *A. H.* having a conſiderable eſtate in land, and alſo a large perſonal eſtate upon mortgage on lands in *Norfolk*, deviſed a ſum of 7000*l.*, to be laid out after the death of his wife, in the purchaſe of lands in *Ireland*, the rents and profits to be diſtributed among poor perſons in *Ireland*. *E. H.*, his widow and executrix, proved his will, and, afterwards, by her will reciting the will of *A. H.*, and that his perſonal eſtate was out upon mortgage in *Norfolk*, ſhe ordered her real eſtate to be ſold, and the 7000*l.* to be paid to the uſes declared by the will of *A. H.*—By the Lords Commiſſioners, *Loughborough*, *Aſhhurſt*, and *Hotham*—the bequeſt to the charity would be good, being to a charity in *Ireland*, if it was not made otherwiſe by the circumſtance of the money being upon mortgage on an eſtate here, which could not be liable to the deviſe to a charity: but it is too late to take that objection on the will of *E. H.*, ſhe admitting by the deviſe to the ſame uſes, that ſhe had perſonal eſtate of the teſtator: ſhe is therefore paying a debt, not giving money that is upon mortgage, but only admitting that ſhe had 7000*l.* perſonal eſtate from him; which, as ſhe was executrix and reſiduary legatee, is admitting a debt to his eſtate. Although the court will not marſhal aſſets for a charity, yet it will make the legatees go upon the mortgage.

Blandford v. Tackerell, 4 Br. Ch. Rep. 394. A charitable deviſe for general purpoſes is void within the ſtatute: *ſecùs*, of a deviſe for the benefit of perſons ſuſtaining a certain character, as, children and grand-children.

Jones v. Williams, Ambl. 651. A bequeſt of money, to ariſe by ſale of lands, to be applied in water-works for the uſe of the inhabitants of a town, is a publick charitable uſe, and therefore within the ſtatute and void.

Oliphant v. Hendrie, 1 Br. Ch. Rep. 571. A bequeſt of money, to be laid out in heritable ſecurities in *Scotland*, is not within the ſtatute.]

Churchwardens.

CHURCHWARDENS (*a*) are officers inſtituted for the benefit and advancement of religion, whoſe chief duty is to ſuppreſs all prophaneneſs and immorality, and to ſee that the publick worſhip be performed with due decency and reverence.

(*a*) Of their firſt inſtitution, *vide* Kennet's Par. Antiq. 649. Of Walter Reyſidesmen, or ſinodſmen, *vide* Degg's Parſon, 183. [Burn's E. L. tit. *Churchwardens.* nolds' Conſtit. An. 1322. § 6. Chichley's Conſtit. An. 1416. 2 Johnſon's E. L.]

But though they deal chiefly in matters belonging to the church, yet are they every where treated of in our law books, as (*b*) temporal perſons, and are undoubtedly to be conſidered as a (*c*) lay corporation veſted with a temporal right in their offices, and a ſpecial property in the goods belonging to the church; which further appears by the duties enjoined them by ſeveral ſtatutes and acts of parliament; as will be more fully explained under the following heads:

(*b*) *Vide* Hard. 379.

(*c*) And may take goods for the benefit of the church. Roll. Abr. 393. March 66. but not lands; and therefore, if a feoffment be made to the uſe of the churchwardens of *D.*, the uſe is void. 12 H. 7. 27. Kelw. 32. a. Finch's Law, 8vo. edit. 178. Co. Lit. 3. a. S. P. March, 66. S. P. *per Cur.* and *vide* Duke's Char. Uſes, 82., where it is ſaid, that lands given them for a charitable uſe, ſhall be a good appointment within the 43 El. c. 4. *Vide* tit. *Charitable Uſes, and Mortmain.*—But, by cuſtom, in ſome places, as, in *London*, the parſon and churchwardens are a corporation, and may purchaſe and demiſe lands, *&c.* Cro. Jac. 532. March, 66, 67. Lane, 21. 5 Mod. 395. And *Q.* Whether they may not have land by preſcription for the reparation of the church? But, admitting they may, yet they cannot preſcribe generally *in non decimando*, for they are not ſpiritual perſons, though their office be a kind of an eccleſiaſtical office. Roll. Abr. 653. 2 Roll. Rep. 107. Comp. Incumb. 507, 508. [By 9 Geo. 1. c. 7. they are enabled to purchaſe a workhouſe for the poor.]

(A) Of the Manner and Right of chooſing Churchwardens.

(B) Of their Intereſt in, and Power over the Things belonging to the Church.

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

(D) Of their Power and Duty in making Preſentments, and hindering Irreverence in the Church.

(E) Of their Accounts; and herein of Actions brought by, or againſt them, and the Remedies they have when their Time is expired.

(A) Of the Manner and Right of chooſing Churchwardens.

Cro. Jac. 532. Cro. Car. 352. Noy, 31. 139. 2 Roll. Abr. 234. pl. 1. Hard. 379. Raym. 439. [In ſome places, the lord of the manor preſcribeth for the appointment of churchwardens: and this ſhall not be tried in the eccleſiaſtical court, although it be a preſcription of what appertains to a ſpiritual thing. God. 153.]

BY the common law, the right of chooſing churchwardens belongs to the pariſhioners, who are to be at the charge of repairing the church, &c., and (*a*) therefore it is but fitting that they ſhould have it in their power to determine what perſons are proper to be entruſted in theſe concerns: nor (*b*) doth any canon deprive them of this right; for though by cuſtom the pariſhioners in ſome places chooſe one, and the parſon another; yet this is by virtue of the cuſtom; the validity of which, as of all other cuſtoms, muſt be determined in the king's temporal courts: (*c*) nor can the archdeacon, or any others, who by virtue of their offices are to ſwear and admit them, control any ſuch election; for herein their offices are purely miniſterial.

That they may be choſen by a ſelect veſtry, *vide* Jones, 439. Cro. Car. 551. But *qu.* They are to be choſen every *Euſter* week, or ſome week following, according to the direction of the ordinary Can. 89. What perſons are exempted from ſerving, *vide* head of *Privileges*, and 1 W. & M. c. 18. By which ſtatute, if any diſſenting from the church be choſen churchwarden, he may execute the office by a ſufficient deputy, by him to be provided, who ſhall comply with the laws in that behalf. (*a*) And hence alſo it is, that in *London*, where the parſon and churchwardens are a corporation, and may purchaſe and demiſe lands, and diſpoſe of goods, the churchwardens are always choſen by the pariſhioners. Cro. Jac. 532. March, 66. Lane, 22. [But the canon ſhall take place in the new-erected pariſhes in *London* (unleſs the act of parliament, in virtue of which any pariſh was erected, ſhall have ſpecially provided, that the pariſhioners ſhall chooſe both); inaſmuch as *no cuſtom* can be pleaded in ſuch new pariſhes. Gibbs, 215. (*b*) By 89th canon, anno. 1603, churchwardens are to be choſen by the parſon and pariſhioners jointly, if it may be: if not, the parſon names one, and the pariſhioners are to chuſe another. But this canon is ſaid not to be regarded by the common law. Hard. 378. *per* Hale. Carth. 118. S. P. *per* Holt Ch. Juſt. But *vide* 2 Vent. 41., and the following caſe. There was a cuſtom for the parſon to appoint one churchwarden, and the two old churchwardens the other: but it went no further. The two old churchwardens could not agree; ſo the one preſents *Berwick*, and the other *Catton*. And the court held, that by this diſagreement, the cuſtom was laid out of the caſe; and then they muſt reſort to the canon: under which, *Catton* being duly elected, they decreed for him. Catton v. Barwick, 1 Str. 145.] (*c*) For if the archdeacon refuſeth them, a *mandamus* lies; of which there are numberleſs inſtances. *Vide* 6 Mod. 89. 2 Ld. Raym. 1068. 3 Salk. 88. And where, for a falſe return, an action on the caſe lies, 2 Lutw. 1012. And that in ſuch action both the churchwardens may join. 3 Lev. 362. And for an ill and evaſive return, *vide* Vent. 267. 2 Salk. 433. pl. 14. And that before he is ſworn he may officiate. Vent. 267. And that there is no fee due for ſwearing them, except by cuſtom. Salk. 330. pl. 2.

Carth. 118. And though by cuſtom the rector or vicar may name one, yet where the vicar of *St. Giles* in *Northampton* was under a deprivation for not taking the oaths to King *William* and Queen *Mary*, and the church being vacant, the pariſhioners proceeded to the election of two churchwardens, and preſented them to be ſworn; but the regiſtrar of the conſiſtory court being a friend to the vicar, refuſing to ſwear them, unleſs that perſon, whom the late vicar approved, was nominated one, a *mandamus* was granted.

Carth. 393. Hill. 8 W. & M. The King and Rees. Comb. 417. S. C. Salk. 366. The pariſhioners are alſo judges of the fitneſs and qualifications of the perſons they chooſe for that office; and therefore, where to a *mandamus* to ſwear a churchwarden, choſen according to cuſtom, the archdeacon returned, that the perſon preſented was a poor dairy-man, who had no eſtate, and was *perſona minus habilis*

habilis & idonea for that office; the court granted a peremptory *mandamus*. pl. 5. S. C. 12 Mod. 116. S. C. Ld. Raym. 138. S. C. 5 Mod. 325. S. C.

[*Mandamus* to the archdeacon of *Colcheſter*, to ſwear *Rodney Fane* into the office of churchwarden. He returns, that before the coming of the writ, he received an inhibition from the Biſhop of *London*, with a ſignification that he had taken upon himſelf to act in the premiſes. But by the court—the return is ill. It doth not appear that the town of *Colcheſter* is within the dioceſe of the biſhop who inhibits: beſides, the archdeacon is but a miniſterial officer, and is obliged to do the act, whether it be of any validity or not. And a peremptory *mandamus* was granted. 1 Str. 610. Although the pariſhioners neglect never ſo long to chooſe churchwardens, yet the ordinary hath no power of appointing them. Stutter v. Freſton, 1 Str. 52.

There hath been ſome diverſity of opinion among the judges, whether it be a good return to a *mandamus* to ſwear a churchwarden, that *he was not elected*, inaſmuch as the archdeacon cannot judge either of the election or of the qualities of the perſon elected. But the proper diſtinction, as to this point, Dr. *Burn* thinks is taken in the caſe of *Q.* v. *Twitty* (*a*), *M.* 1 *An. Mandamus* to ſwear a churchwarden, ſuggeſting that he was *duly elected*. The return was, that he was *not duly elected*. It was objected, that this was not a good return. But by *Holt*, C. J.—Where the writ is, to ſwear one *duly elected*, there a return that he was *not duly elected*, is a good return; for it is an anſwer to the writ: but where it is to ſwear one *choſen* churchwarden, there a return that he was *not duly choſen*, is naught, becauſe it is out of the writ and evaſive. Rex v. White, 2 Ld. Raym. 1379. Rex v. Harwood, *id.* 1405. Regin. v. Guiſe, *id.* 1008. (*a*) 2 Salk. 433.

To a *mandamus* to ſwear the plaintiff churchwarden of *Heſton* in *Middleſex*, the defendant returned, that he was not duly elected. In the courſe of the trial, the queſtion was, Where the common right of chooſing churchwardens reſts? The plaintiff inſiſted, it was in the pariſhioners at large as to both the churchwardens, and would therefore have left it upon the defendant to ſhew a cuſtom or right in the parſon to name one. The defendant on the contrary inſiſted, that of common right it was in the parſon and pariſhioners, and therefore it lay upon the plaintiff to prove a cuſtom in the pariſhioners to chooſe both. And of this opinion was *Lee*, C. J., and that though there are ſome dictums to the contrary, yet they had never been regarded. The plaintiff, therefore, went on to prove a cuſtom to chooſe both by the pariſhioners, but failed in it; it appearing that though the parſon had generally left it to the pariſhioners, yet he had ſometimes interfered. *Lee*, C. J. likewiſe held, that a curate ſtood in the place of the parſon, for the purpoſe of nominating one churchwarden. Hubbard v. Sir Henry Penrice, 2 Str. 1246.

A *mandamus* was directed to the commiſſary of the conſiſtorial and epiſcopal court of the Biſhop of *Wincheſter* for the parts of *Surry*, to admit and ſwear *Henry Griffith* and *Thomas Garner* churchwardens of the pariſh of *Saint Olave*, *Southwark*. And a like *mandamus* was alſo directed to him to admit and ſwear another Rex v. Dr. Harris, 3 Burr. 1420. 1 Bl. Rep. 430. S. C.

ſet of churchwardens into the ſame office. The commiſſary returned, that a cauſe was depending before him, in which it was diſputed, which of the two ſets of churchwardens had been duly elected, and till that is determined, he cannot admit either one ſet or the other.—By Lord *Mansfield* and the court—The return is bad: the commiſſary cannot try the right. He ought to obey both writs, and it is of no prejudice to either party.—It was propoſed by the court, and conſented to by the parties, to try the right on a feigned iſſue; the execution of the peremptory *mandamus* to be ſuſpended till after the trial, and then the peremptory *mandamus* to go to ſwear in thoſe that ſhould prevail on the trial.

Caſtle v. Richardſon, 2 Str. 715.

To a libel in the eccleſiaſtical court for not taking upon him the office of chapel-warden, the defendant pleads, that it is a donative, and thereupon moves for a prohibition. Upon debate, it was denied; the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the pariſh officers, there was none; for they are the officers of the pariſh, and not of the patron of the donative.]

Mich. 27 Car. 2. in B. R. between Whaley and Lambert. 3 Keb. 533. 542. S. C.

Prohibition was granted *niſi* to the eccleſiaſtical court, in a caſe where *J. S.* ſued as churchwarden of, *&c.* in *Colcheſter*, on a ſuggeſtion, that in *Colcheſter* there is a cuſtom for the inhabitants to elect the churchwardens, and that *A.* and *B.* were duly elected, which matter the defendant had pleaded in the ſpiritual court; but the plea was refuſed; but it appearing that *J. S.* was churchwarden *de facto*, choſen by the parſon, and that he all the year acted as ſuch; and that he, with the inhabitants and another churchwarden, made the tax for which the defendant was ſued in the eccleſiaſtical court; the rule for a prohibition was diſcharged; for, *per Cur'*, where the queſtion is only, Who is churchwarden? if ſuch cuſtom is alleged, a prohibition ſhall be granted: but the matter here is for a tax for the repair of the church; and it is not material now whether he was duly elected or not; it is ſufficient that he was guardian *de facto*; and it may be as well put in iſſue, Whether the miniſter was a rightful miniſter? Beſides, this tax is not rated by the churchwardens, for they have no ſuch power; but it is a common charge, impoſed by the major part of the pariſhioners; and the churchwardens do no more in aſſeſſing it, than the other pariſhioners; and the tax will be well aſſeſſed by the major part of the inhabitants, though the churchwardens are againſt it: their chief buſineſs is in collecting it; and the matter is a matter of eccleſiaſtical cognizance; for the ſpiritual judge may enquire touching the want of reparations of the church. And *Note*, That upon the rule for diſcharging the prohibition, all this matter was ordered to be entered, for fear it ſhould be afterwards thought, that a prohibition was decreed where a cuſtom was in queſtion.

(B) Of their Intereſt and Power over the Things belonging to the Church.

THE churchwardens, when choſen, are a corporation, intruſted with the care and management of the goods belonging to the church, which they are to order for the beſt advantage of the pariſhioners: they are likewiſe enabled to take goods for the benefit of the church; but cannot diſpoſe of them without the conſent of the pariſhioners. Roll. Abr. 393. 2 Inſt. 492. 2 Roll. Rep. 67. Yelv. 173. 2 Brownl. 215. Comp. Incumb. 390. [2 P. Wms. 125. Where an obligation is made to them and their ſucceſſors, and they die, their executors ſhall have the action, and not their ſucceſſors. Vin. tit. *Churchwardens*, D.]

They have ſuch a ſpecial property in the (*a*) organ, (*b*) bells, (*c*) pariſh books, (*d*) bible, chalice, ſurplice, *&c.* belonging to the church, that for the taking away, or for any damage done any of theſe, they may (*e*) bring an action at law; and therefore (*f*) the parſon cannot ſue for them in the ſpiritual court. F.N.B. 91. K. (*a*) Roll. Abr. 393. (*b*) Cro. Eliz. 145. 179. (*c*) 5 Mod. 395, 396. Ld. Raym. 337. (*d*) Roll. Rep. 67. (*e*) That the action muſt be for *bona parochianorum*, and not *bona eccleſiæ*. Mod. 65. *per Cur.* 2 Keb. 675. S. C. and S. P. *per Cur.* Vent. 89. S. C. and S. P. and the court inclined accordingly; but ſaid, the precedents were both ways.—Where they may ſue at common law for damages, and in the ſpiritual court for the things in ſpecie. Sid. 281. 2 Keb. 622. (*f*) Roll. Abr. 393. 2 Inſt. 492.

If two churchwardens ſue in the ſpiritual court for a levy towards the reparation of their church, and have ſentence to recover, and coſts aſſeſſed, and after, one of them releaſes, yet the other may proceed for the coſts, *&c.*; for churchwardens have nothing but to the uſe of the pariſh; and the corporation conſiſts of both; and one only cannot releaſe or give away the goods of the church. Cro. Jac. 234. Yelv. 173. 2 Brownl. 215. S. C.

Alſo they have ſuch a ſpecial property in the goods of the church, that when they are ſtolen they may bring an appeal of robbery for them: (*g*) they may alſo ſue the offender in the ſpiritual court *pro ſalute animæ*, but not to recover damages. 2 Hawk. P. C. c. 23. § 44. (*g*) 2 Keb. 23. Sid. 281. 2 Inſt. 492. 1 Keb. 743. Regiſt. 57.

But the churchwardens have no right to, or intereſt in, the freehold and inheritance of the church, which (*h*) belongs ſolely to the parſon or incumbent. Comp. Incumb. 381. And therefore the churchwardens cannot grant a licence for burying in the church, being the freehold of the parſon. Cro. Jac. 366. Noy, 104. Yet the churchwardens, by cuſtom, may have a fee for burying in the church, becauſe the pariſh is at the charge of repairing the floor. Vent. 274. 3 Keb. 504. 523. 527. But the church-yard is a common burial-place for all the pariſhioners. Comp. Incumb. 381. (*h*) If the walls, windows, or doors of the church, be broken by any perſon, or the trees in the church-yard cut down, or the graſs thereon eaten by a ſtranger, the incumbent ſhall have his action. 21 H. 7. 21. b. Bro. Treſpaſs, 210. 38 H. 6. 19. 11 H. 4. 12. And ſo may his leſſee, if the church-yard be let. 2 Roll. Abr. 337.

Alſo the ſeats in the church being fixed to the freehold, the churchwardens (*i*) cannot diſpoſe of them alone, nor can the churchwardens and rector jointly diſpoſe of them without the conſent of the ordinary; and though ſuch diſpoſitions have been *Vide* 12 Co. 105. Hetl. 94. S. C. Godb. 200. S. C. Moor,

878. S. C. 2 Bulſt. 150. Hob. 69.

made; yet it hath been always preſumed that it was ſo done with the conſent and approbation of the ordinary.

Comp. Incumb. 382. Salk. 167. pl. 7. 1 Wilſ. 326. (*i*) But by the cuſtom of *London*, the churchwardens have the ordering of the ſeats there, for the pariſhioners are obliged to repair the chancel, as well as the body of the church. Comp. Incumb. 387, 388. 2 Roll. Abr. 288. Poph. 140. 2 Roll. Rep. 24. And there may be the like cuſtom elſewhere, for the churchwardens to diſpoſe of ſeats. Raym. 246. admitted *per Cur.* But the churchwardens muſt ſhew ſome particular reaſon why they are to order the ſeats, excluſive of the ordinary; for a general allegation, that they uſed to repair, which is no more than what they are obliged to by common right, is not ſufficient. 2 Lev. 241.

Comp. Incumb. 382. 8 H. 7. 12. Whether churchwardens may remove ſeats erected by a ſtranger in the church.

But as ſeats are erected for the more convenient attending of divine ſervice, and as the pariſhioners are at the expence of erecting them and keeping them in repair, if any of them be taken away, though they are fixed to the freehold, yet the churchwardens, and not the parſon, ſhall bring the action againſt the wrong-doer.

Vide Noy, 108. Comp. Incumb. 387.

Godb. 279. That churchwardens

It is ſaid to have been holden, that at common law a churchwarden may maintain an action upon the caſe for defacing a monument in the church.

themſelves, nor any others, cannot take down arms in windows, or deface grave-ſtones or monuments erected in the church or church-yard; and if they do, an action lies by the heirs or executors of the parties for whom they were erected. Roll. Abr. 625. Noy, 104. Godb. 200. Cro. Jac. 367. 2 Bulſt. 151. *Ante*, tit. *Actions on the Caſe*, (F). But the ordinary may deface any ſuperſtitious picture. Noy, 104. [Nor can any ornaments be ſet up in the church without his conſent. 1 Str. 576. But it muſt be exerciſed according to a prudent and legal diſcretion, which the court of the arches hath a right to look into, and correct. 2 Str. 1080.]

(C) Of their Power and Duty in making Rates in Matters relating to the Church.

Vide Comp. Incumb. 389.

THE churchwardens have no power to make any rate themſelves, excluſive of the pariſhioners, their duty being only to ſummon the pariſhioners, who are to meet for that purpoſe, and when they are aſſembled, a rate made by the majority preſent ſhall bind the whole pariſh, although the churchwardens voted againſt it.

Vent. 367. Mod. 79. 194. (*a*) By the civil and canon law, the parſon is obliged to repair the whole

But if the churchwardens give the pariſhioners due notice, that they intend to meet for that purpoſe, and the pariſhioners refuſe to come, or being aſſembled refuſe to make any rate, they may make one without their concurrence; for as they are liable to be puniſhed in the eccleſiaſtical courts for (*a*) not repairing the church, it would be unreaſonable that they ſhould ſuffer by the wilfulneſs and obſtinacy of others.

church, and it is ſo in all chriſtian kingdoms but in *England*; for it is by the peculiar law of this nation, that the pariſhioners are charged with the repairs of the body of the church. Carth. 360. *per* Holt, Ch. Juſt.—The biſhop cannot appoint commiſſioners to tax the pariſhioners, or make rates for repairing the church. 2 Mod. 8. 223. But the ſpiritual court may compel the pariſhioners to do it, and may excommunicate every one of them till it be repaired; but if any are willing to contribute, they are to be abſolved till the greater part agree to make a tax. Comp. Incumb. 388, 389. [But it is remarkable, that the ſtatute, or writ, *circumſpectè agatis*, 13 Ed. 1. ſtat. 4. § 2., which ſeems the foundation of this eccleſiaſtical juriſdiction, is expreſs, "*in quibus caſibus alia pœna non poteſt inferri quam pecuniaria.*" If the queſtion concerning the rate depend on the bounds of the pariſh, that matter muſt be decided at common law. Deg. 172.] Of the manner it is to be made, *vide* 5 Co. 67. Ventr. 308. 2 Mod. 222. 254. Lit. Rep. 263. Poph. 197. Mod. 236.

The

The churchwardens in ſummoning the pariſhioners need not do it from houſe to houſe, but a general publick ſummons at the church is ſufficient, and the major part of them that appear upon ſuch ſummons will bind the whole pariſh. Vent. 367. Comp. Incumb. 389.

On a motion for a prohibition, it appeared, that the libel recited that *J. S.*, dean of, *&c.* had preſented that the church and chancel of *D.* was out of repair, *&c.*, and that the churchwardens of the ſaid pariſh did make, or cauſe to be made, a certain rate upon the inhabitants thereof, towards the charge of repairing the ſaid church and chancel; and that the churchwardens had accordingly repaired the church and chancel, and beautified the ſame with ornaments, and that *H.* was a pariſhioner of the ſaid pariſh, and refuſed to pay his proportion of the ſaid rate; and it being objected, 1ſt, That the churchwardens only could not make a rate; 2dly, That the parſon alone ought to repair the chancel; a prohibition was granted generally to the whole ſuit, though it was ſtrongly inſiſted on that the prohibition ought to go *quoad* the rate for repairs of the chancel only. Carth. 360. Hawkins and Rous. 5 Mod. 390. S. C. Salk. 165. pl. 3. S. P. Ld. Raym. 59.

(D) Of their Power and Duty in making Preſentments, and hindering Irreverence in the Church.

PRESENTMENTS made by churchwardens relate to the church, the parſon and pariſhioners, in which they are to be guided by the articles delivered them: but theſe articles muſt be agreeable to the laws of the church, and particularly to the canons made and agreed on in the year 1603: they need not take a particular oath upon all the preſentments they make, but may do it by virtue of their (*a*) general oath of churchwardens. Vent. 114. 2 Vent. 42. (*a*) That ſuch promiſſory oath does not ſeem to be puniſhable as perjury. Keb. 522.

The oath is to be general, *viz.* to do all things which appertain to their office; and therefore if the oath tendered requires them to preſent (*b*) matters not preſentable by law, they are not obliged to take it, (*c*) nor are they to be required to preſent or accuſe themſelves. Hard. 364. (*b*) Where the articles enjoined the churchwarden to preſent filthy talkers, revilers, and common ſowers of ſedition among neighbours; the court held, that theſe general terms comprehended matters out of their juriſdiction; and that if the churchwarden had pleaded theſe *quod non tenetur reſpondere* as to thoſe matters, and the plea had been refuſed, a prohibition ought to have been granted. Vent. 114. The S. P. as to ſowing ſedition among neighbours. Vent. 127. But whether any perſon within his pariſh hath encroached upon the church-yard, is lawful, though matter of freehold. Vent. 127. Alſo, if the oath tendered has theſe general words, *viz. To make preſentations according to the king's eccleſiaſtical law*; the particular articles, by way of direction, will not be ſufficient grounds for a prohibition. Vent. 127. (*c*) But to preſent every perſon in the pariſh, does not include themſelves. Vent. 127.

Alſo if the eccleſiaſtical court proceeds againſt the churchwardens in matters not within their juriſdiction, an action on the caſe lies againſt them. Hard. 364. *per Cur.*

And if the churchwardens maliciouſly preſent an innocent perſon for any crime, by which he is put to expence, or ſuffers in his good name or reputation, an action on the caſe lies. Cro. Car. 285. 291. Sid. 469. Vent. 86.

In

Lev. 196. adjudged between Hall and Tanner; for though they may preſent it in the eccleſiaſtical court, yet they are not bound in the mean time to permit ſuch irreverence and indecency in the church. Sand. 13, 14. S. C. adjudged; and there ſaid by the reporter, that the court, taking it to be a great miſdemeanor in the plaintiff, gave judgment againſt him, without regard to the exceptions to the defendant's plea. Sid. 301. S. C. and S. P. adjudged; Twiſden only doubting upon the words of the canon, againſt wearing a hat, *&c. viz.* What hat intended? and ſaid, they might appeaſe a diſturbance in the church; but laying hands on a man to pull off his hat, tends to the raiſing a diſturbance and breach of the peace. 2 Keb. 124, 125. S. C. adjudged.

In aſſault and battery againſt a churchwarden, he juſtified that the plaintiff was at church in time of prayers with his hat on, and that he demanded of him to pull it off, and becauſe he did not do it, the churchwarden took off his hat and laid it by him; and the court held this a good juſtification; and that churchwardens may juſtify to wake a man, to ſwitch boys that are at play, and turn an excommunicated perſon out of the church.

Comp. Incumb. 335. *Vide* 2 Bulſt. 49.

Churchwardens may reſtrain and hinder any ſtranger not licenſed from preaching in their church or chapel.

(E) Of their Accounts; and herein of Actions brought by, or againſt them, and the Remedies they have when their Time is expired.

(*a*) Or to a ſelect committee appointed by the pariſhioners, according to the cuſtom of ſome pariſhes, who may allow their accounts, and ſuch allowance ſhall diſcharge them from being called in queſtion in the ſpiritual court. 2 Lutw. 1027. (*b*) By the ſucceeding churchwardens, either in the ſpirirual court, or by writ of account at common law. Godb. 279. Roll. Rep. 71. 106, 107. 2 Keb. 6. 22. Sid. 281. (*c*) But the pariſhioners cannot bring an action of account againſt them at common law, but muſt make new, *&c.* Bro. Account, 71, 8 E. 4. 6. Bro. Corporations, 55. 4 E. 4. 6. Bro. Garden, 7. And though a pariſh preſcribe to chuſe two churchwardens, and that the perſons ſo choſen ſhall continue in that office for two years; yet the pariſh may, notwithſtanding the preſcription, remove ſuch wardens at their pleaſure, and chuſe new ones. 26 H. 8. 5. b. 13 Co. 70. Comp. Incumb. 390. *Vide* 27 H. 8. c. 25. in Raſtal, that no churchwarden ſhall continue in his office above one whole year. (*d*) *Vide* Sid. 307. Where a churchwarden of *St. Martin's in the Fields* was indicted for taking a ſilver cup of one, for the place of gallery-keeper, *colore officii, &c.*

THE churchwardens, at the expiration of their year, are to give up their accounts to their (*a*) pariſhioners, and on refuſal (*b*) may be proceeded againſt in the eccleſiaſtical court, or the (*c*) ſucceeding churchwardens may bring an (*d*) action of account againſt them at common law.

Roll. Abr. 121. pl. 9. 393. S. C. (*e*) But whether they can plead it in bar to the account, or muſt ſet it forth in diſcharge before auditors, *vide* Mod. 65. Vent. 88. S. C. 2 Keb. 675. S. C.

If the churchwardens, by the conſent and agreement of the pariſhioners, take a ruinous bell and deliver it to a bell-founder, and that he by their agreement ſhall have for the caſting thereof 4*l.*, and ſhall retain it till the 4*l.* be paid; this agreement of the pariſhioners ſhall (*e*) excuſe the churchwardens, in a writ of account brought againſt them by their ſucceſſors.

[They cannot commence a ſuit in their own names after their year is out. Dent

If the churchwardens and pariſhioners make an aſſeſſment, and the churchwardens lay out the whole money, but before the whole is collected their time is expired, and new churchwardens are choſen, the former churchwardens, by having preſented ſuch pariſhioners as refuſed to pay before the determina-

tion

tion of their time, may ſtill proceed againſt them; otherwiſe the new churchwardens muſt collect ſuch arrears, and reimburſe their predeceſſors. v. Prudence and Bond, 2 Str. 852.] *Vide* Preced. in Chan. 42. 2 Vent. 262. where bills have been exhibited for relief againſt the new churchwardens and pariſhioners, for money expended by order of the veſtry. [See too, Nicholſon v. Maſters, Vin. Abr. tit. *Churchwardens*, C. p. 9. *Radnor* Pariſh in *Wales*, *id.* p 10.]

[It is ſaid, the ſpiritual court hath no juriſdiction to order a rate to reimburſe the preceding churchwardens, and a prohibition was granted after ſentence, becauſe upon the face of the order it appeared the eccleſiaſtical court had no juriſdiction: And by the whole court of King's Bench—There cannot be a rate made to reimburſe the churchwardens; becauſe they are not obliged to lay the money out of their own pockets.] Dawſon v. Wilkinſon, Ca. Temp. Hardw. 381.

If goods belonging to the church are taken away, and the churchwardens for the time being neglect to bring an action, the ſucceeding churchwardens may, by virtue of their office, bring an action againſt the wrong-doer, but they muſt declare *ad damnum parochianorum*, and not *ipſorum;* though the old churchwardens, in whoſe time the fact was done, may lay it either way. Cro. Eliz. 145. 179. Leon. 177. *Vide* Dalſ. 105. 2 Brownl. 215. Kelw. 32.

If *A.* was churchwarden of *B.*, and at the end of the year gave up his accounts to his ſucceſſor, and yet *A.* is falſely and maliciouſly cited by *D.* into the eccleſiaſtical court, to render an account, and at the requeſt of *D.* he is excommunicated for not rendering up his account; an action lies againſt *D.* 2 Jones, 132. Gray and Day. Raym. 418. S. C. adjudged, though the ſentence was given by a judge; but for this *vide* Hard. 194, 195, &c. [In ſuch caſe he may have a prohibition. Nutkins v. Robinſon, Bunb. 247. So where they have paſſed their accounts at the veſtry. Snowden v. Herring, *id.* 289. Wainwright v. Bagſhaw, 2 Str. 974. The ſpiritual court may compel the churchwardens to bring in their accounts, but hath no juriſdiction to ſettle them. If they preſume to decide upon them, a prohibition will be granted, even after ſentence allowing the accounts, and an appeal to the arches. Adams v. Ruſh, 2 Str. 1133. Leman v. Goulty, 3 Term Rep. 3.]

By the 3 & 4 *W.* & *M. cap.* 11. "In all actions to be "brought in the courts of *Weſtminſter*, or at the aſſiſes, for "money miſpent by churchwardens, the evidence of the pa- "riſhioners, other than ſuch as receive alms, ſhall be taken and "admitted."

Churchwardens are comprehended within the purview of the ſtatutes 7 *Jac.* 1. *cap.* 5. and 21 *Jac.* 1. *cap.* 12. as to pleading the general iſſue to actions brought againſt them, (*a*) and as to double coſts when they have judgment.

(*a*) But in an action on the caſe againſt a churchwarden for a falſe and malicious preſentment, though there be judgment for him, yet he ſhall not have double coſts; for the ſtatute does not extend to ſpiritual affairs. Cro. Car. 285, 286. Jones, 305. S. C.

[By 11 *Geo.* 2. *c.* 76. § 5. Churchwardens, &c. are required to carry hawkers of brandy, &c. before juſtices of peace, &c.]

Commitments.

(A) What Kinds of Offenders are to be committed.
(B) By whom.
(C) To what Priſon.
(D) What is to be done previous to their Commitment.
(E) What ought to be the Form of the Commitment.
(F) At whoſe Charges they are to be ſent to Priſon.
(G) To what Court the Commitment is to be certified.
(H) By what Means the Party may be diſcharged from ſuch Commitment.

(A) What Kinds of Offenders are to be committed.

2 Hawk. P. C. c. 16. § 1. ALL perſons who are apprehended for offences not bailable, as alſo perſons who neglect to offer bail for offences which are bailable, muſt be committed.

2 Hawk. P. C. c. 16. § 2. Alſo wherever a juſtice of peace is empowered to bind a perſon over, or to cauſe him to do a certain thing, he may commit him *quouſque*, *&c.* if in his preſence he ſhall refuſe to be ſo bound, or to do ſuch thing.

(B) By whom.

2 Hawk. P. C. c. 16. § 3. IT is laid down by Serjeant *Hawkins* as a matter which ſeems agreed by all the old (*a*) books, that whereſoever a conſtable, or private perſon, may juſtify the arreſting another for a felony or treaſon, he may alſo juſtify the ſending or bringing him to the common gaol; and that every private perſon hath as much authority in caſes of this kind as the ſheriff, or any other officer, and may juſtify ſuch impriſonment by his (*b*) own authority, but not by the command of another.

(*a*) 10 H. 4. 7. a. 7 E. 4. 20. a. 9 E. 4. 26. b. 27. a. b. 20 E. 4. 6. b. 49 H. 6. 17. b. 18. a.

(*b*) 5 H. 7. 4. b. 5. a. 2 H. 7. 3. b. 11 Ed. 4. 4. b. 6. b. 7. a, b. 5 H. 7. 4. b. 5. a. Fitz. *Falſe Impriſonment*, 8.

But

But inaſmuch as it is certain, that a perſon lawfully making ſuch an arreſt, (*a*) may juſtify bringing the party to the conſtable, in order to be carried by him before a juſtice of peace; and inaſmuch as the ſtatutes of 1 & 2 *Ph. & M. cap.* 13. and 2 & 3 *Ph. & M. cap.* 10., which direct in what manner perſons brought before a juſtice of the peace for felony ſhall be examined by him, in order to their being committed or bailed, ſeem clearly to ſuppoſe, that all ſuch perſons are to be brought before ſuch juſtice for ſuch purpoſe; and inaſmuch as the ſtatute of 3 *Car.* 2. *c.* 2. commonly called the *habeas corpus* act, ſeems to ſuppoſe, that all perſons who are committed to priſon are there detained by virtue of ſome warrant in writing, which ſeems to be intended of a commitment by ſome magiſtrate, and the conſtant tenor of the late books, practice, and opinions, is agreeable hereto; it is certainly moſt adviſeable, at this day, for any private perſon who arreſts another for felony, to cauſe him to be brought, as ſoon as conveniently he may, before ſome juſtice of peace, that he may be committed or bailed by him.

2 Hawk. P. C. *ibid.* (*a*) 9 E. 4. 26. b. 27. a. 10 E. 4. 17. b. H. P. C. 91. 112.

H.P.C. 91. 112. Dalt. c. 118.

It is certain, that the (*b*) privy council, or any one or two of them, or (*c*) a ſecretary of ſtate, may lawfully commit perſons for treaſon, and for other offences againſt the ſtate, as in all ages they have done.

2 Hawk. P. C. c. 16. § 4. (*b*) And. 298. [Croſton's caſe, Vaugh. 142. Sid. 78. Fitz-patrick's caſe, Salk. 103. The right of one or more lords to commit out of council, is extremely queſtionable; and indeed ſeems to have been denied in the caſe of the Seven Biſhops, both by court and counſel on each ſide. 4 St. Tr. 310, 311. (*c*) The earlieſt inſtances that occur in our law-books, of commitments by a ſecretary of ſtate, are in 2 Leon. 175. Hellyard's caſe; and 1 Leon. 70, 71. Howell's caſe; the former in Tr. 29 El., and the latter in Mich. 29 & 30 Eliz. Theſe were both by Sir Francis Walſingham, who is deſcribed as one of the principal ſecretaries of the lady the queen, but with the addition of and, &c. in the firſt; in the laſt expreſsly of the words, "and one of the privy-council;" ſo that he ſeemeth rather to have acted in that character, than as ſecretary. However, in Melvin's caſe, in the 4th of Car. 1., the next inſtance to be met with, the addition here mentioned is dropped, and the commitment is ſaid to be ſimply by the *Lord Conway ſecretary of ſtate.* There is no doubt, but that the power here aſſerted in this officer, was erroneous in its commencement; as hath been very ſatisfactorily proved by Lord Camden, in his argument in the caſe of Entick v. Carrington, 11 St. Tr. 316.: but there is alſo no doubt, as his Lordſhip obſerved, but that he is now in the full *legal* exerciſe of it: becauſe there hath been not only a clear practice of it, at leaſt ſince the Revolution, confirmed by a variety of precedents; but it hath been recognized and confirmed by ſeveral caſes directly on the point. Rex v. Kendall and Roe, 5 Mod. 78. Skin. 596. S. C. Ld. Raym. 65. S. C. 1 Salk. 347. S. C. 4 St. Tr. 559. S. C. The Queen v. Derby, Fort. 140. Rex v. Earbury, 2 Barnard. 293. 346. Yaxley's caſe, Skin. 596. Carth. 291. Sir William Wyndham's caſe, 3 Vin. Abr. tit. *Bail.* H. a. 6. p. 7. Str. 2. S. C. Rex v. Lord Scarſdale and Lord Dupplin, *ibid.* p. 8. Rex v. Harvey, *ibid.* p. 9. Rex v Florence Henſey, 1 Burr 642. Rex v. Wilkes, 2 Wilſ. 150. 11 St. Tr. 302. S. C. Sayre v. Earl of Rochford, 2 Bl. Rep. 1165.]

But the king cannot commit, as is evident from the following caſe, which was upon an *habeas corpus;* wherein it appeared, the king had requeſted ſome of his miniſtry to commit the defendant to gaol, but they, not having evidence of the defendant's guilt, refuſed to grant any warrant; upon which his majeſty, thinking the defendant guilty, called for a warrant, which he ſigned with his own hand, by which the defendant was committed to the cuſtody of a meſſenger; and the warrant being taken notice of by the court of *B. R.*, and the whole matter being conſidered, the court gave their opinion, that the defendant ſhould be diſcharged, becauſe the warrant was under the king's own hand, and not under the hand of any ſecretary or officer of ſtate, or juſtice of peace.

See 2 Show. Rep. 484. pl. 445.

See Pref. to Ld. Forteſcue's Rep.

peace. And the reaſon given for this hath been, that the king having given all his executive power to his judges and juſtices of the peace, there is none left in him, the executive power being too mean and troubleſome for his majeſty; and if the king erred ever ſo much there is no remedy againſt him, but there is a remedy at law againſt any ſubject whatſoever.

(C) To what Priſon.

BY the 31 *Car.* 2. *cap.* 2. it is enacted, "That no ſubject of "this realm, being an inhabitant or reſiant of this kingdom "of *England*, dominion of *Wales*, or town of *Berwick upon* "*Tweed*, ſhall or may be ſent priſoner into *Scotland*, *Ireland*, "*Jerſey*, *Guernſey*, *Tangier*, or into parts, garriſons, iſlands, or "places beyond the ſeas, which then were, or at any time here- "after ſhould be, within or without the dominions of his ma- "jeſty, his heirs or ſucceſſors; and that every ſuch impriſonment "is by the ſaid ſtatute enacted and adjudged to be illegal; and "that every ſubject ſo impriſoned ſhall have an action of falſe "impriſonment, and recover treble coſts, and no leſs damages "than five hundred pounds againſt the perſon making ſuch "warrant, who ſhall alſo incur a *præmunire*."

(*a*) But none can claim a priſon as a franchiſe, unleſs he have alſo a gaol-delivery; nor can the king grant to private perſons to have the cuſtody of priſoners committed by juſtices of the peace. And. 345. Cro. Eliz. 829. 9 Co. 119. b. Salk. 343. pl. 1. 2 Hawk. P. C. c. 16. § 67. 2 Ld. Raym. 767. 879.

By the 14 *E.* 3. *cap.* 10. it is enacted as followeth: "In the "right of the gaols which were wont to be in ward of the "ſheriffs, and annexed to their bailiwicks, it is aſſented and "accorded, that they ſhall be rejoined to the ſheriffs, and the "ſheriffs ſhall have the cuſtody of the ſame gaols as before this "time they were wont to have; and they ſhall put in ſuch "under-keepers for whom they will anſwer." And this is confirmed by 19 *H.* 7. *cap.* 10. Alſo it is recited by 5 *H.* 4. *cap.* 10. "That divers conſtables of caſtles within the realm, being aſ- "ſigned juſtices of the peace by the king's commiſſion, had, by "colour of ſuch commiſſion, uſed to take people to whom they "bore evil will, and impriſon them within the ſaid caſtles till "they have made fine and ranſom with the ſaid conſtables for "their deliverance." And thereupon it is enacted, "That none "be impriſoned by any juſtice of the peace but only in the com- "mon gaol; (*a*) ſaving to lords, and others which have gaols, "their franchiſe in this caſe."

20 E. 4. 6. b. Bro. Faux Impriſonment, 21. 27. 2 Hawk. P. C. c. 16. § 9.

Since this ſtatute it hath been holden, that regularly no one can juſtify the detaining of a priſoner in cuſtody out of the common gaol, unleſs there be ſome particular reaſon for ſo doing; as if the party be ſo dangerouſly (*b*) ſick, that it would apparently hazard his life to ſend him to the gaol; (*c*) or there be evident danger of a reſcous from rebels, *&c.* (*d*) Yet conſtant practice ſeems to authorize a commitment to a meſſenger; and it is (*e*) ſaid, that it ſhall be intended to have been made in order for the carrying of the party to gaol.

(*b*) 2 E. 4. 8. b. (*c*) 11 E. 4. 4. b. 5. a. (*d*) 2 Hawk. P. C. c. 16. § 9. (*e*) Salk. 347. pl. 1. Skin. 596. pl. 9. S. P. [By 5 Geo. 1. c. 19., juſtices of the peace

peace within their reſpective juriſdictions, may commit vagrants, and other criminals charged with ſmall offences, either to the common gaol, or houſe of correction, as they ſhall think proper.]

And it is ſaid, that if a conſtable bring a felon to gaol, and the gaoler refuſe to receive him, the town where he is conſtable ought to keep him till the next gaol-delivery. H. P. C. 114. 10 H. 4. 7. pl. 2. Fitz. Eſcape, 8. Dalt. c. 118. Bro. Faux Impriſonment, 25. 2 Hawk. P. C. c. 16. § 9.

If a perſon arreſted in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a juſtice of the firſt county to the gaol of ſuch county. H.P.C. 93. Dalt. c. 18. Cromp. 172. 2 Hawk. P. C. c. 16. § 8.

But by the better opinion, if he had before any arreſt fled into ſuch county, he muſt be committed to the gaol thereof by a juſtice of ſuch county. Dalt. c. 118. H.P.C. 92. 11 E. 4. 4. b. 5. a. 13 E. 4. 8. Plow. 37. Keilw. 45. 2 Hawk. P. C. c. 16. § 9.

Alſo it ſeems to be laid down as a rule by ſome books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the ſame county or not. Keilw. 45. 22 E. 4. 34. b. 2 Hawk. P.C. c. 16. § 8. Alſo, it ſeems, that the court of King's Bench are not reſtrained by the ſaid ſtatute, but may commit to ſuch gaol as they ſhall think moſt convenient.

[By 23 *Geo.* 2. *c.* 26. *ſ.* 11. and 24 *Geo.* 2. *c.* 55., If an offender, againſt whom a warrant ſhall be iſſued by a juſtice of peace of one county, ſhall eſcape into another, he may be apprehended by having the warrant indorſed by any juſtice of the county into which he ſhall ſo eſcape, and bailed in that county, if he be bailable; if not, or he cannot there find bail, he ſhall be carried back into the firſt county, and there committed or bailed.]

As priſoners ought to be committed at firſt to the proper priſon, ſo ought they not to be removed thence, except in ſome ſpecial caſes; and to this purpoſe it is enacted by 31 *Car.* 2. *cap.* 2. "That if any ſubject of this realm ſhall be committed to "any priſon, or in cuſtody of any officer or officers whatſoever, "for any criminal, or ſuppoſed criminal matter, that the ſaid "perſon ſhall not be removed from the ſaid priſon and cuſtody "into the cuſtody of any other officer or officers, unleſs it be by "*habeas corpus*, or ſome other legal writ; or where the priſoner "is delivered to the conſtable or other inferior officer, to carry "ſuch priſoner to ſome common gaol; or where any perſon "is ſent by order of any judge of aſſiſe, or juſtice of the peace, "to any common work-houſe or houſe of correction; or where "the priſoner is removed from one priſon or place to another "within the ſame county, in order to a trial or diſcharge by due "courſe of law; or in caſe of ſudden fire, or infection, or other "neceſſity; upon pain that he who makes out, ſigns, or counter-"ſigns, or obeys or executes ſuch warrant, ſhall forfeit to the "party grieved one hundred pounds for the firſt offence, two "hundred pounds for the ſecond, *&c.*" 2 Hawk. P. C. c. 16. § 10.

(D) What is to be done previous to their Commitment.

BY the 2 & 3 *Ph. & M. cap.* 10. it is enacted, "That every "juſtice or juſtices, before whom any perſon ſhall be brought "for manſlaughter or felony, or for ſuſpicion thereof, before he "or they ſhall commit or ſend ſuch priſoner to ward, ſhall take "the examination of ſuch priſoner, and information of thoſe that "bring him, of the fact, and circumſtances thereof, and the "fame, or as much thereof as ſhall be material to prove the "felony, ſhall put in writing, within two days after the ſaid ex-"amination; and the ſame ſhall certify in ſuch manner and "form, and at ſuch time, as they ſhould and ought to do, if "ſuch priſoner ſo committed or ſent to ward had been bailed, or "let to mainprize, upon ſuch pain as in 1 & 2 *Ph. & M. c.* 13. "is limited and appointed for not taking or not certifying ſuch "examinations, &c." And it is further enacted, "That the "ſaid juſtices ſhall have authority to bind all ſuch by recog-"nizance or obligation, as do declare any thing material to prove "the ſaid manſlaughter or felony, to appear at the next general "gaol-delivery to be holden within the county, city, or town "corporate, where the trial of the ſaid manſlaughter or felony "ſhall be, then and there to be given in evidence againſt the "party; and that the ſaid juſtices ſhall certify the ſaid bonds "taken before them, in like manner as they ought to certify "bonds mentioned in the ſaid former act, &c."

2 Hawk. P.C. c. 16. § 12. (a) Cro. Eliz. 829, 830.

A juſtice of the peace may detain a priſoner a reaſonable time, in order to examine him; and it is (a) ſaid that three days is a reaſonable time for this purpoſe.

(E) What ought to be the Form of the Commitment.

2 Inſt. 52. 591. Dalt. c. 125. H.P.C. 94. 2 Hawk. P. C. c. 16. § 13. 5 Burr. 2684.

EVERY commitment muſt be in writing, and under the hand and ſeal, and ſhew the authority of him that (b) made it, and the time and place, and muſt be directed to the keeper of the priſon.

(b) It may be made either in the king's name, and only teſted by the juſtice, or in the juſtice's name. Dalt. c. 125. 2 Hawk. P. C. c. 16. § 14. Where a commitment in execution muſt be to the ſheriff, and not to the gaoler, *vide* 5 Mod. 21.

2 Hawk. P. C. c. 16. § 15. (c) 8 Co. 290. 9 Co. 87. Dalt. 118. Str. 3.

It may command the gaoler to keep the party in ſafe and cloſe cuſtody; for this being what he is obliged to do (c) by law, it can be no fault to command him ſo to do.

2 Hawk. P. C. c. 16. § 16. (d) H.P.C.

It ought to ſet forth the crime with convenient (d) certainty, whether the commitment be by the (e) privy counſel, or any other authority; otherwiſe the officer (f) is not puniſhable by reaſon

reaſon of ſuch *mittimus*, for ſuffering the party to eſcape, and the court, before whom he is removed by *habeas corpus*, ought to diſcharge or bail him; and this doth not only hold where (*g*) no cauſe at all is expreſſed in the commitment, but alſo where it is (*h*) ſo looſely ſet forth, that the court cannot adjudge whether it were a reaſonable ground of impriſonment. 94. Dalt. c. 125. 2 Inſt. 52. 591. (*e*) 16 Car. 1. c. 10. Cro. Car. 133. 507.

579. 523. 2 And. 298. *cont.* Roll. Rep. 134. Leon. 71. (*f*) 2 Inſt. 591. H. P. C. 109. Palm. 550. (*g*) Cro. Car. 579. Palm. 558. 2 Hawk. P. C. c. 16. § 16. (*h*) As where one was committed for manifold contumacy to the high commiſſion court. Roll. Rep. 245. Or for refuſing to anſwer before them, to certain articles. Roll. Rep. 220. 245. Or for inſolent behaviour, and words ſpoken at the council-table. Cro. Car. 133. 579. 2 Bulſt. 139, 140.

But a commitment for high treaſon or felony in general, without expreſſing the particular ſpecies, hath been holden good. 2 Inſt. 52. Cromp. 233. b.

Dalt. c. 125. Sid. 78. And. 298. Keb. 305. Palm. 558. 2 Hawk. P. C. c. 16. § 16. *Vide* 2 Inſt. 591. *cont.*

But now, ſince the *habeas corpus* act, it ſeems that ſuch a general commitment is not good; and therefore where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery* to make his eſcape, who was committed by a warrant of a ſecretary of ſtate for high treaſon; on a *habeas corpus*, they were admitted to bail; becauſe it did not appear what ſpecies of treaſon Sir *James* was guilty of. Skin. 596. pl. 9. The King v. Kendall and Row, Salk. 347. S. C. pl. 1. Ld. Raym. 65. 5 Mod. 78.

S. C. [but a commitment for treaſon generally is good. 2 Wilſ. 158.]

It is ſafe to ſet forth that the party is charged upon oath; but this is not neceſſary; for it hath been reſolved, that a commitment for treaſon, or for ſuſpicion of it, without ſetting forth any particular accuſation or ground of the ſuſpicion, is good. 2 Hawk. P. C. c. 16. § 17. Dalt. c. 125. Cromp. 233. 2 Inſt. 52. 591. [Str. 2, 3. Vin. Abr. tit. *Bail*, H. a. p. 7. 2 Wilſ. 158. 11 St. Tr. 304.]

Every ſuch *mittimus* ought to have a lawful concluſion, (*a*) *viz.* that the party be ſafely kept till he be delivered by law, or by order of law, (*b*) or by due courſe of law, or that he be kept till further (*c*) order, (which ſhall be intended of the order of law,) or to the like effect; and if the party be committed only for want of bail, it ſeems (*d*) to be a good concluſion of the commitment, that he be kept till he find bail: but a commitment (*e*) till the perſon who makes it ſhall take further order, ſeems not to be good: and it ſeems that the party, committed by ſuch or any other irregular *mittimus*, may be bailed. 2 Hawk. P. C. c. 16. § 18. (*a*) 2 Inſt. 52. 591. H. P. C. 94. Cromp. 233. Dalt. c. 124. (*b*) That the omiſſion of theſe words, *until he be delivered by due courſe of law*, makes no nullity in the *mittimus* of a juſtice of peace, for they are no more than the law ſays. 3 Keb. 531. (*c*) Lev. 230. *cont.* Cro. Car. 558. (*d*) 6 Mod. 73, 74. 2 Ld. Raym. 978. 3 Salk. 321. pl. 1. 284. p. 12. 6 Mod. 73. Holt, 590. (*e*) 2 Inſt. 52. 591. Roll. Rep. 220. Lev. 230. Cro. Car. 579. *cont.* 3 Bulſt. 48, 49. Roll. Rep. 410.

[A commitment of one for carrying goods without an univerſity licence, "until he gives ſecurity to carry no more, and to obſerve the ſtatutes of the univerſity," is bad. Rex v. Barnes, 2 Str. 917.

So is a commitment generally to priſon, not ſpecifying what gaol, or directed to any particular gaoler.] Rex v. Smith, 2 Str. 934.

Alſo a commitment grounded on an act of parliament ought to be conformable to the method preſcribed by ſuch ſtatute; as Carth. 152, 153. adjudged, and

a difference taken between a commitment as a criminal, and where one is committed for a contumacy: [in the first case, the commitment must be until discharged according to law: in the last, until he comply.]

where the churchwardens of *Northampton* were committed on the 43 *Eliz. cap.* 2., and the warrant concluded in the common form, *viz. until they be duly discharged according to law;* but the statute appointing *that the party should there remain until he should account*, for want of such conclusion they were discharged.

[Bracey's case, Salk. 348. Ld. Raym. 99. S.C. 5 Mod. 308. S.C. Comb. 390. S.C. Hollingshead's case, 1 Salk. 351. S.P. Rex v. Nathan, 2 Str. 880. S.P. Miller's case, 2 Bl. Rep. 881. 3 Wilf. 420. S.C.]

So where one *Bracey* was committed by the commissioners of bankrupts, for refusing to answer, and they concluded their warrant, *viz. until he conform himself to our authority, and be thence delivered by due course of law:* and upon the return of a *habeas corpus* he was discharged; for the statute only empowers them to commit until *he submit himself to be by them examined.*

Carth. 291. pl. 3. Yaxley's case.

So where one *Yaxley* was committed by the Earl of *Nottingham*, *secretary of state*, by virtue of the 35 *Eliz.* for refusing to answer, whether he was a *Jesuit, seminary, or a massing priest;* and the conclusion of the warrant was, *there to remain until he shall be from thence discharged by due course of law;* whereas the words of the statute are special, *viz. until he shall answer unto the question;* he was discharged on being asked these questions, and answering them openly and directly in the negative.

Rex v. Hall, 3 Burr. 1636.

[So a commitment of a man as a rogue and vagabond under 17 *Geo.* 2. *c.* 5. *s.* 7., for running away and leaving his wife and children *to be maintained* by the parish, there to remain until he shall be discharged according to the laws and customs of this realm, was holden to be bad, because it did not contain a direct allegation that the wife and children *were chargeable*, and because the commitment directed by the statute is for a *limited* time, whereas this was indefinite.]

Baxter's case, Mich. 20 Car. 2. in *C. B.*

Mr. *Baxter* being committed, by two justices of the peace of *Middlesex*, to *Clerkenwell* prison, was brought by *habeas corpus* to *C. B.;* the gaoler returns that he keeps him by virtue of a warrant from the justices of the peace, in these words: *Whereas ... hath been proved unto us upon oath, that* Richard Baxter, *clerk, hath taken upon him to preach in an unlawful assembly, conventicle, meeting, under colour or pretence of exercise of religion, contrary to the laws and statutes of this realm, at* Acton, *where he now liveth, ... the said county, not having subscribed the oath by act of parliament ... that case appointed to be taken; and whereas we having tendered ... him the oath and declaration appointed to be taken by such as shall offend against the said statute, which he has refused to take; we therefore send you herewith the body of the said* Richard Baxter, *strictly charging and commanding you, in his majesty's name, to receive him the ... Richard Baxter into his majesty's said prison, and him there safely keep six months, without bail or mainprize; and hereof, &c.* The return the court held insufficient, the warrant being vitious throughout. First, There is nothing in the warrant to certify the court on what statute the justices proceeded. Secondly, A

mit they did proceed on the ſtatute 17 *Car.* 2., (which they muſt intend, if any,) yet the commitment is ill, for ſeveral reaſons. Firſt, It doth not appear that *Baxter* was guilty of any offence at all againſt this act. This law doth not forbid conventicles, nor enjoin the taking of any oath, nor ſubſcribing any declaration, (nay, there is no ſuch thing as a declaration in the act;) the preaching at conventicles is only one of the deſcriptions that are there given of ſuch perſons as are not to come within five miles, *&c.*, and the taking the oath is only allowed them as a remedy to ſecure themſelves againſt the penalty of the law: the only offence then is, of perſons ſo deſcribed, to come within five miles of a corporation, or the place where they have taken upon them to preach, *&c.* Now it doth not appear by the warrant that Mr. *Baxter* did either of theſe; it is only ſaid that he took upon him to preach at *Acton*, where he now liveth; which laſt words are only the ſuggeſtions of the juſtices, and not any part of that which is proved unto them, upon oath; as the crime intended to be puniſhed by law muſt be. Secondly, It doth not appear that he preached, *&c.* ſince the act of oblivion, neither is there any other deſcription given of him to make him the perſon intended to be reſtrained by the act; the time ſhould have been expreſſed. Thirdly, It is not ſaid who made the oath before the juſtices; ſo that the priſoner can have no remedy in caſe the oath were falſe. Fourthly, If his being at *Acton* were proved after, *&c.*, yet it doth not appear how long he continued there; poſſibly he might be ſent for before the juſtices, and committed immediately after his preaching, and then he could not be guilty of any reſidence puniſhable within this act: and for theſe reaſons he was diſcharged.

[The legiſlature having given magiſtrates a power of examining a pauper touching his ſettlement, it ſeemeth that they muſt neceſſarily have as incidental to ſuch power, a power of committing to priſon in caſe of his refuſal to anſwer their queſtions: if ſo, a commitment, "until he ſhall anſwer," is good. Rex v. Jackſon, 1 Term Rep. 653.

A commitment under 9 *Geo. c.* 22. for ſetting fire to a *parcel* of unthreſhed corn, is bad, as not deſcribing any offence within the act. So, is a commitment under the 7 *Geo.* 2. *c.* 21. "for "having with force and arms made an aſſault on the proſecutor "with intent feloniouſly to ſteal, take, and carry away from the "perſon, *&c.*": the words of this laſt act being that "if any "perſon ſhall make an aſſault with an offenſive weapon, or by "menaces or in a forcible manner demand money, *&c.* from any "other perſon, with a felonious intent to rob ſuch perſon, he "ſhall be guilty of felony."] Rex v. Judd, 2 Term Rep. 255. Rex v. Remnant, 5 Term Rep. 169.

(F) At whoſe Charges they are to be ſent to Priſon.

And by the ſtatute of 27 Geo 2. c. 3., When any perſon not having goods or money in the county where he is taken, ſufficient to bear the charges of himſelf and of thoſe who convey him, is committed to gaol, or the houſe of correction, by warrant from a juſtice, then on application by the conſtable, or other officer, who conveyed him, to any juſtice for ſuch county or place, [ſuch juſtice] ſhall upon oath examine into and aſcertain the reaſonable expences, and ſhall, without fee, by his warrant, order the treaſurer to pay the ſame; but in *Middleſex* the ſame ſhall be paid by the overſeers of the poor.

BY the 3 *Jac.* 1. *cap.* 10. it is enacted, "That every perſon "and perſons that ſhall be committed to the common or "uſual gaol, within any county or liberty within this realm, by "any juſtice or juſtices of the peace, for any offence or miſ- "demeſnour, having means or ability thereunto, ſhall bear their "own reaſonable charges for ſo conveying or ſending them to "the ſaid gaol; and the charges alſo of ſuch as ſhall be appointed "to guard them to ſuch gaol, and ſhall ſo guard them thither: "and if any ſuch perſon or perſons, ſo to be committed, ſhall "refuſe, at the time of their commitment and ſending to the "ſaid gaol, to defray the ſaid charges, or ſhall not then pay or "bear the ſame, that then ſuch juſtice or juſtices of the peace "ſhall and may, by writing under his or their hand and ſeal, or "hands and ſeals, give warrant to the conſtable or conſtables of "the hundred, or conſtable or tithingman of the tithing or town- "ſhip where ſuch perſon or perſons ſhall be dwelling and inha- "biting, or from whence he or they ſhall be committed, or "where he or they ſhall have any goods within the county or li- "berty, to ſell ſuch and ſo much of the goods and chattels of the "ſaid perſon, as by the diſcretion of the ſaid juſtice or juſtices of "the peace, ſhall ſatisfy and pay the charges of ſuch his or their "conveying or ſending to the ſaid gaol; the appraiſement to be "made by four of the honeſt inhabitants of the pariſh or tithing "where ſuch goods or chattels ſhall remain and be; and the "overplus of the money which ſhall be made thereof, to be deli- "vered to the party to whom the ſaid goods ſhall belong."

And it is further enacted, "That if the ſaid perſons ſhall not "have, or be known to have any goods or chattels which may be "ſold for the purpoſe aforeſaid, within the county or liberty, an "indifferent aſſeſſment ſhall be made by the conſtables and "churchwardens, and two or three other honeſt inhabitants of "the pariſh or tithing where ſuch offenders ſhall be taken or ap- "prehended, the ſaid taxation being allowed under the hand of "one or more juſtice or juſtices of the peace, if there be ſuch "conſtables or churchwardens there inhabiting; and in default "of them, by four of the principal inhabitants of the ſaid pariſh, "townſhip, or tithing, where ſuch offender ſhall be taken or ap- "prehended; and if any ſo aſſeſſed ſhall refuſe to pay their ſaid "taxation, then the juſtice or juſtices of the peace, by whom the "ſaid offenders ſhall be committed to priſon, or any juſtice of the "peace near adjoining, ſhall and may give warrant as aforeſaid "to the conſtable, tithingman, or other officer, there to diſtrain "the goods of any ſo aſſeſſed, which ſhall refuſe to pay the ſame, "and to ſell the ſame; and that ſuch perſon or perſons ſo au- "thorized, ſhall have full power ſo to diſtrain; and by appraiſe- "ment of four ſubſtantial inhabitants of the ſaid place, to ſell a "ſufficent quantity of the goods and chattels of the perſon ſo "refuſing,

"refuſing, for the levying of the ſaid taxation; and if any over-"plus of the money come by the ſale thereof, the ſame to be de-"livered to the owner."

(G) To what Court the Commitment is to be certified.

BY the 3 *H.* 7. *cap.* 3. it is enacted, "That every ſheriff, "bailiff of franchiſe, and every other perſon, having autho-"rity or power of keeping of gaol, or of priſoners for felony, do "certify the names of every ſuch priſoner in their keeping, and "of every priſoner to them committed for any ſuch cauſe, at the "next general gaol-delivery, in every county or franchiſe where "any ſuch gaol ſhall be, there to be calendered before the juſ-"tices of the deliverance of the ſame gaol, whereby they may, as "well for the king as for the party, proceed to make deliver-"ance of ſuch priſoners according to law, on pain to forfeit to "the king, for every default there recorded, one hundred ſhil-"lings." *Vide* title *Habeas Corpus.*

(H) By what Means the Party may be diſcharged from ſuch Commitment.

A Perſon legally committed for a crime, certainly appearing to have been done by ſome one or other, cannot be lawfully diſcharged by any other but by the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to proſecute him on a proclamation for that purpoſe, by the juſtices of gaol-delivery. Keilw. 34. 3 Inſt. 209, 210. H.P.C. 94. 2 Hawk. P.C. c. 16. § 22.

But if a perſon be committed on a bare ſuſpicion, without any appeal or indictment for a ſuppoſed crime, where afterwards it appears that there was none; as for the murder of a perſon thought to be dead, who afterwards is found to be alive, it hath been holden that he may be ſafely diſmiſſed, without any farther proceeding; for that he who ſuffers him to eſcape, is properly puniſhable only as an acceſſary, where there can be no principal; and it would be hard to puniſh one for a contempt founded on a ſuſpicion appearing in ſo unconteſted a manner to be groundleſs. Keilw. 34. H. P. C. 109, 110. 114. 2 Hawk. P.C. c. 16. § 22.

Common.

4 Co. 37. a. 2 Inſt. 65. Vent. 387.

COMMON is a right or privilege which one or more perſons claim to take or uſe in ſome part or portion of that which another man's lands, waters, woods, &c. naturally produce, without having an (a) abſolute property in ſuch lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing on ſome agreement between lords and tenants, for ſome valuable purpoſes, which, by age being formed into a preſcription, continues good, although there be no deed or inſtrument in writing that proves the original contract or agreement.

(a) And therefore, if I have a right of common in another man's ſoil, and I grant it to *A.* reſerving rent, if the rent be behind, I cannot diſtrain the beaſts of *A.*, becauſe the right of common, which every man hath, runs through the whole common; and I cannot ſay that any particular part of the common is more mine than another. Co. Lit. 47. a. 142. a. 2 Roll. Abr. 446.

(A) Of the ſeveral Kinds of Common: And herein,

1. Of Common Appendant.
2. Of Common Appurtenant.
3. Of Common in Groſs.
4. Of Common *pur Cauſe de Vicinage.*

(B) Of the Intereſt of him who is Owner of the Soil.

(C) Of the Commoner's Intereſt in the Soil: And herein of the Remedies the Law gives him,

1. Againſt the Lord or Owner of the Soil.
2. Againſt the other Commoners: And herein of Admeaſurement.
3. Againſt Strangers.

(D) Of Approvement and Incloſure.

(E) Of Apportionment and Extinguiſhment.

(A) Of the ſeveral Kinds of Common.

(b) Of the nature of this kind of common, and that it can only be

THE general diviſion of common, according to ſome books, is into, 1ſt, *Common of paſture*, which is a right or liberty that one or more have to feed or fodder their beaſt or cattle in another man's lands; 2dly, (b) *Common of turbary*, or a liberty of cutting turves

turves in another's ſand or ſoil; 3dly. (*a*) *Common of piſcary*, or a right and liberty of taking fiſh in another's fiſh-pond, pool, or river; 4thly, *Common of eſtovers*, which is a right of taking trees or loppings, ſhrub, underwood in another's woods, coppices, *&c.*; and 5thly, (*b*) A liberty, which in ſome manors the tenants have of digging and taking ſand, gravel, ſtone, *&c.* in the lord's ſoil.

appendant to an houſe, *vide* 4 Co. 37. a. Of preſcribing for it, *vide* Lev. 231. Sid. 354. 2 Keb. 290. that an aſſiſe lies of it. 8 Co. 48. That by a grant of a houſe *cum pertinentiis*, common of turbary paſſes, *vide* Cro. Jac. 179, 180. 3 Lev. 165. *Vide* Lev. 231. Sid. 354. (*a*) That a man may preſcribe to have *ſeparalem piſcariam*, and exclude the owner of the ſoil wholly from fiſhing; for he has ſtill the profit of the ſoil and the water, *&c.* Co. Lit. 122. 8 Co. 98. Vent. 391. Sand. 251. 2 Sand. 326. How it muſt be preſcribed for, *vide* Hard. 407. (*b*) For this *vide* Co. Lit. 41. b.

But the word *common* is uſually underſtood of common of paſture, of which there are four (*c*) kinds; firſt, *Common appendant*; ſecondly, *Common appurtenant*; thirdly, *Common in groſs*; fourthly, *Common pur cauſe de vicinage*; and therefore,

Co. Litt. 122. a. Vaugh. 255. (*c*) For *ſhack* in the county of *Norfolk*, which is a ſort of *common pur cauſe de vicinage*; and the commencement thereof, *vide* 7 Co. 5.

1. Of Common Appendant.

Common appendant of common right belongs to arable land for beaſts that ſerve for maintenance of the plough; as horſes and oxen to plough the land, kine and ſheep to compeſter it; and for ſuch common there is (*d*) no need to preſcribe *.

Co. Lit. 122. a. 26 H. 8. 4. (*d*) But it muſt be ſaid to have been time out of mind. 4 Co. 37. Roll. Abr. 401. Cro. Car. 542. muſt be appendant time out of mind. Keilw. 129. b. Roll. Abr. 396. Fitz. Iſſue, 143. and cannot be created at this day. 26 H. 8. 4. 5 Aſſ. 9. Fitz. Aſſiſe, 134. Roll. Abr. 396.

* *Qu. de hoc*, For Lord Coke, in his commentary on the ſame ſection, *ante* 121. b., ſays, "Appendants are ever by preſcription." [But this may be reconciled: for, an appendancy cannot be without preſcription, the former always implies the latter; and, therefore, if one pleads common appendant, it is unneceſſary to add the uſual form of preſcribing. Hargrave's note, 2 Co. Lit. 122. a.]

As the lords of ſeveral manors, in which there were great waſtes, uſed to portion out ſome parts of the arable lands to their tenants, which they were to till and plough, and were to hold in nature of ſocage; it was neceſſary, in ſupport of tillage, which hath always been greatly favoured in the law, that the cattle employed in this ſervice ſhould have food and provender in ſome other parts of the manor; and this was uſually aſſigned them in ſuch waſtes as were leaſt fitted for improvement or cultivation.

4 Co. 37. 2 Inſt. 86.

Hence it is, that if before the ſtatute of *quia emptores terrarum*, the lord of the manor had made a feoffment of parcel of the manor, to hold of him; the feoffee, as incident to the grant, ſhould have common in the waſtes of the lord.

Roll. Abr. 396. 4 Co. 37. a. S. P. 2 Inſt. 86. S. P.

This kind of common is regularly appendant (*e*) only to arable land; yet it may be claimed by that name as appendant to a manor, farm, a plough-land, or a carve of land, though it may contain paſture, meadow, and wood; for it ſhall be preſumed to have been all originally arable land, though afterwards converted into meadow, paſture, *&c.*

37 H. 6. 34. 26 H. 8. 4. a. 4 Co. 37. a. 11 H. 6. 12. Roll. Abr. 396. 2 Brownl. 298.

2 Inſt. 85. 474. (*e*) It cannot be appendant to land which is approved within time of memory out of the waſte of the lord. 5 Aſſ. 2. Bro. Common, 16. S. C. Bro. Aſſ. 116. S. C. Roll. Abr. 397. S. C.

It

(a) 37 H. 6. 34. 10 E. 4. 10. b. Roll. Abr. 397. Co. Lit. 122. a. (b) 14 H. 6. 6. b. Bro. Common, 13.

(a) It can only be for ſuch cattle as are neceſſary in tillage, as oxen and horſes to plough the land, and cows and ſheep to compeſter it; (b) and therefore a preſcription to have common appendant for all manner of cattle is not good, becauſe it comprehends goats, geeſe, and ſuch like, which is more properly common appurtenant.

S. C. 37 H. 6. 34. S. C. Roll. Abr. 397. S. C. Old N. B. 26. 25 Aſſ. 8.

17 E. 3. 27. 34. Roll. Abr. 399. S. C.

Common appendant may by uſage be limited to any certain number of cattle.

17 E. 3. 34. b. Roll. Abr. 397. S. C.

A man may have common appendant for thirty cattle in one place, and to the ſame land common appendant alſo in another place, for part of his ſaid cattle, and ſo may take it where he pleaſes.

27 E. 3. 86. Roll. Abr. 396. S. C.

Common appendant (c) may be through all the year, ſaving at a certain time, in which the lord uſeth it.

(c) May be on condition or limitation; as *quamdiu* he pays ſo much, ſo *tamdiu* as he ſhall be living in ſuch a houſe to which the common is appendant. 37 H. 6. 34. Fitz. Treſpaſs, 85. S. C. Bro. Common, 13. S. C. Roll. Abr. 397. S. C.

17 E. 3. 26. 34. Roll. Abr. 397.

(d) So it may be to common in the meadow, after the hay carried off, till *Candlemas*.

(d) So to common in the paſture, from the feaſt of *St. Auguſtin* till *All Saints*. 17 E. 7. 26. 34. Roll. Abr. 397. S. C.—So it may be to common two years after the corn cut and carried away, till it is reſown, and every third year *per totum annum*. 22 Aſſ. 42. Roll. Abr. 397. S. C. Sand. 343. S. P. *Vide poſt*, letter (C).

Salk. 169. pl. 1.

If an inhabitant of one pariſh hath common appendant in certain waſte grounds which lie in another pariſh, he ſhall be aſſeſſed, and pay taxes in that pariſh where his farm lies, and not in that in which he hath common; for the common is only incident to it, and will paſs by a grant of the farm; and is therefore to be conſidered as part of the farm, and the farm to be taxed the higher.

2. Of Common Appurtenant.

Co. Lit. 122. a. [(e) It may be claimed by *grant*, as well as by preſcription.

Common appurtenant can only be claimed by (e) preſcription, and is a right of commonage for beaſts, not (f) only commonable, (g) as horſes, oxen, cows, and ſheep, but likewiſe for beaſts not commonable, as ſwine, goats, and geeſe.

Sachervill v. Porter, Cro. Car. 482. F. N. B. 180. N.] (f) A man may preſcribe to have it for all manner of cattle. 15 E. 4. 33. Roll. Abr. 402. S. C. (g) Theſe are commonable, and called *magna averia*, for which *vide* Cro. Jac. 580. 2 Roll. Rep. 173. Sand. 227.—If the lord licence a ſtranger *ad ponend. averia* into the common, this ſhall be intended of commonable cattle only, and not of hogs. 2 Mod. 7. *per* North, Ch. J.—But if the licence be for a particular time, it is otherwiſe. 2 Mod. 7. *per* North.

15 E. 3. 32. Roll. Abr. 398. [(h) Common cannot be claimed by reaſon of inhabitancy in an ancient meſſuage in a vill. Gateward's caſe, 6 Co. 60. Cro. Ja. 15. S. C. Hob. 86. S. C. cited.]

He that claims common by force of a preſcription, as an inhabitant (h) of a town, ſhall have no other cattle to common there, but what are (i) levant and couchant within the ſame town.

(i) What cattle ſhall be ſaid levant and couchant, *vide* Noy, 30, which

where it is ſaid, that by Coke Ch. Juſt. ſo many cattle as the land, to which the common is appurtenant, may maintain in the winter, ſo many ſhall be ſaid levant and couchant. *Vide* Vent. 54. And ſo many beaſts may be ſaid levant and couchant upon a houſe as may be tied there, and are uſually to be maintained in the houſe. 2 Brownl. 101. But *per* Vaugh. 253. Cattle cannot be levant on a meſſuage only; [and ſee *acc.* Scholes v. Hargreaves, 5 Term Rep. 46.] Yet in Salk. 169. pl. 2., preſcription to have common for all beaſts levant and couchant, as appendant to a cottage, is good; for a cottage contains a curtilage at leaſt; and there is no difference between a meſſuage and curtilage as to this. Alſo a cottage, by ſtatute, ought to have four acres of land. 6 Mod. 114. S. C. 11 Mod. 53. pl. 29. 72. pl. 3. 12 Mod. 35. Ld. Raym. 726. And Holt, Ch. Juſt. ſaid, that he remembered the trial of an iſſue, where it was ruled by Hale, Ch. Juſt. that foddering cattle in the yard was ſufficient evidence of levancy and couchancy. Salk. 169. pl. 2. 6 Mod. 115. S. P. 2 Ld. Raym. 1015. [See Mr. J. Buller's obſervation on theſe caſes, 5 Term Rep. 49.]

If a man claims common, by preſcription, for all manner of commonable cattle in the land of another, as belonging to a tenement, this is a void preſcription; (*a*) becauſe he doth not ſay that it is for cattle levant and couchant upon the land to which he claims it to be appurtenant; for a man cannot have common *ſans* number appurtenant to land; and when he claims the common for all cattle commonable, and doth not ſay for cattle levant and couchant upon the tenement, this ſhall be intended common *ſans* number, according to the words; (*b*) for there is not any thing to limit it, when it doth not ſay for cattle levant and couchant. Roll. Abr. 398. (*a*) It is naught upon a general demurrer, but is helped after verdict. Theadle and Miller. Lev. 196. Sid. 313, 314. 2 Keb. 108.

120. Mellor and Spateman. Sand. 346. 2 Mod. 6, 7. 12 Mod. 249.: and *vide* 3 Mod. 162. Co. Ent. 656. Poph. 201. Vent. 164, 165.; and ſo Sand. 227. adjudged. 1 Mod. 75. Cro. Jac. 44. (*b*) But if a man preſcribes for common for a certain number of cattle, as belonging to certain land, he need not ſay levant and couchant. 2 Mod. 185. *Vide* the diverſity adjudged, and Roll. Abr. 401. Vent. 163. 1 Mod. 75. Cro. Jac. 27.

It ſeems agreed, that if a man has a grant of common for a (*c*) certain number of beaſts, that the commoner may take the beaſts of a ſtranger, and put them upon the common, ſo that it exceed not the number. 22 Aſſ. pl. 84. 45 E. 325. b. 11 H. 6. 26. b. *Vide* Cro.

Jac. 15. 575. (*c*) *Secus* of common *ſans* number. Roll. Abr. 402. But he that claims the ſole paſture of land may licence a ſtranger to put in his beaſt. 2 Sand. 327.

Alſo in caſe of a common appurtenant, it is ſaid, that where the number of the beaſts to be commoned is certain, the commoner may grant over the commonage of part, and reſerve the reſt to himſelf. Jones, 375. Cro. Car. 432.

It is clear, that if a commoner borrows cattle to manure his land, he may uſe the common with them; for by the borrowing he has a ſpecial property in them. 22 Aſſ. 84. Roll. Abr. 396. 402. S. C. F. N. B. 180. b. Skin. 138. S. P. admitted.

3. Of Common in Groſs.

This is a right of commonage which muſt be claimed by deed or preſcription, and hath no relation to any land belonging to the commoner: it may be for a certain number of cattle, or *ſans* number. Co. Lit. 122. a. 2 Inſt. 477. What ſhall be ſaid common in groſs, *vide* Roll. Abr. 402.

He that hath common in groſs for a (*d*) certain number of cattle, may put in the cattle of a ſtranger, and uſe the common with them. 1 H. 6. 22. b. Roll. Abr. 402. S. C.

(*d*) So may he who hath common *ſans* number in groſs. 11 H. 6, 22. b. Roll. Abr. 402. S. C.

Common

9 E. 4. 39. 26 H. 8. 3. Roll. Abr. 401. S. C. Cro. Car. 542. S. P.

Common appendant cannot be made common in groſs, for that is for cattle levant upon the land, to which, &c., and therefore it cannot be ſevered without extinguiſhment.

Roll. Abr. 402. Cro. Jac. 15. S. C.

So common appurtenant for cattle levant and couchant upon the land, cannot be made in groſs.

But though it cannot by grant be ſevered from the ſoil, yet common appurtenant for a certain number of beaſts may be granted over, *per Cur.*

Roll. Abr. 402. Cro. Car. 432, 433. S. C. adjudged, and ſtated, that it was granted over with parcel of the manor. Jones, 375. S. C. adjudged.

If *A.*, and all thoſe whoſe eſtate he hath in the manor of *D.*, have had time out of mind a fold-courſe, *ſſ.* common of paſture for any number of ſheep, not exceeding 300, in a certain field, as appurtenant to the ſaid manor, he may grant over this fold-courſe to another, and ſo make it in groſs; becauſe the common is for a certain number, and by the preſcription the ſheep are not to be levant and couchant upon the manor, but it is a common for ſo many ſheep appurtenant to the manor, which may be ſevered from the manor as well as an advowſon, without any prejudice to the owner of the land where the common is to be taken.

4. Of Common *pur Cauſe de Vicinage.*

Co. Lit. 122. a. (*a*) That by ſuch incloſure the common is gone. 4 Co. 38. Roll. Abr. 399. S. P.

Common *pur cauſe de vicinage* is but an excuſe of treſpaſs, and no man can put his beaſts into the land in which he hath ſuch common, but they muſt eſcape thither themſelves, and either of the parties that have ſuch neighbouring grounds (*a*) may incloſe againſt the other.

Roll. Abr. 399.

But if there be common *pur cauſe de vicinage* between two manors, and the lord of one manor incloſe, yet he ſhall not bind a copyholder of the ſame manor, but that he may have common *pur cauſe de vicinage* as he had before.

7 Co. 5. b. Reſolved *per Cur.*

If there be common *pur cauſe de vicinage* between the towns of *A.* and *B.*, and *A.* have 50 acres of common, and *B.* 100 acres of common, the inhabitants of *A.* cannot put more cattle into their common than the 50 acres will depaſture, without any regard to the common of *B.*; for the original cauſe of this common was not the profit of either town, but to prevent ſuits in open countries for reciprocal eſcapes from one field into the other.

Vide 2 Bulſt. 57.

If there are two manors in one vill, the tenants of each may intercommon; and this is likewiſe called common *pur cauſe de vicinage.*

Roll. Abr. 399. But for this *vide* Poph. 201. Latch. 161. 3 Keb. 388.

Every common *pur cauſe de vicinage* is common appendant; and therefore a man need not preſcribe in a common *pur cauſe de vicinage;* but it is ſufficient to ſay, that he and all thoſe whoſe eſtate, &c. have uſed to intercommon *cauſa vicinagii.*

(B) Of the Intereſt of him who is Owner of the Soil.

THE lord of the ſoil hath ſuch an intereſt therein, that it ſeems agreed, that a cuſtom or preſcription (*a*) totally to exclude him from all manner of profit is void, as unreaſonable and againſt law. Co. Lit. 122. a.

(*a*) Therefore if the owner of the ſoil grants to another common *ſans number* there, yet the grantee cannot uſe the common with ſo many cattle that the grantor ſhall not have ſufficient common for his cattle. 12 H. 8. 2 Roll. Abr. 396. 399. Bridg. 5. Roll. Rep. 365. Sand. 245. S. P. admitted.—But where the lord ſhall, by preſcription, be reſtrained to a certain number, *vide* 2 Roll. Abr. 267. pl. 2.

But one may preſcribe or allege a cuſtom to have *ſolam veſturam terræ* from ſuch a day to ſuch a day, and exclude the owner of the ſoil. Co. Lit. 122. a. And may preſcribe to have *ſeparalem paſturam*, and exclude the owner of the ſoil from feeding there. Co. Lit. 122. a.

Alſo it ſeems by the better opinion, that a preſcription for *ſol. & ſeparal. paſtur.* at all times, ſo as to exclude the lord from feeding there, is good; for this does not exclude the lord of all the profits, for he ſhall have the mines, trees, *&c.* and is not like a preſcription for the whole common to exclude the lord, for that is repugnant. [North v. Cox, Vaugh. 251. 1 Lev. 253. S. C. Potter v. North, 1 Ventr. 383. 1 Saund. 350. S. C. 1 Lev. 268. S. C. Hopkins v. Robinſon, 1 Mod. 74. 2 Lev. 2. S. C. 2 Keb. 757. 842. 1 Ventr. 123. 163. S. C. Pollex. 13. S. C.]

The lord without preſcription cannot agiſt the cattle of a ſtranger in the common. 30 E. 3. 27. Roll. Abr. 396.

But he may (*b*) licence a ſtranger to put in his cattle, if he leaves ſufficient common for the commoners. 2 Mod. 6, 7. *& vide* 2 Mod. 275.

(*b*) And if the lord licence a ſtranger *ad ponend. averia* into the common, this ſhall be intended of commonable cattle only, and not of hogs; but if the licence be for a particular time, it is otherwiſe. 2 Mod. 7. *Per* North, that ſuch licence muſt be by deed. 2 Lev. 2.

If the lord alien in fee the ſoil where the common is taken, ſaving his power of paſture, as lord, he ſhall have common there as lord; *aliter* without any ſaving; but the alienee of the ſoil may depaſture it, as the lord had done before. 18 Aſſ. 56. pl. 4. 18 E. 3. 43. Roll. Abr. 396.

If *A.* grant common to *B.* in a certain place, *A.* cannot afterwards erect a rick there; for by the grant the cattle of *B.* are to range over the whole place without reſtraint; and it ſhall not be in the power of *A.* to defeat his own grant. Cro. Jac. 271. Farmer and Grant. Yelv. 201. S. C. adjudged.

[The right of commoners in a common may be ſubſervient to the right of the lord in the ſoil; ſo that the lord may dig claypits there, or impower others to do ſo, without leaving ſufficient herbage in the common, if ſuch a right can be proved to have been always exerciſed by him. Bateſon v. Green, 5 Term Rep. 411.

So, he may with the conſent of the homage, grant part of the ſoil of the common for building, if he hath immemorially exerciſed ſuch right. Folkard v. Hemmett, Sittings after *Eaſter* Term, 1776, C. B. 5 Term Rep. 417. n.

So,

Clarkſon v. Woodhouſe, 5 Term Rep. 412. n.

So, a cuſtom, that the owners of ancient meſſuages, &c. within a manor have had aſſigned to them by the moſs-reeve certain portions of the common to be holden by them in ſeveralty for digging turves, &c. called moſs dales, and have incloſed and approved ſuch moſs dales, (after clearing them of turves,) and holden them ſo incloſed in ſeveralty, diſcharged from all right of common, is good.]

(C) Of the Commoner's Intereſt in the Soil: And herein of the Remedies the Law gives him.

A Commoner hath only a (*a*) ſpecial and limited intereſt in the ſoil; but yet he ſhall have ſuch (*b*) remedies as are commenſurate to his right, and therefore may diſtrain beaſts damage-feaſant, bring an action on the caſe, &c. but not being abſolute owner of the ſoil, he cannot (*c*) bring a general action of treſpaſs for a treſpaſs done upon the common.

(*a*) For the intereſt and power of a commoner, and the general learning thereof, *vide* Bridg. 10, 11. Godb. 123, 124. 2 Leon. 201, 202. S. C. (*b*) Where he may maintain an aſſiſe, and what ſhall be a ſufficient ſeiſin for that purpoſe. Roll. Abr. 404. (*c*) 4 Mod. 187. Carth. 285. Skin. 432. 2 Salk. 637. admitted. 9 Co. 111. b.

12 H. 8. 2. 13 H. 8. 15. Sid. 251.

A commoner cannot regularly do any thing on the ſoil which tends to the melioration or improvement of the common, as cutting down buſhes, fern, &c.

Roll. Abr. 405. 2 Bulſt. 116. S. P. Godb. 52. S. P.

Therefore if a common every year in a flood is ſurrounded with water, yet the commoner (*d*) cannot (*e*) make a (*f*) trench in the ſoil to avoid the water; becauſe he has nothing to do with the ſoil, but only to take the graſs with the mouth of his cattle.

(*d*) So the commoner cannot cut buſhes, fern, &c. which impair the common, Bridg. 10., unleſs it be by ſpecial preſcription. Godb. 182. (*e*) Unleſs by ſpecial cuſtom. (*f*) For if he makes any thing *de novo* in the land, he is a treſpaſſer; but may amend and reform a thing abuſed; and therefore, if the land be full of mole-hills, he may dig them down. Brownl. 228. So if there be holes dug in the common to the damage of the land, the commoner may put again, the earth dug, into its place. Brownl. 228.——Alſo a commoner may ſcour a trench, as has been uſed to be done time out of mind, and as is done in the moors of *Somerſet*. Sid. 251.

Lit. Rep. 38. & *vide* 1 Roll. Abr. 406.

Every commoner may (*g*) break the common if it be incloſed, and although he does not put his cattle in at the time, yet his right of commonage ſhall excuſe him from being a treſpaſſer.

(*g*) Where he may make one or more gaps to put in his cattle, if the common be incloſed, *vide* Goldſ. 117. 2 Inſt. 88.—May throw down the hedges. 2 Mod 65, 66. Brownl. 228.—If the lord makes a pond in the common, the commoners may let the water out. Brownl. 228.

2 Leon. 202, 203.

If a tenant of the freehold ploughs it, and ſows it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land: ſo, if he lets his corn lie in the field beyond the uſual time, the other commoners may notwithſtanding put in their beaſts.

But for the better underſtanding of the commoner's right and intereſt in the common, and of his remedies when his right is infringed, it may be neceſſary more particularly to conſider,

1. What

1. What Remedies he has againſt the Lord or Owner of the Soil.

If a commoner find conies on the ſoil ſpoiling the graſs, he cannot deſtroy or drive them off, nor, conſequently, can he deſtroy the burrows, which is, in effect, deſtroying the conies; but to the law the commoner muſt reſort for his remedy, if he is aggrieved. 1 Burr. 266. 2 Wilſ. 51. Roll. Abr. 405. pl. 2. Cro. Eliz. 876. Cro. Jac. 195. 229.

It is (*a*) a general rule, that a commoner cannot diſtrain or chaſe out the cattle of the lord or tertenant, damage-feaſant; and (*b*) that if the lord ſurcharges the common, the (*c*) proper remedy is an action on the caſe. (*a*) For which *vide* 2 Leon. 203. Yelv. 104. 129. Cro. Jac. 208.

Brownl. 187. Godb. 182. (*b*) That the commoner may have an action on the caſe, F. N. B. 125. 9 Co. 112.—And how ſuch action is to be laid. Lutw. 107. (*c*) And therefore there can be no relief in equity where the lord ſurcharges. 2 Vern. 116. *——* See the next caſe.

If there is a cuſtom, that a cloſe ought to lie freſh and hained every ſecond year till *Lady-day* after the corn cut and carried away; and *J. S.* hath uſed time out of mind to have common in the ſaid cloſe after *Lady-day*, till it is ſowed again with corn, for his cattle levant and couchant upon a certain tenement as appurtenant thereto; in this caſe, if the lord of the ſoil of the ſaid cloſe puts in his cattle into the ſaid cloſe againſt the cuſtom, when it ought to lie freſh and hained by cuſtom, the ſaid *J. S.* though he be but a commoner, (*d*) may take the cattle of the lord there damage-feaſant, and juſtify in an action of treſpaſs brought againſt him by the lord of the cloſe where he took the cattle; for if the lord may eat the graſs before the common is to be taken purſuant to the cuſtom, the tenant would be defeated of all the benefit of his common. Roll. Abr. 405, 406. Trulack and White, adjudged, [4 Burr. 2430. cited by the court and admitted.] (*d*) So where the lord by cuſtom is ſtinted to a certain number of cattle, and yet he puts in more, Kenrick and Pargiter, Yelv. 129. Adjudged by three judges againſt two, who doubted, and inclined to think, that a cuſtom and uſage to diſtrain ought to have been alleged. Cro. Jac. 208. Brownl. 187. [See Lord Mansfield's obſervations on this caſe, 4 Burr. 2429, 2430.]—But how far the lord may be diſtrained to a certain ſtint, *vide* 2 Roll. Abr. 267.

(*e*) If (*f*) I have (*g*) common of eſtovers in the woods of *J. S.* and *J. S.* cuts part, or all the wood, yet I cannot take any part of this which is cut, (*h*) but ſhall be put to my aſſiſe, or caſe, as my eſtate is. (*e*) Roll. Abr. 406. Cro. Eliz. 826. S. P. *per Cur.* Cro. Jac. 257. S. P. *per Curiam.* Roll. Abr. 567. pl. 3. like point. Yelv. 188. S. P. *per Curiam.* Brownl. 220. S. P. *per Cur.* Bulſt. 93, 94. S. P. admitted *arguendo.* (*f*) So if one grants to me 1000 cords of wood, to be taken at my election, and the grantor, or a ſtranger, cuts down all, or part of the wood, I can take no part of that which is cut down. Sir Thomas Palmer's caſe, 5 Co. 25. Cro. Eliz. 820. S. C. Noy, 32. S. C. Moor, 691. pl. 955. S. C. Yelv. 188. cited. [Woodſon v. Newton, 2 Str. 777. S. P. Rackham v. Jeſup, 3 Wilſ. 332. S. P.] (*g*) But if a man claims all the thorns, &c. growing on ſuch a place, he may take them, though cut down by another. Douglas and Kendall, Cro. Jack. 257. adjudged. Yelv. 188. adjudged. Brownl. 219, 220. adjudged. Bulſt. 93, 94. (*h*) For this *vide* 9 Co. 112. Brownl. 197. Roll. Abr. 108. pl. 22. F. N. B. 58. Hob. 43. Yelv. 188. 5 Co. 25.

2. Againſt the other Commoners; and herein of Admeaſurement.

The writ of admeaſurement lies by (*i*) one commoner againſt (*k*) another; but if the tenant ſurcharges the common, the lord ſhall (*l*) not have a writ of admeaſurement againſt the tenant. F. N. B. 125. B. D. (*i*) *Per* 2 Inſt. 86. it lies only for and againſt ſuch as have common appendant; but Q. & *vide* F. N. B. 125. Roll. Rep. 365.

(*k*) Yet

(*k*) Yet upon this ſuit all the commoners ſhall be admeaſured. F. N. B. 125. [(*l*) *Vide* Fitzh. tit. *Admeaſurement*, pl. 12. 16.]

F.N.B.125. D. 126. D. So if the lord ſurcharge the common, or approve without leaving ſufficient, the tenant ſhall not have a writ of admeaſurement againſt him, but an aſſiſe.

F.N.B.125. D. *Vide* Ld. Raym. 1187. *contr.* No writ of admeaſurement lies againſt a commoner *ſans number*, nor ſhall his (*a*) common be admeaſured.

(*a*) But the tertenant may diſtrain his cattle. Sand. 345.*——* The book ſays, the lord of the ſoil may diſtrain.

22 Aſſ. pl. 65. Style, 428. Yelv. 104. One commoner (*b*) cannot diſtrain the cattle of another; for the right of commonage, which every commoner has, runs through the whole land.

2 Lutw. 1240. [4 Burr. 2426. 1 Bl. Rep. 673. S. C. And *after admeaſurement*, a commoner may diſtrain the ſupernumerary cattle of a fellow-commoner. 3 Wilſ. 287. If *A.*, being poſſeſſed of land in a common field, and having a right of common over the whole field, and ſeveral other perſons having a like right of common, enter into an agreement not to exerciſe their reſpective rights for a certain term of years, and each party covenant to that effect; if, during that term, the cattle of one of the perſons, party to ſuch agreement, come upon the land of *A.*, *A.* may diſtrain them; for this agreement is an extinguiſhment of the common *pro tempore*; and therefore, with regard to *A.*, the commoner is a ſtranger. Whiteman v. King, 2 H. Bl. 4.] (*b*) But if a man has common for ten beaſts, and he puts in more, the ſurpluſage beyond the ten may be taken damage-feaſant. 46 E. 3. 12. b. 2 Lutw. 1241. [Freem. 273. S. C. *Vide* 4 Burr. 2431. His relief is either by writ of admeaſurement, or by action on the caſe. F. N. B. 125.] 9 Co. 112.——Where one commoner may have relief in equity againſt another for oppreſſing the common. Vern. 308.

3. Againſt Strangers.

15 H. 7. 13. 14 H. 7. 3. 9 Co. 112. b. Bridg. 10. A commoner may juſtify the taking of the cattle of a ſtranger damage-feaſant upon the common, in his own name, for the intereſt which he has in the common.

Roll. Abr. 320. 405. Yelv. 130. Godb. 185. Jenk. 144. But can have no action unleſs laid *per quod* his common was impaired. Keilw. 47.

3 Lev. 104. Wotton and Salter, adjudged. But in his avowry he muſt allege a particular damage; as that he could not have common *in tam amplo modo quo debuit & conſuevit*, for without a particular damage, he can no more diſtrain the beaſts of a ſtranger, than bring an action upon the caſe.

2 Mod. 6. Smith and Feverel, adjudged. If in an action on the caſe brought by a commoner againſt a ſtranger, for putting his cattle in the common, *per quod commoniam in tam amplo modo habere non potuit*, the defendant pleads a licence from the lord to put his cattle there, but doth not aver there is ſufficient common left for the commoners; this is not a good plea; for though it may be objected, the plaintiff may have replied ſpecially, and ſhewn there was not enough, yet this being the very giſt of the action, the defendant ſhould have pleaded it.

[To an action on the caſe by a commoner for digging pits, &c. whereby, &c., the defendant pleaded, that he was lord of the ſoil, and that he had digged for coals, doing as little damage as poſſible to the herbage, and averred, that he had left a ſufficiency of common: the plaintiff demurred, and ſhewed for cauſe, that the plea amounted to the general iſſue; and ſo thought the court. Goe v. Cother, 1 Sid. 136. Treſpaſs by the lord of a manor for deſtroying his peat and filling up the holes out of which it was digged: the defendant juſtifies under a right of common over the waſte appendant, &c., and that the plaintiff had digged this peat in ſome parts of the common, and laid it up in others, whereby the defendant was hindered from enjoying his common *in tam amplo modo*, &c.; the plaintiff replies, *de injuriâ ſuâ propriâ abſque tali cauſâ*: the plaintiff cannot upon this iſſue, give in evidence, that there was a ſufficiency of common left. D'Ayrolles v. Howard, 3 Burr. 1385.]

But in an action againſt the lord, the plaintiff muſt particularly ſhew the ſurcharge. 2 Mod. 7. *per Cur.* Lutw. 107.

[But againſt a ſtranger, or a fellow-commoner, he need not. Atkinſon v. Treſdale, 3 Wilſ. 278.]

[For every feeding by the cattle of a ſtranger, perhaps, an action will not lie; but the commoner muſt ſhew that *proficuum communiæ ſuæ per totum id tempus amiſit*, or, that he could not have his common in ſo beneficial a manner as before. It is not neceſſary that he ſhould have loſt his common, but only the profits of it: he need not, therefore, ſhew that he turned on any cattle at the time when the injury complained of was committed.] Mary's caſe, 9 Co. 113. Wells v. Watling, 2 Bl. Rep. 1233.

(D) Of Approvement and Incloſure.

BY the order of the common law, there could be (*a*) no approvement, becauſe the common iſſued out of the whole waſte. 2 Inſt. 85. (*a*) But by the common law, the lord might improve againſt any that had common appendant, but not againſt a commoner by grant. 2 Inſt. 474.

But now, by the (*b*) ſtatute of (*c*) *Merton*, *cap.* 4. "Becauſe "great men, having (*d*) enfeoffed others of ſmall tenements in "their great manors, complained they could not make their pro- "fit of the reſidue of their manors, as waſte, woods, and paſ- "tures, it is provided, when ſuch feoffees bring an (*e*) aſſiſe for "their (*f*) common of paſture, and it is alleged they have not "ſufficient paſture (*g*) belonging to their tenements, ingreſs or "regreſs, the truth ſhall be inquired by the aſſiſe, and if found "they have not ſufficient, they ſhall recover ſeiſin by the view "of the inqueſt, and by their (*h*) diſcretion ſhall have ſufficient, "*&c.* but if found they (*i*) have ſufficient, *&c.* the other ſhall "make (*k*) the profit (*l*) of the (*m*) reſidue, and be quit of the "aſſiſe." (*b*) Which ſee explained 2 Inſt. 85, 86. Vaugh. 257. (*c*) Made 20 H. 3. c. 4. (*d*) So that it extends only to enable the lord to approve againſt his tenants. 2 Inſt. 85. (*e*) So it may be tried in an action of treſpaſs *. 2 Inſt. 88. Godb. 117. Or if the lord incloſe any part, and leave not ſufficient common in the reſidue, the commoner may break down the whole incloſure. 2 Inſt. 88. (*f*) It extends not to common of piſcary, turbary, eſtovers, &c. 2 Inſt. 87. (*g*) So that it extends not to common in groſs. 2 Inſt. 86. (*h*) So that if found they have not ſufficient, the inqueſt ſhall find what is ſufficient, that the lord may approve the reſidue. 2 Inſt. 88. (*i*) And though, after it ſhould prove inſufficient, the improvement continues. 2 Inſt. 87, 88. (*k*) By incloſure. 2 Inſt. 87. And not by digging for coals, &c. Sid. 106. And if the lord makes a feoffment of part, his feoffee may incloſe, for the feoffment in its nature was an improvement. 2 Inſt. 87. (*l*) And thereby it is diſcharged of the common; and if the tenant purchaſe it, his common is not extinguiſhed. 2 Inſt. 87. (*m*) But the lord cannot approve the whole, leaving them ſufficient in other lands. 2 Co. 25. b.

* This muſt mean treſpaſs on the caſe.

By the ſtatute of *Weſt.* 2. *cap.* 46., "The ſtatute of *Merton* "ſhall bind (*n*) neighbours, and ſuch as claim common of paſ- "ture appurtenant to their tenements, but not ſuch as claim "common by ſpecial grant or feoffment for a certain number, or "otherwiſe. (*n*) Though he dwells in another town, if the towns and commons adjoin. 2 Inſt. 474. ——And if the lord hath common in the tenant's ground, the tenant may improve within this act. 2 Inſt. 474. —— Seems as if the common of the lord was reſerved upon the firſt feoffment. 2 Inſt. 475.

" By occaſion of (*a*) wind-mill, ſheep-cote, dairy, enlarging of " a court (*b*) neceſſary, or (*c*) curtilage, (*d*) none ſhall be grieved " by aſſiſe of *novel diſſeiſin* for common of paſture."

(*a*) Theſe are but for example; for the lord may erect an houſe for the habitation of a beaſt-keeper. 2 Inſt. 476. Lev. 62. (*b*) It muſt be ſhewn that it was done for his neceſſary reſiance. Nevil and Hamerton, Lev. 62. adjudged. Sid. 79. adjudged. Keb. 283. 314. (*c*) Whether neceſſary it ſhould be an ancient one. Lev. 62. *dubitatur*, Sid. 79. *dubitatur*. And *vide* Keb. 283. 314. (*d*) Though there is not ſufficient common left. 2 Inſt. 476. Lev. 62.

" And where any (*e*) having right to approve, levies dike or " hedge, and (*f*) it is thrown down (*g*) in the night or other " ſeaſon, *&c.*, and it cannot be known (*h*) by verdict of aſſiſe or " jury by whom, and the men of the town near (*i*) will not " indict ſuch as are guilty of the fact, the towns near adjoining " (*k*) ſhall be diſtrained to levy the hedge or dike at their own " coſts, and to yield damages (*l*)."

(*e*) It is not neceſſary to ſet forth what eſtate the party has; for he that hath the herbage only may incloſe. Carth. 114. and *vide* 241. (*f*) The cutting down of timber is not within the act. Raym. 487. (*g*) If the proſternation in the day or night was before the face of the owners, or ſo publick that the offenders might be known, it is not within the act. Lev. 108. A traverſe taken accordingly. (*h*) For the inquiſition, and other proceedings on this act, *vide* Cro. Car. 280. 440. 580. Jones, 307. Sid. 107. 212. Mod. 66. Carth. 241. 10 Mod. 157. Ld. Raym. 616. (*i*) No time being appointed, it ſhall be intended within a year and a day. 2 Inſt. 476. Roll. Rep. 365. *Per* Cro. Car. 440. A convenient time. (*k*) The lord ſhall bring his action upon this ſtatute, againſt the towns bordering round about the town where the fact was done, and judgment ſhall be given, that they ſhall, at their proper coſts, make the ditch, &c. 2 Inſt. 477. Roll. Rep. 365. [(*l*) By ſtat. 6 Geo. 1. c. 16., the remedy provided by this act, is extended to the owners of trees, &c. cut down, ſpoiled, &c. either by day or by night.]

By the 3 *E.* 6. *cap.* 3., " The ſtatutes of *Merton* and *Weſtm.* " are confirmed, and treble damages given to the commoners " that recover in ſuch aſſiſe againſt the lord."

Vern. 32. (*m*) Where upon ſuggeſtion that an incloſure is an improvemnt within the ſtatute of *Merton*, Chancery will grant an injunction till it be determined at law. 2 Vern. 301. 356.——Where it will decree an incloſure purſuant to an agreement, though oppoſed by two or three wilful tenants. Chan. Ca. 48. Vern. 456. Chan. Rep. 259.—Where an agreement to ſtint a common. 2 Vern. 103.

It hath been ruled in (*m*) Chancery, that a common which hath been incloſed for thirty years, ſhall not afterwards be thrown open.

[By ſtat. 29 *Geo.* 2. *c.* 36. Owners of common, with the conſent of the majority in number and value of the commoners; majority of the commoners, with the conſent of the owners; any perſons, with the conſent and grant of the owners and majority of commoners, may incloſe and hold in ſeveralty, for the growth and preſervation of timber and underwood, any part of the commons, for ſuch time, in ſuch manner, and upon ſuch conditions as ſhall

§ 3. be agreed by them reſpectively; ſuch agreement to be in writ-

§ 4. ing, and ſigned by the parties, and enrolled by the clerk of the peace withing three months after the execution of it; and to be binding upon all perſons whomſoever, if not appealed againſt to the juſtices at ſeſſions within ſix months after its enrolment.

§ 7. 6. If wood is deſtroyed, the offender may be puniſhed according to 1 & 6 *Geo.* 1.; but if not convicted within ſix months, ſatisfaction ſhall be made by the adjoining pariſhes, as for dikes

§ 8. and hedges overthrown by the ſtatute *Weſtm.* 2. Perſons cutting, *&c.* wood upon commonable grounds ſhall be puniſhed in like manner.

By

By ſtat. 31 *Geo.* 2. *c.* 41. it is provided, That if any recompence be agreed to be given for ſuch incloſure, it ſhall be made to the perſons intereſted in the right of common, in proportion to their reſpective intereſts; and not to the overſeers of the poor, as was directed by § 2. of the preceding act: and the powers given to owners by that act may be exerciſed by tenants for life, or years, during their reſpective intereſts, with a proviſo that nothing done by them ſhall have effect after the determination of their eſtates. § 2. § 3.

By ſtat. 13 *G.* 3. *c.* 81. it is enacted, That all tillage or arable lands, lying in common fields, ſhall be fenced, cultivated, and improved in ſuch manner, and kept and continued in ſuch courſe of huſbandry, and cultivated under ſuch rules, as three-fourths in number and value of the occupiers, with the conſent of the owners and rector, impropriator or tithe owner, or their leſſee, ſhall by writing under their hands direct and appoint; which rules ſhall not be binding for any longer term than ſix years, or two rounds, according to the ancient and eſtabliſhed courſe of the pariſh. They may too poſtpone the opening of ſuch common field lands for ſuch reaſonable time as they ſhall agree upon, and ſettle how long they ſhall continue open, and what number of cattle each commoner ſhall turn on. Cottagers however, or commoners without land, are not to be excluded from their uſual right of common, unleſs they have agreed in writing upon ſome compoſition for it by an annual payment. But if the commoners agree not to depaſture the lands in common at the uſual times, and allot what ſhall be deemed by a majority of ſuch cottagers, as ſhall not have agreed to compound for their right of common, an equivalent common to be enjoyed excluſively by them, ſuch cottagers ſhall uſe their right of common only over thoſe parts of the common field lands which ſhall be ſo allotted them. Perſons having a ſeparate ſheep-walk, or paſture for cattle, are not to be deprived of their right without their conſent.—Lords of manors, with conſent of three-fourths of the commoners, may leaſe out one twelfth part of any common or waſte within ſuch manor, the rent to be applied in draining, fencing, or otherwiſe improving the reſidue; and two-thirds of the commoners, with conſent of the lords of the manors, may appoint the time when common paſtures ſhall be broken and depaſtured, and when the ſame ſhall be ſhut and unſtocked; reſerving however a portion for ſuch as may diſſent. § 1. § 2. § 7. § 8. § 9. § 10. § 15. § 18. § 19.

If the majority of commoners agree upon a by-law for ſtopping a trench, being a nuiſance to the common, it ſhall bind all the commoners, though there be no cuſtom to ſupport it.] Moor, 579.

(E) Of Apportionment and Extinguiſhment.

Co. Lit. 122. Hob. 235. 8 Co. 78. Owen, 122. 4 Co. 37.

COMMON appendant, becauſe it is of common right, ſhall be apportioned by the commoner's purchaſe of part of the land in which he hath ſuch common; but common appurtenant ſhall be extinct by the commoner's purchaſe of part of the land in which, *&c.*; both common appendant and appurtenant ſhall be apportioned by alienation of part of the land to which the common is appendant or appurtenant.

For this, and where the unity of poſſeſſion of the whole land makes an extinguiſhment, *vide* 4 Co. 37. 8 Co. 136. Show. 350. 4 Mod. 365. Carth. 342.

A releaſe of common in one acre, is an extinguiſhment of the whole common.

Hob. 190. Cro. Jac. 253. Yelv. 189. Noy, 136. 2 Roll. Abr. 61. 2 Brownl. 210. Moor, 667. Cro. Eliz. 794.

A copyholder had common in his lord's waſte; the lord grants and confirms the copyhold land and meſſuage to him and his heirs *cum pertinentiis*: it was reſolved the common was extinct*, for it was annexed to his cuſtomary eſtate by the cuſtom; which eſtate being determined, the common is alſo gone, and cannot continue without words to that intent; and *cum pertinentiis* will not do; for the common was no appurtenant to the freehold eſtate granted by the lord.

* But ſee *infra*.

Cro. Eliz. 570. Bradſhaw and Eyre. 4 Mod. 364. S. C. cited.

But if *A.*, as appurtenant to a certain meſſuage and twenty acres of land, hath common in the lands of *B.*, and after *B.* enfeoffs *A.* of the ſaid lands in which, *&c.*, *per quod* the common is extinguiſhed; and after *A.* leaſes to *B.* the ſaid meſſuage and twenty acres of land, with all commons, profits, and commodities thereto appertaining, *vel occupat. vel uſitat. cum pred. meſſuagio*, this is a good grant of a new common for the time; for though it were not common in the hands of the leſſor, yet it is *quaſi* common uſed therewith, and although (*a*) it be not the ſame common as was uſed before, yet it is the like common; but yet becauſe it was not there averred, that this common was therewith uſed at the time of the leaſe, it was adjudged againſt the defendant who claimed the common.

(*a*) So if a copyhold meſſuage eſcheats, to which before common in the demeſnes of the lord did belong, and the lord by deed grants it *per nomina meſſuag. &c. & communiar. quarumcunque dicto meſſuag. ſpectant., &c. vel cum eodem meſſuag. uſitat.* Cro. Eliz. 794. 2 And. 168.

Salk. 170. pl. 3. 364. pl. 5. Crowther and Oldfield, 2 Ld. Raym. 1225.

A copyholder that hath common of paſture in the waſtes of the lord out of the manor, hath the ſame, as belonging to his land, and if he enfranchiſe the copyhold eſtate, ſtill his common remains; but where a copyholder has common in the waſtes within the manor, that belongs to his eſtate, and if the eſtate be enfranchiſed, the common is extinct.

6 Mod. 19. 2 Vern. 250.

Alſo it has been ruled in equity, that if the lord of the manor enfranchiſes a copyhold with all commons thereunto belonging or appertaining, and afterwards buys in all the other copyholds, and then diſputes the right of common with the copyholders he had enfranchiſed, and recovers at law; though the common be extinct at law, yet it ſhall ſubſiſt in equity, and the ſame right of common as belonged to the copyhold will be decreed.

Conditions.

BY the word *condition*, is uſually underſtood ſome quality (*a*) annexed to a real eſtate, by virtue of which it may be (*b*) defeated, enlarged, or created upon an uncertain event.

Co. Lit. 201. (*a*) By expreſs words, which is called a condition in fact; as where a feoffment is made of lands, reſerving rent payable on a certain day, upon condition, that it be not paid on the day, the feoffor may re-enter, &c. Co. Lit. 201. Or implied by law, which is called a condition in law; as if an office be granted to one, the law annexes, without expreſs words, a condition, that the party ſhall duly and faithfully execute it, and that for miſbehaviour, the grantor may diſcharge him. Co. Lit. 233. a. (*b*) And *note*, that it is a general rule, that a condition which deſtroys or defeats the eſtate or grant, is to be conſtrued ſtrictly. Roll. Abr. 438. Co. Lit. 220.

Alſo qualities annexed to perſonal contracts and agreements, are frequently called *conditions*, and theſe muſt be interpreted according to the (*c*) real intention of the parties, and are uſually taken moſt (*d*) ſtrongly againſt the party to whom they are meant to extend, leſt by the obſcure wording of his own contract, he ſhould find means to evade and elude it.

Vide heads of *Covenant* and *Obligations*. (*c*) If the condition of an obligation be, that the obligor ſhall make all the linen the obligee ſhall wear during his life, the obligee muſt deliver to the obligor the cloth of which it is to be made; for all contracts are to be interpreted according to the intent and ſubject-matter. Lev. 93. (*d*) If I covenant to deliver ſo many yards of cloth, and I cut it in pieces, and then deliver it. Raym. 464.—If the condition of a bond be to pay 50 *l.*, though it is not ſaid of money, yet it muſt be ſo intended, and the obligor cannot tender fifty pounds weight of ſtone. Sid. 151., &c.

(A) By what Words created in a Deed.

(B) By what Words created in a Will.

(C) Of the Manner of creating the Condition, and at what Time it muſt be annexed.

(D) Where the Nature of the Thing will admit of no Condition, but muſt be abſolute.

(E) To whom the Condition may be reſerved.

(F) To whom it ſhall be ſaid to extend to be bound by it.

(G) What ſhall be ſaid a Condition, and not a Covenant.

(H) What ſhall be ſaid a Condition, and not a Limitation, and how they differ.

(I) Of Conditions precedent and ſubſequent.

(K) Of void Conditions, being againſt Law.

(L) Of repugnant Conditions.

(M) Of impoſſible Conditions.

(N) Of the Effect of a void, illegal, or impoſſible Condition.

(O) Of the Breach of the Condition: And herein,

1. What ſhall be a Breach thereof.
2. What the Party muſt do to entitle him to the Advantage thereof; and herein of Notice, Requeſt, Tender, and Refuſal.
3. What ſhall be a Diſpenſation therewith.
4. How far he, who enters for a Condition broken, is reinſtated in his former Eſtate.

(P) Of performing the Condition: And herein,

1. What Perſons may perform it.
2. To whom it may be performed.
3. At what Time it may be performed.
4. At what Place it may be performed.
5. What ſhall be ſaid a ſufficient Performance.

(Q) What ſhall excuſe the Non-performance: And herein,

1. Of the Act of God.
2. Of the Act of Law.
3. Of the Act of the Party.
4. Of the Act of a Stranger.

(A) By what Words created in a Deed.

Co. Lit. 203. (a) *Ad effectum, ea intentione, ad ſolvendum* in the king's grants make a condition.

MY Lord *Coke* ſays, that by inſerting the very word *condition*, or *ſub conditione*, conditions are moſt properly created; but there are alſo (*a*) other words, ſays he, that will do as effectually, as the word (*b*) *proviſo*; but then it muſt not depend upon another ſentence; alſo the words muſt be thoſe of the grantor, and compulſory to enforce the grantee to do ſome act.

Roll. Abr. 407. 10 Co. 42. Hob. 231. 4 Leon. 70.—Where the words *ſi modo*, by the common law, make a condition, though it is otherwiſe by the civil law, as in a licence from the archbiſhop to accept another living, *modo ſit* within ten miles of the former. *Vide* Jones, 394. Cro. Car. 475. Owen, 152. (*b*) 2 Co. 70. b.

It is ſaid to have been adjudged, that a feoffment (*a*) *eâ intentione* does not make a condition; and it is only a confidence or truſt, unleſs an expreſs re-entry be limited. Roll. Abr. 407. Co. Lit. 204.

(*a*) A man made a feoffment *eâ intentione* that his wife ſhould have an eſtate for life, the remainder to his youngeſt ſon in fee, and the feoffee died without making ſuch eſtate; it was reſolved the heir of the feoffor could not enter, for that there was no condition, but an eſtate executed preſently according to the intent. 4 Leon. 2.—If the king grants an advowſon in fee, and further, that the grantee may amortize this for the ſoul of the progenitors of the king; this is but a licence, and not a condition. 43 E. 3. 34. Fitz. Condition, 7. S. C. Roll. Abr. 407. S. C.

Recoverors to an uſe before 27 *H.* 8. *cap.* 10. leaſed by indenture for ninety-nine years, and the leſſee, by the ſame deed, covenanted with the recoverors to pay the rent to *ceſtui que uſe*, his heirs and aſſigns; *proviſo ſemper*, that if *ceſtui que uſe* make not his heir male his aſſignee, that then he ſhall pay his rent to the recoverors, their heirs and aſſigns; this (*b*) *proviſo* makes not a condition, but only abridges the covenant. Cro. El. 73. adjudged. 2 Leon. 128. 3 Leon. 225. S. C. By the report of which the *proviſo* was, that if the leſſee ſhould

make his heir male his aſſignee, &c. Moor, 107. S. C. cited. (*b*) Where the word *proviſo* makes no condition, but only a qualification or explication of a covenant or grant. *Vide* 2 Leon. 128. 3 Leon. 225, 226. Dyer, 222. 4 Leon. 70. 3 Leon. 16. Poph. 119. Moor, 707. Gouldſ. 131. 2 Co. 72. a. And. 71, 72.

If a man leaſes to a woman for forty years, upon condition that *ſi illa tam diu viveret & cuſtodiret ſe ipſam* a ſole widow, and ſhould inhabit upon the premiſes; this is not any condition; for the word (*c*) *ſi* makes the intention uncertain, whether another thing was intended beſides the ceſſer of the term, or the re-entry. Roll. Abr. 410. Sayer and Hardy, adjudged. Poph. 99. S. C. adjudged, for none can

imagine what the concluſion ſhould be; but it was agreed, that if the leaſe had been for forty years, *ſi tam diu ſola viveret & inhabitaret* upon the premiſes, the leaſe had determined by her marriage or death. Cro. Eliz. 414. S. C. adjudged by three judges againſt one, for every *ſi* ought to be anſwered with a *tunc*. Owen, 107, 108. adjudged. Gouldſ. 179. S. C. adjudged. Moor, 400. pl. 525. S. C. adjudged. (*c*) But if this word had been omitted, it would have been a condition; or if *ſub conditione quod* had been omitted, it would have been a limitation. Gouldſ. 179.

So if a man leaſes lands to another, *proviſo ſi* the rent be arrear, this is not a condition, becauſe the word *ſi* makes the intention uncertain; for where the (*d*) *proviſo* is hypothetical, it ought to be ſhewn what he would have. Roll. Abr. 410. Moody and Garnon. Roll. Rep. 367. S. C. Owen, 107.

S. P. by two judges *arguendo*. Cro. Eliz. 414. S. P. by three judges againſt one *arguendo*. (*d*) Where this being a proper word of condition, though put in an improper place, ſhall make the eſtate conditional. 2 Co. 72. b.

If a man leaſes land to another, *proviſo if the rent be behind, it ſhall be lawful for him to diſtrain, and not being ſufficient, the ground to re-enter into the premiſes, and the ſame to have again in his former eſtate*, this is no good condition, for the words are not, that he ſhall diſtrain the goods upon the tenement; nor is it known what is intended by the word ſufficient, *ſcilicet*, ſufficient reparation, rent, &c., and the words, *the ground to re-enter into the premiſes*, are inſenſible. Roll. Abr. 410. Moody and Garnon. Roll. Rep. 330. 367. S. C. adjudged. Bulſt. 153, 154. S. C. adjudged. Moor, 848. pl. 1151. S. C. adjudged, becauſe not ſaid what ſhall be reſtrained, nor who ſhall re-enter. Cro. Jac. 390. S. C. adjudged, and ſaid, Coke held *reſtrain* to be the ſame as *diſtrain*.

If *A.* infeoffs *B.*, upon condition that he ſhall render to *C.* and his heirs an yearly rent of 20*s.*, and if *B.* and his heirs fail Lit. ſect. 345. Co. Lit. 213. a.

(a) If a man grants a walk in a foreſt, provided the

of payment thereof, that then *A.* and his heirs may enter; this is a good condition, for though a rent cannot be reſerved to a ſtranger, yet yearly rent in this caſe (*a*) ſhall be intended of a yearly ſum of 20*s.* in groſs.

grantee ſhall not cut down any trees *ſuper præmiſſa*, though the ſoil is not granted, and *præmiſſa* hath properly a relation to the thing itſelf; yet ſince, in this caſe, it cannot have ſuch conſtruction, it ſhall be intended of trees growing within the walks. Cro. Eliz. 781. adjudged; and *vide* Moor, 526. Dalſ. 54. Moor, 52.

Poph. 102, 103. Slaning's caſe, certified to the chancellor accordingly, as the opinion of three judges. (*b*) If a man makes a deed of feoffment of lands in ſeveral counties, upon condition the feoffee ſhall re-infeoff him of all the land within twenty days

If *A.*, being ſeiſed in fee of the manor of *B.* and of divers lands in *C.*, then in the poſſeſſion of *D.*, for ſeveral years to come, makes a feoffment thereof to *E.*, to the uſe of himſelf in tail male, remainder to *F.* in tail male, *&c.*; provided that *E.* and the heirs male of his body, or *F.*, and the heirs male of his body, in whomſoever of them the inheritance in tail *of all the premiſes* ſhall happen to be, ſhall pay to the daughter of *A.* 200*l.*, according to the laſt will of *A.*; and *A.* makes a letter of attorney to *J. S.* to enter into the manor of *B.*, and the lands in *C.*, and in his name to take poſſeſſion and deliver it to *E.*, whereupon poſſeſſion is given to *E.* of all but what was in the poſſeſſion of *D.*, and *D.* never attorns, ſo that the lands in *C.* paſſed not; and after *A.* by will bequeaths 200*l.* to his daughter, and dies without iſſue; yet *F.* is not bound by this condition, becauſe he hath not (*b*) *all the lands* according to the purport of the condition, which was, that he that had all ſhould pay, *&c.*, and a condition ought to be taken ſtrictly.

after the date; if livery is made but of part within the twenty days, the condition is not broken, though all is not reconveyed within the twenty days, according to the letter of the condition, which is entire. Hob. 24.

2 Saund. 78. Maleverer and Hawxby, adjudged for the plaintiff upon demurrer, the defendant having pleaded the ſtatute of 23 H. 6. c. 9.

If the condition of an obligation be in this manner, *viz. the condition of this obligation is ſuch, that if the obligor ſhall appear* coram domino rege apud Weſtmon. *ſuch a day*, ad reſpond., &c., *then the condition of this obligation ſhall be void, or elſe the ſame ſhall be in full power and virtue;* yet this is a good condition, for the ſenſe is perfect without theſe laſt words, and they ſhall be rejected for their abſurdity and repugnancy.

Sid. 456. S. C. Mod. 35. S. C. 2 Keb. 625. S. C. Ld. Raym. 38. S. P.

(B) By what Words created in a Will.

Vide tit. *Deviſes*, Co. Lit. 204. a. Dalſ. 58. Moor, 57. pl 162.

AS the intent of the teſtator chiefly governs in wills, ſuch conſtruction is always made of the words as will beſt ſupport his intent, and therefore theſe words *ad faciendum, faciendo ea intentione, ad effectum, &c.* in a will create a condition.

Poph. 8. Cro. Eliz. 454. Owen, 92. Gouldſ. 75.

Roll. Abr. 410, 411. Cro. Eliz. 146. S. C. adjudged. Leon. 174. S. C. adjudged.

So if a man ſeiſed of ſocage lands, having two daughters, deviſe them to one of the daughters, to have and to hold to her and her heirs, to pay to her ſiſter a certain ſum of money at a certain day; theſe words "to pay, *&c.*," make a condition; ſo that the other ſiſter, if the money is not paid, may enter into a moiety

moiety for the condition broken, becauſe otherwiſe ſhe would be remedileſs. Couldſ. 134 Co. Lit. 236. S. C. cited.

But if a man deviſe lands to *B.* for life, paying to *C.* 6*l.* rent yearly, which he wills to be paid at two feaſts half-yearly, and if it be arrear, that then it ſhall be lawful to *C.* to diſtrain; it ſeems this word *paying* makes not any condition, inaſmuch as a diſtreſs is limited for non-payment thereof. Roll. Abr. 411. and Lane, 56. S. C. *dubitatur, & vide* Lane, 78.

If a man deviſe lands to his (*a*) executor to ſell, and (*b*) to make diſtribution of the money for his ſoul, and die; if the executor do not ſell them, the heir may enter, for this creates a condition. 38 Aſſ. 3. Roll. Abr. 410. S. C.

(*a*) For deviſes to executors for payment of debts, *vide* titles *Deviſes* and *Uſes and Truſts*. (*b*) A man deviſes 5*l.* yearly out of his land to his younger ſon, towards his education in learning; this creates no condition, ſo that he ſhall have the rent, though not educated in learning. 2 Leon. 154. 3 Leon. 65. and *vide* Dalſ. 116.

(C) Of the Manner of creating the Condition, and at what Time it muſt be annexed.

CONDITIONS cannot be annexed to eſtates of inheritance, or freehold eſtates without (*c*) deed. Roll. Abr. 413, 414.

(*c*) Cannot regularly be reſerved but by deed indented. Roll. Abr. 413.——But if by deed poll, and the feoffor, *&c.* gets it into his cuſtody, he may plead the condition againſt the feoffee, *&c.* Lit. ſect. 375. Co. Lit. 231.

If a feoffment be made of two acres upon condition, and for breach, that he may re-enter but in one, this is good. Roll. Abr. 412.

If a man agrees with me to make a feoffment to me upon condition, and after makes a charter of feoffment without any condition, and after makes livery *ſecundum formam chartæ* without any condition, this is abſolute without any condition; for the livery is not made according to the agreement, but according to the charter. 34 Aſſ. 1. Roll. Abr. 413.

But if *A.* agrees to enfeoff *B.* in ſurety of payment of certain money, and after makes livery to him and his heirs generally, the eſtate is holden by ſome to be on condition, inaſmuch as the intent of the parties was not changed, but continued at the time of the livery. Co. Lit. 222. b.

If a man makes a charter of feoffment to another, and in the deed there is no condition, but when the feoffor would make livery of ſeiſin to him by force of the deed, he expreſſing the eſtate, makes livery and ſeiſin to him upon condition, the feoffment is of like force as if no ſuch deed had been made. Lit. ſect. 359. Co. Lit. 222. b.

If a diſſeiſee releaſes to his diſſeiſor all his right, and at a day after, the diſſeiſor by indenture grants, that if he pays ſo much at a day certain, the releaſe ſhall be void; this is a void condition, (*d*) as to revive the right to the diſſeiſee. 43 Aſſ. 12. Roll. Abr. 414. Co. Lit. 236. S. P.

(*d*) For inheritances executed cannot be defeated by ſubſequent defeaſance. Co. Lit. 236.——But a releaſe, feoffment, *&c.* may be defeated by indenture of defeaſance made at the ſame time. Co. Lit. 236. 3 Co. 71. b.

Rents,

Co. Lit. 237. a. (a) But in caſe of a

Rents, annuities, warranties, &c. (being inheritances (a) executory) may be defeated by a defeaſance made at the time, (b) or at any time after.

feoffment, &c., where the eſtate is executed, it is not to be defeated by condition or defeaſance, unleſs contained in the ſame deed, or in another executed at the ſame time. 2 Sand. 48. (b) Cro. Eliz. 623. adjudged in caſe of a defeaſance to a bond; for the law is clear, that an obligation, judgment, &c. may be defeated by a ſubſequent defeaſance, and ſo is the common practice; for this *vide* Roll. Abr. 590.

Moor, 679. Broke and Smith. (c) Where a condition, written on the back of a leaſe be-

If the condition of an obligation be to ſave harmleſs certain lands from all incumbrances made by the obligor; and upon the back thereof there be a *memorandum* written, that the condition ſhall not extend to the extent upon a certain ſtatute acknowledged by the obligor; (c) this being written before the ſealing of the obligation, is an explanation thereof.

fore the execution thereof, was holden good. Cro. Jac. 456. But for this *vide* 2 Roll. Abr. 22, 23. And where a *proviſo*, inſerted in an improper place, ſhall have reference to the eſtate and make it conditional. 2 Co. 72. b.

(D) Where the Nature of the Thing will admit of no Condition, but muſt be abſolute.

Owen, 12. Gayton's caſe.

A Parſon cannot reſign upon condition, becauſe it is a judicial act, to which no condition can be annexed, any more than an ordinary can admit, or a judgment be confeſſed upon condition.

Roll. Abr. 412. Co. Lit. 300. S. P. So

The tenant cannot (d) attorn to the grant of a ſeignory (e) upon condition, becauſe this is but a conſent, and no intereſt paſſeth from him.

executors cannot agree upon condition to a legacy. 4 Co. 28. b. (d) Becauſe a bare aſſent without any intereſt. Co. Lit. 300. b. But a patron, in reſpect of his intereſt, may aſſent upon condition to charge the glebe of the parſon. Co. Lit. 300. (e) *Viz.* Upon condition ſubſequent; *ſecus* upon a condition precedent. Co. Lit. 274. So a licence to alien cannot be upon condition ſubſequent; *ſecus* as to a condition precedent, becauſe in ſuch caſe it is no licence till the condition be performed. Poph. 106.

Co. Lit. 274. b. Kelw. 88. S. P.

A diſſeiſee may releaſe his right to the diſſeiſor upon condition.

Co. Lit. 274. b. 9 Co. 85. b. S. P.

But a condition cannot be releaſed upon condition.

Co. Lit. 274. b.

An expreſs manumiſſion of a villein cannot be upon condition, for once free, and for ever free.

Co. Lit. 274. But a naturaliza-

Letters patent of denization of an alien may be upon condition precedent or ſubſequent.

tion by parliament cannot be upon condition, for it is againſt the abſoluteneſs, purity, and indelibility of natural allegiance. Co. Lit. 129. a.

Roll. Abr. 412. and *vide* Roll. Abr. 940.

A man cannot releaſe a perſonal thing, as an obligation upon a condition ſubſequent, but the condition will be void, becauſe a perſonal thing being once ſuſpended, is perpetually extinguiſhed.

Roll. Abr. 412. Barkley and Parkes adjudged.

But a man may releaſe a perſonal thing, as an obligation, or ſuch like, upon a condition precedent; for there the action is not ſuſpended till the condition performed; as where the releaſe was of an obligation with a *proviſo*, that he who releaſed might enjoy 120*l.* due by *J. S.*, at a day then to come, which being a condition precedent was adjudged good.

(E) To whom the Condition may be reserved.

CONDITIONS can only be reserved to the feoffor, donor, or leſſor, and their heirs, but not to any ſtranger. Lit. ſect. 347. Co. Lit. 214.

Alſo, by implication, without expreſs words, the law reſerves the condition to the heir of the feoffor, *&c.*; for, as he is prejudiced by the diſpoſition, it is but reaſonable that he ſhould take the ſame advantages that his anceſtor, whom he repreſents, might. Roll. Abr. 407. 472. *Vide* title *Heir and Anceſtor.*

If a man ſeiſed of lands in the right of his wife, makes a feoffment in fee upon condition, and dies, and after the condition is broken, the (*a*) heir of the huſband ſhall enter; for though no right deſcended to him, yet the title of entry by force of the condition, which was created upon the feoffment, and reſerved to the feoffor and his heirs, deſcended. 8 Co. 43, 44. Co. Lit. 202. a. S. P. 336. b. S. P.

(*a*) So if a man makes a feoffment in fee of lands in *borough-engliſh*, the heir at common law ſhall enter, but the younger ſon ſhall after enter upon him and enjoy, *&c.* Godb. 3. —— By act in law a condition may be apportioned, in the caſe of a common perſon; as, if a man leaſes two acres, one of the nature of *borough-engliſh*, and the other at the common law, upon condition, *&c.*, and the leſſor having two ſons dies, each of them ſhall enter for breach of the condition. Co. Lit. 215. a.

If a condition annexed to gavelkind lands be broken, the heir at common law ſhall enter; but when the eldeſt ſon enters for the condition broken, the younger children ſhall enjoy the land with him. Co. Lit. 11, 12. Lamb. 608.

If *ceſtui que uſe*, after the ſtatute of 1 *Rich.* 3. *c.* 1., and before the ſtatute 27 *H.* 8. *c.* 10., had made a feoffment in fee upon condition, the feoffee ſhould not have entered for the condition broken, but the *ceſtui que uſe*. Co. Lit. 202. a. 215. a. Moor, 212. pl. 353. Leon. 298. Sav. 76.

If a man ſeiſed in fee makes a leaſe for life, rendering rent, and for default of payment a re-entry, *&c.*, and after dies without heir, living the tenant for life, though the lord by eſcheat ſhall have the rent as incident to the reverſion, and may diſtrain for it, yet he cannot enter. Lit. ſ. 348. Co. Lit. 215. b.

Guardian in chivalry or ſocage, in the right of the heir, may take benefit of a condition by entry, or re-entry by the common law. Co. Lit. 215. b.

If tenant for life and the reverſioner join in a feoffment, the condition may be reſerved to the leſſee only, and by his re-entry he ſhall deveſt but his eſtate. Roll. Abr. 407.

If *A.* enfeoff *B.* upon condition, that if the heir of *A.* pays to *B.*, *&c.* 20*s.*, then he and his heirs may re-enter, this is a good condition, of which the heir of *A.* may take advantage, and yet *A.* himſelf never can. Co. Lit. 214. b.

If a man gives lands to his eldeſt ſon in tail, remainder to his ſecond ſon in tail, *&c.*, upon condition, that if the eldeſt ſon, or any of his iſſue, alien, the land ſhall remain to the ſecond, *&c.*; the conſequence of the condition, that the land ſhall remain to another, is void, though upon ſuch alienation the donor himſelf might enter *. Co. Lit. 379. a. * *Vide* Lit. § 723. and Ld. Coke's commentary thereon, 379. a.

(F) To whom it ſhall be ſaid to extend to be bound by it.

Roll. Abr. 421. Moor, 92. pl. 229. S. P.

IF an eſtate be made to a feme covert, ſhe ſhall be bound by the condition, becauſe this does not charge her perſon, but the land.

Roll. Abr. 421. 8 Co. 44. b. S. P.

So if an eſtate be made to an infant upon an (*a*) expreſs condition, the infant (*b*) ſhall be bound to perform it.

(*a*) But where an infant ſhall be bound by a condition in law, or not, *vide* Co. Lit. 233. b. 234. a. 8 Co. 44. b. Hard. 11. Carth. 42. *Vide* head of *Infants*. (*b*) So where an eſtate is deviſed to an infant, on condition, he is bound to take notice thereof, and perform the condition. 2 Lev. 21. 1 Mod. 86. 300. Vent. 200.

Roll. Abr. 421. Jones, 390. Cro. Jac. 374. 3 Bulſt. 58.

So if an eſtate be made to another in fee, upon condition; his heir, after his death, though he be within age, ſhall be bound by the condition.

5 Co. 68. Lord Cheney's caſe. Roll. Abr. 422. S. C. Moor, 727. S. C.

If a man deviſes land to *H.* his ſon, and to the heirs of his body, the remainder to *T.* and the heirs male of his body, upon condition that he or they, or any of them, ſhall not alien, diſcontinue, *&c.*; this condition ſhall extend only to reſtrain *T.* and the heirs male of his body, and not *H.* or his heirs.

Roll. Abr. 422. Cro. Jac. 398. S. C. adjudged. Dyer, 152. S. P. 2 Bulſt. 290.

If a man leaſes lands for years, upon condition that the leſſee, or his aſſigns, ſhall not alien the term to any but to one of his brothers, and after the leſſee aliens to one of his brothers; this aſſignee is not within the condition, but he may alien to whom he pleaſes.

Roll. Rep. 68. 389. S. C. adjudged.

2 Leon. 38. Owen, 8. 55. Moor, 271. S. C.

If a man deviſes part of his lands to his eldeſt ſon in tail, and the reſt of his land to his younger ſon in fee; provided that neither of his ſons ſhould ſell or leaſe, before he comes to the age of thirty years; and that if either of the ſons ſhould, *&c.*, the other ſon ſhould have his lands, *&c.*; the eldeſt ſon, before his age of thirty, leaſes, and the younger enters upon him, he ſhall hold the lands diſcharged of the proviſo; for that extends only to the immediate eſtate expreſsly deviſed, and not to the new eſtate ariſing upon the limitation.

2 Leon. 35. Cob and Prior, adjudged. Latch. 20. S. C. adjudged, becauſe a condition to avoid an eſtate ſhall be taken ſtrictly.—And *per* Moor, 11. pl. 40. Dyer, 65. A proviſo that the leſſee ſhall not alien, extends not to his executors.

If a man deviſes land to his wife, during the minority of his ſon, upon condition that ſhe ſhall not do waſte, and dies, and the wife marries again, and dies, and after the huſband commits waſte, the condition is not broken.

Vaugh. 31, 32. Triſtram and Counteſs of *Baltinglaſs*.

If *A.* is tenant for life, with power, by a marriage-ſettlement, to make leaſes for twenty-one years, ſo long as the leſſee, his executors or aſſigns, ſhall duly pay the rent reſerved, and he makes a leaſe purſuant to the power, the tenant is at his peril obliged to pay the rent, without any demand of the leſſor, becauſe the eſtate is limited to continue only ſo long as the rent is paid.

If

If a gift be made in tail, on condition that the donee do not diſcontinue, and the donee have iſſue two daughters, and one of them diſcontinue, the donor ſhall enter and evict them both, becauſe it was the original condition annexed to the whole eſtate, that no part of it ſhould be diſcontinued. Co. Lit. 163. b. [See *acc.* Sir W. Moore's caſe, 26 Eliz. C. B. Hal. MSS. n. 4. 13th ed. Co. Lit. *ubi ſupra.*]

(G) What ſhall be ſaid a Condition, and not a Covenant.

IF a man makes a leaſe for years, by (*a*) indenture, (*b*) provided always, and it is covenanted and agreed between the parties, that the leſſee ſhall not alien, this is both a condition and covenant. Co. Lit. 203. b. Roll. Abr. 408.

(*a*) That the leſſor may take it as a covenant or condition, but not as both. Dalſ. 8. (*b*) The word *proviſo* ſometimes amounts to a limitation, and ſometimes to a covenant. Co. Lit. 204. a.

If a man leaſes for years, and in the indenture there is (*c*) ſuch a clauſe, *et non licebit* to the leſſee *dare, vendere vel concedere ſtatum & terminum ſuum alicui perſonæ ſine licentiâ* of the leſſor, *ſub pœnâ forisfacturæ termini prædict'*, this is a good condition. Roll. Abr. 408. Leon. 246. S. C. cited.

(*c*) So that the leſſee ſhall continually dwell upon the houſe, upon pain of forfeiture of the ſaid term and intereſt. Roll. Abr. 409. Co. Lit. 204. Godb. 99. So that neither he, nor his aſſigns, grant, aſſign, or ſell the land to any *præter*, &c. upon pain of forfeiture of the term. Roll. Rep. 68, 69. 2 Bulſt. 290.—For being by indenture, they are the words of both parties. Cro. Eliz. 202.

But if a man leaſes for years, and the leſſor covenants that the leſſee ſhall have houſe-bote, hay-bote, and plough-bote, without committing waſte, upon pain of forfeiture of the leaſe, this is a covenant on the part of the leſſor, and therefore no condition; and by *Anderſon* and *Beamont* the covenant is no more than the law appoints; therefore that, and (*d*) all that is ſubſequent to it, is void. Cro. Eliz. 604.

(*d*) Where a *proviſo* was void, becauſe no more was to be done by it than what might be done without. *Vide* Poph. 116.

If a man leaſes lands for years, rendering rent, and the leſſee covenants to pay the rent, and not to do waſte, and the leſſor binds himſelf in an obligation that the leſſee ſhall enjoy the lands for the ſaid rent, and doing according to the covenants of the ſaid indenture, theſe words, (*e*) *for the rent*, make not a condition, becauſe he hath other remedy for the rent, *ſcilicet*, upon the indenture of covenants. Roll. Abr. 410. Roll. Rep. 367. S. C.

(*e*) The leſſor covenanted that the leſſee, paying his rent, ſhould enjoy the land. 4 Leon. 50. By two judges againſt one, the covenant is conditional.—But Sid. 280., it is holden contrary *per Cur.*; and 2 Mod. 34, 35., it is adjudged *cont.*—So if a man leaſes for years, excepting the trees, and liberty to fell and carry them away, *reparando ſepes & implendo foveas*, the repairing the ditches, &c. is no condition, but a covenant upon which the leſſee hath remedy by action. 2 Jones, 206. and *vide* March, 9. 2 Roll. Rep. 466.

If a man leaſes for years, rendering rent, and the leſſee covenants to repair, &c. and after the leſſor deviſes to the leſſee for more years, yielding the like rent, and under ſuch covenants as were in the firſt leaſe, yet this makes no condition; for though, after the firſt leaſe is ended, the leſſee ſhall not be bound by the Owen, 54. 92. 3 Leon. 33. And. 230. S. C. adjudged. Goulſ. 74. S. C.

Godb. 99. S. C. Poph. 8. S. C. cited. Cro. El. 288. S. C. cited.

covenants, yet the will expreſſing that the leſſee ſhould have the lands, obſerving the firſt covenants, it ſhall not be taken to be a condition, by any intent to be collected out of the will; for covenants and conditions differ much.

(H) What ſhall be ſaid a Condition, and not a Limitation; and how they differ.

Co. Lit. 203. 2 Co. 70. 2 Sid. 152. 2 Brownl. 68. Goulſ. 134.

WORDS which properly create a *condition*, (*a*) are *ſub conditione, ita quod, ſi contingat, proviſo, &c.* for the non-performance of which, none but the *heir* at law can enter; and regularly, in caſe of a *condition*, the eſtate of the party is not determined without entry or claim.

(*a*) *Per* Lord Coke, 10 Co. 35. Mary Portington's caſe; if there be expreſs words of condition annexed to the eſtate, it cannot be conſtrued a limitation; but this opinion has been denied to be law; and *per* Hale, C. B. Vent. 200., There is no other authority to ſupport it: for, firſt, though the words be proper to create a condition; yet if, upon the non-performance thereof, the eſtate be limited over to another perſon, this ſhall be a limitation; for it ſhall not be in the power of the heir, by his not claiming, or entering, to defeat the intereſt of ſuch perſon. Brownl. 65. Roll. Abr. 412. and Vent. 200., *per* Hale, it may properly be called a conditional limitation: ſecondly, if lands are given to the heir, upon condition, this upon non-performance ſhall be conſtrued a limitation; otherwiſe no advantage could be taken of it; the benefit of conditions annexed to real eſtates belonging to the heir, as thoſe to the perſonal eſtate do to the executor. Cro. Eliz. 204. Owen, 112. 2 Mod. 7. Lutw. 809. 3 Mod. 32.

Co. Lit. 236. b. (*b*) 2 Mod. 7. 2 Ld. Raym. 750. 1 Bl. Rep. 610.

Proper words of *limitation* are, *dum, dummodo, quamdiu, donec, quouſque, ubicunque, uſque ad, tamdiu*, or ſo long as he ſhall pay ſuch a rent, or be abbot or parſon, *&c.*; and in theſe caſes the law (*b*) veſts the eſtate in the *party*, without entry or claim: but he cannot bring a poſſeſſory action, as treſpaſs, *&c.* without an actual entry.

Co. Lit. 234. b. Vaugh. 32.

So if an eſtate be made to a woman (*c*) *dum ſola fuerit*, this is a *limitation* which determines her eſtate upon marriage.

(*c*) If a leaſe be made to a woman for thirty years, *ſi tamdiu viveret, & cuſtodiret ſe ipſam* a widow, it determines by her death or marriage. Cro. Eliz. 414. Poph. 99. Moor, 400. Goulſ. 179. and *vide* Roll. Abr. 411. 843. Owen, 107.

Roll. Abr. 411. Hainſworth and Pretty. Cro. Eliz. 833. 919. Moor, 644. Noy, 51.

If a man, having three ſons, deviſes his lands to the eldeſt, upon condition that he ſhall pay 20*l.* to each of the other two ſons; and that if he fails in payment thereof to either of the ſons, that then they may enter and have the land; this is a *limitation*: ſo that if the eldeſt does not pay the money, the two ſons may enter into the land.

S. C. adjudged, and Owen, 8. 2 Leon. 38. Cro. Jac. 56. 592. Carter, 93. S. P. adjudged between Spittle and Davis.

Roll. Abr. 411, 412. Wiſeman and Baldwin. Cro. Eliz. 376. Goulſ. 152. Owen, 112. S. C. adjudged; and the judgment in

If a man hath iſſue two ſons, *ſſ. R.* the eldeſt, and *H.* the youngeſt, and alſo two daughters, and deviſes certain lands thus, *viz.* to *H.* in tail, when he comes to twenty-four years of age, upon condition that he ſhall pay to my two daughters 20*l.* a year, at their full age; and if the ſaid *H.* dies before twenty-four, then I will, that *R.* my ſon and heir, ſhall have the ſaid land to him and to his heirs, he giving and paying to my ſaid daughters the ſaid money, in ſuch manner as *H.* ſhould have done, if he had lived; and if my ſaid ſons *H.* and *R.* (if the ſaid lands come to the

the ſaid *R.* by the death of *H.*) do not pay the ſaid money to my ſaid daughters, as aforeſaid, then I will my ſaid land ſhall remain to my daughters and their heirs for ever; and after the deviſor dies; this is a *limitation* upon the eſtate of *H.* and not a condition; ſo that if *H.* does not pay the money to the two daughters, after his age of twenty-four years, and at the full age of the daughters, *R.* ſhall have it by way of *limitation*, and cannot enter as for a condition broken; becauſe otherwiſe, if this ſhould be a condition, it would defeat the portions given to the daughters, and the future deviſe to them, which is againſt the intent of the deviſor: adjudged in a writ of error, *per totam Curiam*, and the judgment given to the contrary *in banco* reverſed. *C. B.* reverſed accordingly.

If a man deviſes lands to another in tail, upon condition that he ſhall not alien; and that if he dies without iſſue, it ſhall remain over to another in fee; and after the deviſee aliens; yet he in the remainder cannot enter for the condition broken, but the heir at common law; for this is not a limitation, but a *condition*. Roll. Abr. 412. Skirne and Bond, by two judges; but *quære*.

If a copyholder in *borough-engliſh* ſurrenders to the uſe of his will, and after deviſes to his wife for life, remainder to his eldeſt ſon, (*a*) paying 40*s.* to each of his brothers and ſiſters, within two years after the death of his wife, *&c.* this is a *limitation*, and not a condition; for if it ſhould be a condition, it would extinguiſh in the heir, and there would be no remedy for the money. Cro. Eliz. 204, 205. Wellock and Hammond, adjudged. 2 Leon. 114. S. C. Cro. Jac. 592. 2 Sid. 152.

3 Co. 21. 2 Brownl. 68. S. C. cited. (*a*) For this *vide* Stile, 294.

If a copyholder in fee, in *borough-engliſh*, having three ſons, ſurrenders to the uſe of his will, and deviſes to his ſecond ſon, upon condition to pay 20*l.* a-piece to his daughters, and dies, this is a *condition*, and not a limitation; for there is no neceſſity to expound it otherwiſe, as where a man deviſes to his eldeſt ſon. Cro. Jac. 56. Curtis and Wooliverſton, adjudged, *per totam Curiam præter* Williams, who held it was a limitation, and that the land ſhould go to the youngeſt brother, who is inheritable by the cuſtom; for that otherwiſe he would be prejudiced; and *vide* Carter, 171.

If *A.* deviſes lands to *B.*, provided that if *B.* marries without the conſent of *C.* and others, or dies without iſſue, then to *D.*, *&c.*; this is a *limitation*, and not a condition, in reſpect the remainder is limited over to a ſtranger, and not to the heir: for though the words *proviſo & ſi* (*b*) are expreſs words of condition, it would be an unreaſonable conſtruction of the intent of the deviſor, that *B.* ſhould do an act by which the eſtate of *D.* ſhould be forfeited. 2 Lev. 21, 22. Williams and Fry, adjudged. Vent. 199. S. C. adjudged by the name of Fry and Porter.

Raym. 236. Mod. 86. S. C. adjudged. (*b*) Dyer, 316. *dubitatur*. Leon. 283. *dubitatur*. 10 Co. 41. a. *cont.*; but in 1 Vent. 203. (as in ſeveral other books) this opinion of Coke is taken notice of, and denied to be law.—[Words *of an expreſs condition* ſhall not ordinarily be conſtrued as a *limitation*: but where an eſtate is to remain over for breach of a condition, which is by expreſs words a *condition*, yet it ought to be intended as a limitation, *per* Holt. 11 Mod. 61. Page and Hayward, 2 Salk. 570. S. C.]

If a man deviſes certain lands to *A.*, his heir at law; and deviſes other lands to *B.* in fee; *and if* A. *moleſt* B. *by ſuit or otherwiſe, he ſhall loſe what is deviſed to him, and it ſhall go to* B.; theſe words 2 Mod. 7. agreed by *Curiam*.

words make a *limitation*, and not a condition; for if it were a condition, it would deſcend on the heir, and then *B.* would receive no benefit by the breach of it.

Wigg v. Wigg, 1 Atk. 382.

[*A.* deviſed lands to his ſecond ſon, *upon condition that he or his heirs ſhould pay and ſatisfy to the teſtator's ſix grandchildren (the children of the deviſee) the ſum of* 90*l.*, *to be equally divided among them, with a clauſe of entry and diſtreſs in default of payment of all or part.*—This is not a mere condition (*a*), but a conditional limitation, there being an expreſs limitation over to the legatees in caſe of non-payment, who were to enter and hold in the nature of tenants by *elegit*.

(*a*) A condition, properly ſo called, annexed to an eſtate, differs from what is called a conditional limitation in this, that it is the proper effect of a condition to give title by the breach of it, to the grantor, or thoſe claiming from him the reverſion in the lands; a conditional limitation limits the eſtate over to a ſtranger; and in the caſe of a conditional limitation, the eſtate expires and determines of itſelf, without any act, as entry or claim, to be done or made by him who hath the expectant intereſt: whereas in the caſe of a condition properly ſo called, advantage muſt be taken of the breach of it, by the activity of the grantor, his heirs or aſſigns. 2 Wooddeſ. 143, 4. *Conditional limitations* ſo far partake of the nature of conditions, as they abridge or defeat the eſtates previouſly limited; and they are ſo far limitations, as, upon the contingency taking place, the eſtate paſſeth to a ſtranger. Co. Lit. 202. b. n. 1. 13th edit.

For the diſtinction between a *condition in deed* and a *limitation*, denominated by *Littleton* a condition in law, ſee 2 *Bl. Comm.* 155. *Fearne Cont. Rem.* 194. 400.]

(I) Of Conditions precedent and ſubſequent.

Eq. Abr. 108. [Co. Lit. 218. Francis's Max. Eq. 44.

CONDITIONS precedent are ſuch as muſt be punctually performed before the eſtate can veſt; but on a condition ſubſequent, the eſtate is immediately executed; yet the continuance of ſuch eſtate dependeth on the breach or performance of the condition.

If one party covenants to do one thing, the other *doing* another, it is a mutual covenant, and not a condition precedent. Boone v. Eyre, 2 Bl. Rep. 1312. But where mutual covenants go to the whole of the conſideration on both ſides, they are mutual conditions, the one precedent to the other. Duke of St. *Alban's* v. Shore, 1 H. Bl. Rep. 270. There are no preciſe technical words required in a deed to make a ſtipulation a condition *precedent* or *ſubſequent*; neither doth it depend on the circumſtance, whether the clauſe is placed prior or poſterior in the deed, ſo that it operates as a proviſo or covenant. For the ſame words have been conſtrued to operate as either the one or the other, according to the nature of the tranſaction. Hotham v. *E. I.* Company, 1 Term Rep. 645.]

3 H. 6. 7. b. Roll. Abr. 414.

As if I grant, that if *A.* will go to ſuch a place about my buſineſs, that he ſhall have ſuch an eſtate, or that he ſhall have 10*l.* *&c.*; this is a condition precedent.

3 H. 6. 33. b. Roll. Abr. 414.

So if I retain a man for 40*s.* to go with me to *Rome;* this is a condition precedent, for the duty commenceth by going to *Rome*.

Roll. Abr. 415. Jones, 327. Cro. Car. 335.

So if a man, by will, deviſes certain legacies, and then deviſes all the reſidue of his eſtate to his executor, after debts, legacies, *&c.* paid and diſcharged; this is a condition precedent, ſo that the executor cannot have the reſidue of the eſtate before the debts and legacies are diſcharged.

Cro. Eliz. 219. Jennings and

But if a man deviſes a term to *A.*, and that if his wife ſuffer the deviſee to enjoy it for three years, that ſhe ſhall have all his good

goods as executrix; but if she disturbs *A.* then he makes *B.* executor, and dies; his wife is executrix presently: for though in grants the estate shall not vest till the condition precedent is performed, yet it is otherwise in a will, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of being executrix, if she perform it not.

Gore, adjudged *per totam Curiam*, tho' Anderson at first inclined *cont.* Leon. 229. S. C. adjudged *per totam Curiam*, Anderson changing his opinion. Winch. 115, 116. S. C. cited.

If *A.*, tenant for life, and *R.*, in reversion in fee, covenant to levy a fine, and that it shall be to the use of *A.* and his heirs, *si R.* does not pay 10*s.* to *A.* the tenth of *September* after; and if he does pay, then to the use of *A.* for life, and after to the use of *R.* in fee; in this case this word *si*, *&c.* is a condition subsequent, and not precedent; so that *A.* hath an estate in fee till *R.* pays the 10*s.*, because there is a day limited for the payment of the 10*s.*, and the subsequent words explain the intent to be a subsequent condition, *ff. And if he pays it, then it shall be to A. for life, and after to the use of R. in fee*, which shews the intent to be that *A.* shall have an estate in fee till the 10*s.* paid.

Roll. Abr. 415, 416. Spring and Cesar, adjudged. Jones, 389. Winch. 103. S. C.

A copyholder in *borough-english* surrenders to the use of himself for life, and after to the use of his eldest son and his heirs, if he lives to twenty-one; provided and upon condition, that if he dies before twenty-one, that it shall remain to the surrenderer and his heirs; though by the first words it seems to be a condition precedent, yet upon all the words taken together it is not, but a surrender to the use of the eldest son, to be defeated upon a condition subsequent.

3 Lev. 132. adjudged.

If *A.* makes a lease for five years to *B.* upon condition, that if *B.* pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and makes livery and seisin to *B.* (*a*); this passeth the freehold immediately; and *B.* hath a fee conditional; because if the freehold was not to vest in *B.* till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inserted in such deeds as are perfected privately, which might prove greatly prejudicial to strangers.

Lit. § 350. Co. Lit. 216, 217. (*a*) But if *A.* leases land to *B.* for five years, and *B.* enters, and after *A.* by deed grants to *B.* that if he pays to *A.* 10*l.* during the term, that then he shall have the land to him and his heirs; this enures as an executory grant, by increasing the estate; but the fee-simple passeth not before the condition performed. Co. Lit. 217. b.

But in case of a lease for life, with such a condition, the freehold passeth not before the condition performed, because the livery may presently work upon the freehold.

Co. Lit. 217. b.

So if a man grants an advowson, *&c.* (which lie in grant) for years, upon such condition, the grantee shall have no fee till the condition performed.

Co. Lit. 217.

If *A.* lease to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs at a day, that *B.* shall have the fee, and before the day *A.* is attainted of treason and executed; now though the condition became impossible by the act and offence of *A.*, yet *B.* shall not have a fee, because a precedent condition to

Co. Lit. 218. a.

increaſe an eſtate muſt be performed; and (*a*) if it becomes impoſſible, no eſtate ſhall ariſe.

(*a*) But it has been rûled in equity, where the condition of a bond was to ſettle certain lands, in ſuch a manor, by ſuch a day, though the obligor died before the day, and ſo the bond ſaved at law, and yet the agreement ſhould be executed in *ſpecie*, and ſo decreed in Chancery, between Hotham and Ryland, Eq. Abr. 18.

Vern. 79. 167. Alſo, in equity, with reſpect to conditions precedent and ſubſequent, the prevailing diſtinction ſeems to be, to relieve againſt the breach or non-performance, whether the condition be precedent or ſubſequent, where a compenſation can be made.

Chan. Ca. 89. Wallis and Grimes. Mod. 307. S. C. cited. As if *A.* conveys lands to *B.*, *&c.* and their heirs upon truſt, that if *C.* the ſon of *A.* within ſix months after the death of *A.*, ſhould ſecure to truſtees 500*l.* for the younger children of *C.*, then after ſuch ſecurity given, to convey to *C.* and his heirs; and until the time for giving ſuch ſecurity, in truſt for the eldeſt ſon of *C.*; and in default of ſuch ſecurity, to convey to ſuch eldeſt ſon and his heirs; if *C.* dies before any ſuch ſecurity given, yet this condition, though precedent, being only in nature of a penalty, the intent of the truſt ſhall be regarded, which was to ſecure 500*l.* for the younger children.

Vern. 79. 167. Popham and Bamfield. 2Vern. 222. S. C. cited, as a caſe in which there was relief. 2Vern. 338. S. C. cited as a condition which was relieved againſt. The teſtator deviſed his eſtate to the defendants, in truſt for the uſe and benefit of the plaintiff; but declared his will to be, that the plaintiff ſhould have no benefit of the deviſe, unleſs the plaintiff's father ſhould ſettle on the plaintiff two full thirds of the eſtate ſettled on the father on his marriage; and in default thereof, the eſtate to the defendants: the father made no ſettlement on the plaintiff, but deviſed all his eſtate to him for life, but ſubject to the payment of debts: it was admitted, and ſo adjudged, that this eſtate was executed in the plaintiff by the ſtatute of uſes, and conſequently that this is a condition ſubſequent; yet the Chancellor declared, that though conditions ſubſequent, which are to deveſt an eſtate, need not be literally performed; yet, even in ſuch caſe, if the party cannot be compenſated in damages, it would be againſt conſcience to relieve; and therefore ordered the maſter to examine the value of the eſtate deviſed, and the amount of the debts which that eſtate was charged with, and to report to the court, whether after debts paid there would be two full thirds of the father's eſtate, which was ſettled on him in marriage, left to the plaintiff; and upon a re-hearing, would not vary the former order, declaring that the difference was, whether this caſe lay in compenſation or not; and if a compenſation was made, he would relieve againſt the breach of the condition; but in caſe (*b*) a ſufficient compenſation was not made, he would then conſider farther of it.

(*b*) That in all caſes of forfeitures and branches of a condition, ſome kind of a compenſation may be made; therefore this rule is to be extended no farther than where compenſations have been allowed, and not to the forfeitures by a tenant for life, making a feoffment, levying a fine, ſuffering a recovery, wilful forfeitures by copyholders, &c. Preced. Chan. 570.

2Vent. 352. Cage and Ruſſel adjudged in Canc. If a feme covert, having power by will to deviſe lands, deviſes them to her executors, to pay 500*l.* out of them to her ſon, provided that if the father gives not a ſufficient releaſe of certain goods to her executors, that then the deviſe of the 500*l.* ſhould be

be void, and go to the executors, and after her death a releaſe is tendered to the father, and he refuſes; yet upon making the releaſe after, the money ſhould be paid to the ſon; for it was ſaid to be the ſtanding rule of the court, that a forfeiture ſhould not bind where a thing may be done after, or a compenſation made for it; as where the condition is to pay money, &c., and though it is generally binding, where there is a deviſe over, yet here, it being to go to the executors, it is no more than the law implies.

If a man deviſes lands to *J. S.*, upon condition to pay 20,000*l.* to his heir at law, *viz.* 1000*l. per ann.* for the firſt ſixteen years, and 2000*l. per ann.* after, till the whole ſhould be paid, and the heir enters for the non-payment of one of the 1000*l. per ann.*, *J. S.* ſhall be relieved upon payment of the 1000*l.*, together with the intereſt, from the time it became payable, without any deduction for taxes; the court declaring, that wherever they can give ſatisfaction or compenſation for the breach of a condition, they can relieve. Salk. 156. pl. 7. Grimſton and Lord Bruce. 2 Vern. 594. S. C.

If one having three daughters, deviſes lands to the eldeſt, upon condition that ſhe, within ſix months after his death, pay certain ſums of money to her two other ſiſters; and if ſhe fail, then he deviſes the land to his ſecond daughter, on the like condition, &c.; the court may enlarge the time for payment, though the lands are deviſed over; and in all caſes that lie in compenſation, the court may diſpenſe with the time, though even in caſe of condition precedent. 2 Vern. 222. Woodman and Blake.

So where one deviſed lands to *J. S.*, his kinſman, paying 1000*l.* a-piece to his two daughters, who were his heirs at law, and *J. S.* made default, and the daughters recovered in ejectment; yet *J. S.* was relieved, on payment of principal, intereſt, and coſts; though it was inſiſted, that this was a condition precedent, and to the diſinheriſon of the heir at law, and in favour of (*a*) a voluntary deviſee. 2 Vern. 366. Barnardiſton and Fane. (*a*) *Vide* Vern. 456. where it was given as one reaſon, why the court refuſed to relieve, that the party, who had not performed the condition, was a volunteer.

A man having two daughters, deviſed to each of them 20,000*l.*, payable at the age of twenty-five years; but if they, or either of them, married before the age of ſixteen; or if the marriage were without the conſent of their mother and truſtees, then they ſhould loſe 1000*l.* of the portion, which ſhould go to his other children: one of them married before the age of ſixteen, but with the conſent of all the parties; and it was holden, that the time, being only a circumſtance, might be diſpenſed with. Skin. 285. The Earl of *Saliſbury* and Bennet decreed Hil. 2 W. & M. by the Lords Commiſſioners. 2 Vern. 223. S. C. where it is ſaid that the father treated with the Lord *Saliſbury* about the marriage, though he died before it was had; and there decreed, that both parts of the condition need not have been performed, the father, by ſuch treaty, having himſelf diſpenſed with it. But in 2 Vent. 365. S. C. which came on Paſch. 36 Ca. 2. it is ſaid, that my Lord Keeper was of opinion, that both parts ought to be obſerved.

A. deviſed his lands to truſtees for three years, and if within the three years there happened a marriage between *G.*, who was a diſtant relation, and of the ſame blood with the teſtator, and *W.* his niece, and heir at law, then to *W.* for life, remainder to her 3 Chan. Ca. 129. Bertie and Lord Faulkland. Salk. 231.

pl. 9. S. C. where it is ſaid, that the decree was reverſed in the Houſe of Lords. 2 Vern. 333. S. C. where it is ſaid that the matter was ended there by compromiſe. *Vide* title *Marriage*, what conditions relating thereto ſhall be void.

her firſt ſon, &c. in tail male, by *G.* to be begotten; but if the marriage ſhould not take effect within the three years, or if the marriage ſhould be before the years of conſent, and not ratified when of competent age, then to *F.* in tail, who was likewiſe a remote relation of the teſtator, but not of the ſame blood: the marriage between *G.* and *W.* did not take effect, though ſeveral propoſals were within the time made by her friends to his guardians, but not accepted by them; and though ſhe herſelf had preſſed the match as far as the modeſty of her ſex would permit. She afterwards married the plaintiff, and by her bill prayed the benefit of the deviſe; the condition being anſwered by her, to what ſhe was capable of doing, having married a perſon, as was urged, equal in circumſtances, &c. to *G.* but her bill was diſmiſſed by the advice of *Holt* and *Treby*, Ch. Juſtices.

(K) Of void Conditions, being againſt Law.

2 H. 4. 9. Co. Lit. 206. b. Roll. Abr. 418.

IF a feoffment be made, on condition to do a thing that is *malum in ſe*, as to kill or rob *J. S.* the eſtate of the feoffee is abſolute, and a bond made on ſuch condition is void; for the eſtate ſettled in the feoffee ſhall not be defeated, nor ſhall a bond be forfeited

(*a*) 2 Vent. 209.

for the forbearance of ſuch an action; and (*a*) an obligee is puniſhable for taking ſuch a bond to do a thing againſt law.

Roll. Abr. 417. Cro. Jac. 248. 274. Cro. Car. 180. Lit. Rep. 135. Hutton, 111. Jones, 220.

If a parſon, on his being preſented to a living, gives a bond, conditioned to reſign, ſuch condition may be lawful, and not againſt 31 *Eliz. cap.* 6. of ſimony; as (*b*) if the condition be to reſtrain the incumbent from non-reſidence, a vicious life, or that he ſhall reſign when the patron's ſon, kinſman, or friend, become qualified to take the living.

2 Keb. 445. Sid. 389. Raym. 175. Comp. Incumb. 40, 41. (*b*) So a bond conditioned for the payment of money to the ſon of the laſt incumbent, ſo long as he ſhould continue a ſtudent in *Cambridge* unpreferred, &c. is good. Noy, 142.——So where a patron took bond of his preſentee, to pay 5 *l.* yearly to the wife and children of the laſt incumbent. Earl of *Suſſex*'s caſe cited by Foſter, J. Noy, 142.——But Comp. Incumb. 39. theſe charitable reſolutions, if any ſuch there were, do not ſeem to be law.

Vide the authorities *ſupra*, and Comp. Incumb. 39, 40.

But if the condition be for a leaſe of the glebe or tithes, or a ſum of money, this is clearly ſimony within the ſtatute; and therefore the condition void, being againſt law.

Comb. 394.—That the condition muſt be averred to have been entered into for a ſimoniacal purpoſe. *Vide* Cro. Jac. 274. Hut. 110. Moor, 64.—And where a ſpecial averment may be that an obligation was made for a matter againſt law. Leon. 73. 203. Godb. 29. 2 Wilſ. 347.

2 Chan. Ca. 399. Vern. 411. 131. Eq. Abr. 86, 87. [That ſuch bonds are bad at law, was determined by the Houſe of Lords in the great cauſe of Ffytche v. The Biſhop of *London*, May 3

Alſo in equity it hath been ruled, that where a bond of reſignation is general, as to reſign upon requeſt, ſome ſpecial reaſon muſt be ſhewn to require a reſignation; for though ſuch bond may in ſtrictneſs of law be good, yet if they are made an ill uſe of, as by extorting money from the incumbent, &c. (*c*) equity will grant a perpetual injunction againſt them.

1783. But ſee 4 Term Rep. 81. 359.] (*c*) That the ordinary may refuſe to accept of a reſignation made by the reſtraint of ſuch bonds. Comp. Incumb. 31.

If the ſheriff of a county makes *B.* his under-ſheriff, and takes a bond or covenant from him, that he will not ſerve executions above 20*l.* without his ſpecial warrant, this is a void covenant, becauſe it is againſt law and juſtice, inaſmuch as when he is made under-ſheriff, he is liable by the law to execute all proceſs, as well as the ſheriff is. Roll. Abr. 417. Hob. 12. S. C. Moor, 856. pl. 1175. Godb. 212. Brownl. 65. S. C. in which laſt book it is ſaid to be otherwiſe, where he voluntarily covenanted; and *vide* title *Sheriff*; and 2 Brownl. 282.

But if an under-ſheriff covenants with the high-ſheriff to diſcharge and ſave him harmleſs from all eſcapes of priſoners arreſted by the under-ſheriff, or any by him appointed, this is a good covenant; for ſince the high-ſheriff transfers his authority, it is but reaſonable he ſhould take ſecurity for the faithful execution of it; and there is nothing intended againſt law, but rather to prevent than connive at eſcapes. Hob. 12, 13. Moor, 856. pl. 1175. Godb. 212. Brownl. 65. reſolved *per Curiam.*

If *A.* being a cuſtom-houſe officer by patent, makes *B.* his deputy, and covenants *inter alia* to ſurrender the old patent, and procure a new one to *B.* and himſelf before a day, and that if *B.* dies before *A.* that *A.* ſhall pay 300*l.* to the executors of *B.* and gives bond for the performance thereof; admitting theſe covenants void (*a*) *per* 5 *Ed.* 6. *cap.* 16. the whole bond is void, though ſome of the covenants are not void or illegal. Cro. Eliz. 529. Lee & *Ux.* v. Colſhill. 2 And. 55. S. C. adjudged, becauſe the obligation is one entire act and deed of the party. 3 Co. 82. S. C. cited. (*a*) So where a ſheriff takes a bond for a point againſt 23 H. 6. c. 9. and alſo for a juſt debt; the whole bond is void, according to the letter of the ſtatute; for a ſtatute is a ſtrict law; but the common law divides according to common reaſon, and having made that void which is againſt law, lets the reſt ſtand. Hob. 14. Moor, 856. pl. 1175. Godb. 213. 10 Co. 100. Latch. 143. Mod. 35. 2 Brown. 282. Vent. 237. Carter, 230. 2 Wilſ. 351.

As to bonds entered into in reſtraint of trade, it ſeems to have been always admitted, and hath been frequently adjudged, that a bond reſtraining trade in general, as that a perſon ſhall not follow ſuch a trade in any part of the kingdom, is void; the reaſons whereof are, that ſuch bond tends to a monopoly, and is againſt the publick good; deprives the party of his means of livelihood; enables maſters to lay hardſhips upon their ſervants, apprentices, *&c.* tends to oppreſſion; and is attended with immediate and apparent damage to the one ſide, only to free the other from the fear of a diſtant damage that may or may not happen: but it ſeems to be now agreed, that a condition reſtraining trade in a particular place, if done fairly, and upon a good and lawful conſideration, and with no ill intention, is good. Alſo it ſeems to be now ſettled, that there is no (*b*) difference between a bond and a promiſe in theſe caſes, *viz.* that a bond ſhould be void, and a promiſe good; but that the true diſtinction in theſe contracts, whether by bond, covenant, or promiſe, is between thoſe entered into upon a juſt, fair, and reaſonable conſideration, and thoſe entered into upon no conſideration, or a vicious one; that the former will be good, the latter void. Cro. Eliz. 872. Moor, 115. pl. 259. 242. pl. 379. 2 Leon. 210. 3 Leon. 217. March, 191. Owen, 143. And there ſaid, by Anderſon, that he might as well bind himſelf that he would not go to church. 3 Lev. 241. (*b*) The difference formerly holden was, that in covenant or promiſe, all being to be recovered in damages, the jury may aſſeſs them in regard to the conſideration; but otherwiſe of a bond; becauſe then the whole ſum muſt be recovered, be the damages or conſideration never ſo ſmall. 3 Lev. 242.

Cro. Jac. 596. Jon. 13. March, 77. 2 Roll. Rep. 201. Jolliffe v. Bride.

And therefore where *A.* and *B.* living in the ſame town, and being both mercers, *A.* deſired *B.* to buy his old goods, which *B.* did, at ſuch a price, upon condition, that he would not follow his trade within the ſaid town; this was holden a lawful contract; 1*ſt*, Becauſe it was a voluntary reſtraint, and the rule is *volenti non fit injuria.* 2*dly*, That it was made upon a valuable conſideration, the uſe of his trade being compenſated by the price given him for his old goods. 3*dly*, That the agreement was neither *malum in ſe*, nor *malum prohibitum.* 4*thly*, That a man may bind himſelf not to live in ſuch a place, and by conſequence not to trade there. 5*thly*, That theſe kind of bonds are very frequent in *London.*

10 Mod. 27. 85. 130. 1 P. Wms. 181. S. C. Fort. 296. S. C. Mitchel v. Reynolds. [(*a*) So of a ſtreet, Comb. 122. Rep. 118. S. P.]

So, where the condition of a bond was, that whereas *A.* had taken the ſhop of *B.* who was a baker, for the term of ſo many years, and had given *B.* ſo much money for it, the condition of the obligation was ſuch, that if, during the term aforeſaid, *B.* ſhould not exerciſe the trade of a baker within the (*a*) pariſh where the ſhop was, that then the bond ſhould be void, otherwiſe to remain in full force; and this was holden a good bond.

Cheſman v. Nainby, 2 Str. 739. 3 Br. P. C. 349. S. C. Davis v. Maſon, 5 Term

Show. 2. Comb. 121. Thompſon and Harvey adjudged. Holt, 674.

So, if the condition of a bond is, that the obligor ſhall not buy any ſheeps-trotters of any perſon of whom the obligee had or ſhould buy, this is void, being a reſtraint of trade, and tending to a monopoly.

Cro. Eliz. 705. Dobſon and Crew adjudged upon demurrer without argument.

If the condition of an obligation be, that the obligor ſhall be always ready to give evidence, and to teſtify the truth in any of the king's courts, in all things which ſhall be demanded of him, *&c.* and that he ſhall not hurt, endanger, or moleſt the obligee in his lands or goods, *ratione alicujus rei*, this is a good condition, and not againſt law; for as to the firſt part, if he had not been obliged thereto, he had been compellable by law; and by the laſt part it ſhall be intended that he ſhall not hurt, *&c.* tortiouſly, but not to reſtrain him from purſuing the obligee for felony, or other juſt cauſe.

Vent. 109. Maſon and Watkin, adjudged upon the firſt opening; and the court recommended it to Serjeant Paulet, who was a judge in *Wales*, where the plaintiff lived, to have him proſecuted for taking ſuch bond.

If *A.* is impriſoned for felony, and *B.* bound by recognizance to proſecute, if *B.* after gives bond to *C.* conditioned that *B.* will not give evidence againſt *A.* the condition is againſt law, and the bond void.

Collins v. Blantern, 2 Will. 341.

[To a bond with condition to indemnify againſt a note; the defendant pleaded that it was given as a conſideration for not appearing to give evidence on a proſecution for perjury: it was adjudged on demurrer, after two arguments in the court of *C. P.* that the plea was good.]

18 E. 4. 28. Roll. Abr. 417. Carter, 229. Alien, 60. S. P.

Condition to do a thing which will be maintenance, is void, as to ſave harmleſs from ſuch an appeal of robbery, as *B.* has againſt him.

Lea

Leaſe for life, upon condition, that if the leſſee marries without licence, he ſhall re-enter, is (*a*) good condition. 43 E. 3. 6. Roll. Abr. 418. (*a*) So is a condition to renounce an adminiſtration. 15 E. 4. 30. Roll. Abr. 417.

If the condition of an obligation be, not to ſell the apparel of the wife, this is good; though it was objected it was againſt law, becauſe againſt the liberty of the baron. Roll. Rep. 334. *per* Coke.

So, if a man gives bond to a ſtranger, conditioned for the payment of (*b*) 20*l.* yearly to his wife, this is good. Roll. Rep. 334. Co. Lit. 206.

(*b*) But if the condition be to enfeoff his wife, it is void, becauſe againſt a maxim in law, and yet the bond is good. Co. Lit. 206. b.

(L) Of repugnant Conditions.

A Condition upon a (*c*) feoffment in fee not to (*d*) alien, is void becauſe it is repugnant to the eſtate. Co. Lit. 223. 10 Co. 38. b. (*c*) So on a grant or deviſe. Co. Lit. 223.——But he may be reſtrained for a particular time, or from alienating to a particular perſon. 2 Leon. 82. 3 Leon. 182. Muſchamp's caſe, Bridg. 132. (*d*) So a condition that the wife ſhall not be endowed, or the huſband be tenant by the courteſy, is good. 22 E. 3. 19. b. Roll. Abr. 418. 6 Co. 41. S. P.

So, of a condition, upon a feoffment in fee, that his daughters ſhall not inherit; for this is repugnant to the eſtate, and an attempt to eſtabliſh a different kind of inheritance than is allowed of by law. Dav. 34. Roll. Abr. 418.

But a gift in tail, on condition that the donee ſhall not diſcontinue, or alien in fee-tail, or for (*e*) life, is good; for theſe are tortious acts, which may well be reſtrained by condion. 10 Co. 39. Lit. § 362. Co. Lit. 223. Moor, 39. pl. 126. Vent. 322. Cro. Eliz. 35. Leon. 292. (*e*) Either for the life of another, or his own life; for, though an eſtate for his own life be lawful, yet the condition is good, becauſe the reverſion is in the donor. Co. Lit. 223.

But (*f*) a liberty inſeparable from the eſtate cannot be reſtrained by proviſo. Hence it is, that an eſtate-tail hath (*g*) five eſſential incidents, none of which can be taken away by any condition. 1ſt, To be diſpuniſhable of waſte. 2dly, That the wife ſhall be endowed. 3dly, That the huſband ſhall be tenant by the curteſy. 4thly, That tenant in tail (*b*) may ſuffer a common recovery. 5thly, That collateral warranty, (whether with or without aſſets, if made before 4 *Ann. cap.* 16.,) or lineal with aſſets, may bar it. (*f*) Hob. 170. (*g*) For which *vide* Co. Lit. 224. 6 Co. 41. 1 Co. 86. 9 Co. 128. b. Moor, 601. 633. 1 Co. 14. a. 85. a. 10 Co. 38. b. Cro. Jac. 697. Jones, 58. Vent. 322. Ambl. 379. (*b*) And according to 10 Co. 38. b. Roll. Abr. 418. cannot be reſtrained from making a leaſe, within 32 H. 8. c. 28. or levying a fine, within 4 H. 7. c. 24. But Co. Lit. 223. b. *cont.* For the power of making leaſes is not incident to his eſtate, but given to him collaterally by the ſtatute.

A. made a ſettlement of his lands on his ſon in tail, but took a bond from him not to dock the entail: on a bill to be relieved, it was ruled in equity, that the bond was good, and the bill diſmiſſed with coſts, though the alienation was made by the iſſue; for if the ſon had not agreed to give the bond; the father might have made him only tenant for life. 2 Vern. 233. Freeman and Freeman.

Moor, 809, 810. Pool's caſe adjudged, by the advice of Coke Ch. Juſt.

But where *A.* gave lands to *B.* in tail, remainder to *C.* his brother in like manner, and made them enter into recognizances to each other not to alien; it was decreed in Chancery, that theſe recognizances ſhould be delivered up and cancelled, as creating a perpetuity.

2 Vern. 351. Jervis and Bruton.

So, where *A.* ſettled his land upon his daughter in tail, and took a bond from her not to commit waſte, the daughter levied a fine, and committed waſte, and the bond being put in ſuit, equity relieved againſt it.

46 E. 3. 4. b. Co. Lit. 224. S. P.

A gift in tail, upon condition that the donee may alien for the profit of the iſſue, is a good condition.

Co. Lit. 223. b. (*a*) So if a feoffment be made to baron and feme, upon condition that they ſhall not alien, this is good to reſtrain any alienation by deed, becauſe ſuch alienation is tortious and voidable; but to reſtrain their alienation by fine, is repugnant and void. Co. Lit. 224. a. (*b*) As the alienation of an infant, or of a biſhop without his chapter. Co. Lit. 224. a.

If a feoffment be made upon condition that the feoffee ſhall not alien in mortmain, this is a good condition, (*a*) becauſe ſuch alienation is prohibited by law, and regularly (*b*) what is prohibited by law, may be prohibited by condition.

1 Co. 84. a. Corbet's caſe adjudged, though *B.* had no iſſue at the time of the breach of the condition. Moor, 601. pl. 831. S. C. 2 And. 134. S. C. adjudged. (*c*) Sir Anthony Mildmay's caſe, S. P. 6 Co. 40. adjudged. Moor, 632. pl. 868. the court divided. Hob. 170. cited Cholmley and Humble, S. P. Cro. Eliz. 379. adjudged. Moor, 592. pl. 799. adjudged. And. 346. adjudged. 1 Co. 86. a. cited. (*d*) So in caſe of a deviſe, Germin and Aſtcot, Moor, 364. pl. 495. adjudged, and agreed by all the judges of *England*, that the proviſo was repugnant. And. 186. debated, but no judgment. 2 And. 7. adjudged by all the juſtices. 4 Leon. 83. adjudged *cont.* But 1 Co. 85. cited to have been adjudged, as in Moor and And. and *vide* Cro. Jac. 696. Jones, 58. Godb. 102. Moor, 543. pl. 721. and *vide* Poph. 97. Brownl. 45. God. 351. 2 Roll. Rep. 467. 477. 484.

(*c*) If *A.* hath iſſue two ſons *B.* and *C.* and (*d*) covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to *B.* in tail, remainder to *C.* in tail, *&c.* provided that if *B.*, *&c.* or any of the heirs male of his body ſhall alien, *&c.* the uſes to him limited ſhall ceaſe only in reſpect of him, as if dead, *&c.* this *proviſo* is repugnant, impoſſible, and againſt law; for the eſtate of the tenant in tail doth not ceaſe by his death, but by his death without iſſue.

7 H. 6. 43. b. Co. Lit. 206. S. P. and *vide* Cro. Eliz. 35. 107.

If a man makes a feoffment in fee, provided that the feoffor ſhall have the profits, this condition is void, (*e*) becauſe it is repugnant to the grant.

(*e*) So if there be a leaſe to three during their lives, provided that one ſhall not take the profits during the life of the other two. 2 Leon. 132. adjudged, and *vide* Hob. 170. Bulſt. 42.

Co. Lit. 146. a. (*f*) So if he grants a rent out of land to which he hath title, without a clauſe of diſtreſs, provided that it ſhall not charge his perſon, this is void and repugnant, if he gives not ſeiſin upon the grant. 6 Co. 58. b.

If a man grants a rent-charge out of the manor of *D.* (in which the grantor hath nothing) with a *proviſo* that it ſhall not charge his perſon; (*f*) though the repugnancy doth not appear in the deed, yet the *proviſo* is void, elſe it would take away the whole effect of the grant.

Co. Lit. 146. a.

If a man grants a rent-charge out of land to another for life, provided it ſhall not charge the land, though the grantee might notwith-

notwithſtanding charge his perſon, yet the *proviſo* is repugnant, becauſe the land is expreſsly charged.

If a man grants a rent-charge out of land to another for life, provided it ſhall not charge his perſon, and the grantee dies, his executors may bring debt for the arrears; (*a*) for they cannot diſtrain, becauſe the eſtate in the rent is determined, and the *proviſo* cannot leave the executor without remedy. Co. Lit. 146. b. 6 Co. 41. b. S. P. (*a*) This muſt be underſtood a caſe put at common law, for the executors of ſuch tenant for life may at this day diſtrain, *per* 32 H. 8. c. 37.

If a man makes a leaſe for years, upon condition, that if the leſſor grants over his reverſion, the leſſee ſhall have a fee, if the leſſor grants his reverſion by fine, the leſſee ſhall not have a fee; for when the fine transfers the fee to the conuzee, it would be abſurd and againſt reaſon, that the ſame fine ſhould work an eſtate in the leſſee. Co. Lit. 378. b. 1 Co. 84. Jones, 59. and *vide* Moor, 450.

If an obligation is conditioned for the payment of 7*l.* by 2*s.* *per* week till 7*l.* is paid, and that if he fails of payment of the 2*s.* at any of the days on which it ought to be paid, that the obligation ſhall be void, elſe remain in force; this condition ſhall be taken diſtributively *reddendo ſingula ſingulis*, *viz.* that if he pays the 7*l.* the obligation ſhall be void, but that if he fails in payment of the 2*s.* at any of the days, it ſhall be in full force; for the obligation ſhall not be taken to be of no effect, if by any means it may be made good. Lev. 77. Vernon and Alſop, adjudged upon demurrer to the defendant's plea, that he did not pay 2*s.* at one of the days. Raym. 68. S. C. adjudged, becauſe the condition is ſenſeleſs, and therefore the obligation is ſingle. Sid. 105. S. C. adjudged, and that the obligation was ſingle, and the condition repugnant and void.

If the condition of an obligation be, *That if the obligor ſhall die without iſſue, that then if he by his laſt will, or otherwiſe in his life-time, ſhall lawfully aſſure and convey certain lands to the obligee and his heirs, that then the obligation ſhall be void*, &c. This condition is not repugnant, but ſhall be conſtrued according to the intention of the parties, to be collected out of the words of the condition. Jones, 180. Eaton and Butler, adjudged *per totam Curiam*; *cont.* Dodderidge. Palm. 553. S. C.

[If the condition of a bond ſtate that the defendant is truly indebted, and that the bond ſhall be void if the obligor do *not* pay, and performance be pleaded on the ground of the literal expreſſion; the plaintiff ſhall have judgment; for when the condition recites a debt, and after lays an obligation not to pay it, it is in that (*b*) repugnant and void.] 2 Salk. 463. Wells v. Treguſon, Dougl. 384. (*b*) That it is juſt to ſupply miſtakes in conditions of bonds. 2 Show. 16. and *vide* 39 H. 6. 10. Roll. Abr. 419.

(M) Of impoſſible Conditions.

IF the condition of a bond be impoſſible at the time of the making thereof, as for the obligor to go to *Rome* the next day, the bond is ſingle, for it is the ſame as if there were no condition at all; and a feoffment on condition that the feoffee go to *Rome* on a day, is abſolute, for the condition is repugnant to the feoffment; but (*c*) if an eſtate be to ariſe, or a duty to commence on a prece- Co. Lit. 206. Sav. 96. Leon. 189. 14 E. 4. 3. Bro. 155. (*c*) As if a man leaſes for life upon

condition, that if he goes from a precedent condition that is impoſſible, they can never have effect.

the church of St. *Peter* in *Weſtminſter*, to the church of St. *Peter* in *Rome*, within three hours, to have a fee, which is impoſſible; yet becauſe it is precedent, no fee can accrue. Co. Lit. 206. Roll. Abr. 420.

Bro. tit. *Condition*, 119. If a woman makes a feoffment to a man that is married to another, upon condition that he ſhall marry her, this is a good condition, for his wife may die, and then he may marry her.

But *quære*. Roll. Abr. 419. If the condition of an obligation be, that the obligor ſhall aſſign to the obligee a commiſſion of bankrupts, this is an impoſſible condition, and therefore void, and the obligation ſingle, for it is impoſſible to aſſign the commiſſion.

22 E. 4. 26. Roll. Abr. 420. If the condition be *quod debet pluere cras*, this is a good condition; for though the obligor is not certain thereof, yet if he will take this upon himſelf, and run the hazard, he may at his peril, for this is not impoſſible of itſelf.

22 E. 4. 26. Roll. Abr. 420. So, for the ſame reaſon, if the condition be, that the *pope* ſhall be at *Weſtminſter* to-morrow, this is a good condition.

Sav. 96. Wood and Avery adjudged. 2 Leon. 189. S. C. adjudged, becauſe tried by his own act; but the law never binds men to impoſſibilities. If the condition of an obligation be to ſuſtain and maintain an houſe in ſufficient repair, and ſo to leave it at the end of the term; though at the time of the entry into the bond the timber was ſo rotten that it was impoſſible to ſuſtain and maintain it in repair, yet the obligation is good.

(N) Of the Effect of a void, illegal, or impoſſible Condition.

Co. Lit. 206. (*a*) Where the condition muſt be performed as near the intent of the parties as may be. Co. Lit. 219. IF a feoffment be made, on condition that the feoffee ſhall (*a*) go to *Rome* on a day, the eſtate of the feoffee is abſolute, and the condition void and repugnant.

Co. Lit. 206. a. So, if the condition of a feoffment, &c. be poſſible at the making thereof, and afterwards become impoſſible by the act of God, yet the eſtate of the feoffee ſhall remain.

Co. Lit. 206. a. (*b*) If the condition be, that the feoffee, before ſuch a day, ſhall reinſeoff the feoffor, and before the day the feoffee die, his eſtate is abſolute, becauſe when the condition becomes impoſſible by the act of God, within the time limited by the mutual agreement of the parties, the feoffee is diſcharged; but *quære* of this caſe, for by the expreſs intent of the feoffment, the feoffee is but an inſtrument to re-convey the land of the feoffor. *Vide* Co. Lit. 219. a. As if the condition of a feoffment, &c. be, that the feoffor, &c. ſhall appear in ſuch a court next term, and the feoffor die before, the eſtate of the feoffee, &c. (*b*) is abſolute becauſe executed, and not to be redeemed back but by matter ſubſequent.

Co. Lit. 206. If the condition of a bond be impoſſible at the time of the making thereof, as for the obligor to go to *Rome* the next day, the bond is ſingle, for it is the ſame as if there were no condition at all.

But if the condition of a bond, recognizance, &c. is poſſible at the making, but, before it can be performed, becomes impoſſible by the act of (a) God, of the law, or of the obligee, &c. the obligation is ſaved. Co. Lit. 206. a. (a) Where the condition of a bond was to

ſettle certain lands in ſuch a manor by ſuch a day, and the obligor died before the day; though the bond was ſaved at law, yet Chancery decreed an execution *in ſpecie*. Eq. Abr. 18.

(O) Of the Breach of the Condition: And herein,

1. What ſhall be a Breach thereof.

IF a man makes a deed of feoffment of lands in ſeveral counties, upon condition the feoffee ſhall reinfeoff him of all the land within twenty days after the date, if livery is made but of part within the twenty days, the condition is not broken, though all is not conveyed within the twenty days, according to the letter of the condition, which is entire. Hob. 24.

If a man leaſes an houſe and land, upon condition that the leſſee ſhall not parcel out the land, nor any part thereof, from the houſe, and after the leſſee leaſes the houſe and part of the land to *A.* and after leaſes the reſidue of the land to *C.* this is a breach of the condition; for by the word *parcelling*, is intended a diviſion or ſeparation of the land from the houſe; and if the firſt grant be not a forfeiture, the ſecond is. Roll. Abr. 427. Curtis and Marſh. And. 42. 90. S. C. Moor, 425. S. C. adjudged, that the firſt grant was a

breach of the condition, becauſe every diviſion and ſeverance of the houſe and land is within the words and intent of the condition.

If a leſſee of a houſe covenants not to leaſe the ſhop, yard, or other thing belonging to the houſe, to one who ſells coals, nor that he himſelf will ſell coals there, and after he leaſes all the houſe to one who ſells coals, he hath broken the condition. Roll. Abr. 427. adjudged.

If a man makes a feoffment in fee of lands in five counties, upon condition to re-aſſure; if the re-aſſurance is made of the lands in four counties, but not in the fifth, the condition is broken for the lands in that county only. Moor, 823.

King *Henry* VIII. granted lands to *A.* and his heirs, provided that he and they *perpetuis futuris temporibus invenirent & ſuſtinerent duos capellanos in eccleſia parochiali de* W. *ad orandum pro anima* H. 8. his heirs and ſucceſſors, *& ad celebranda divina ſervitia & curam animarum parochianorum;* and *A.* conveyed the lands to *B.* and his heirs, who appointed two chaplains, one of which was not reſident, but neglected his duty: this is a breach, for the eſtate was tied with the condition, into whoſe hands ſoever it came, and *B.* ought not only to have found chaplains, but alſo to have taken care that they had been ſuch as would have done their duty. Lit. Rep. 94. 105. 128.

If two men, upon ſale of their wives' lands, covenant that they and their wives have good right to convey lands, and to make further aſſurance; if one of the women is under age, this is a breach, for ſhe hath not power to convey the eſtate according to the covenant. 2 Jones, 195. Naſh and Aſhton adjudged.

If

Roll. Abr. 428. 2 Inſt. 145. Owen, 92. S. P. adjudged.

If a man leaſes for life, upon condition that the leſſee ſhall not do any waſte, and after the leſſee ſuffers the houſe to fall for want of covering and reparation, which is not any act of doing, but a permiſſion; yet it ſeems that the condition is broken, for the words are, *any waſte*, and ſuch waſte is within the ſtatute of *Glouceſter*, which ſpeaks of doing waſte; and it ſeems that the permiſſion of the houſe to fall, may properly be called doing waſte.

Roll. Abr. 428. Baſpoole and Long, adjudged by three judges.

But if a man leaſe land, upon condition that the leſſee ſhall not do waſte, and after a (*a*) ſtranger do waſte, yet this is not any forfeiture, becauſe a condition ſhall be taken ſtrictly. Leon. 64. S. P. 4 Leon. 39. S. P. (*a*) So if the condition of an obligation be, that I ſhall not continue ſuch an action, and my attorney, without my privity, continues it, this is no breach. Cro. Jac. 525. *per* Dodderidge and Houghton. 2 Roll. Rep. 63. By Montague and Houghton, *cont.* Dodderidge, who ſaid, the act of my attorney is my own act.

Roll. Abr. 428. adjudged upon a ſpecial verdict.

If a man makes a feoffment in fee, reſerving rent, upon condition if the rent be behind, and no diſtreſs be found upon the premiſes, to re-enter; if the rent be behind, and no diſtreſs but a cupboard in a houſe locked, ſo that the feoffor cannot come at it; this is a forfeiture, for when the place is not open to the diſtreſs, it is all one as if there had been no diſtreſs there.

Leon. 298. Rudiard and Miller adjudged, tho' it was averred this fine was levied to make a jointure to his wife. Sav. 76, 77. S. C. adjudged, becauſe other uſes are limited by the fine than what were before, *viz.* the fee is limited to the heirs of *A.*, whereas it was before limited to *C.*

A. made a feoffment in fee to the uſe of himſelf and his heirs, and 21 *H.* 8. deviſed the uſe to *B.* his younger ſon, and the heirs male of his body, remainder to *C.* his eldeſt ſon in fee, provided *B.* or any of his iſſue ſhould not diſcontinue or (*b*) alien, but only to make a jointure for a wife; and *B.*, after the ſtatute of 27 *H.* 8. *c.* 10., leaſed for three lives, purſuant to the ſtatute of 32 *H.* 8. *c.* 28., and after levied a fine *ſur conuzance de droit come ceo, &c.*, with proclamations, to the uſe of himſelf and his wife, and the heirs male of their two bodies, the remainder to himſelf in tail male, the remainder to the right heir of *A.*; this was a breach of the condition, for he might have made an indefeaſible jointure by fine *ſur grant & render;* but by this fine the tail created by the deviſe is docked; and if he had iſſue by a former wife, they ſhould not inherit. (*b*) What ſhall be ſaid an alienation. 2 Leon. 82. 3 Leon. 182.

Roll. Abr. 428. Cro. Jac. 74, 75. S. C. and S. P. by three judges againſt one.

If there be leſſee for years, upon condition not to deviſe it to any body but only to his ſons or daughters, and he deviſe it to (*c*) a ſtranger, and die, and his executor never conſent to the deviſe; yet (*d*) this is a forfeiture; becauſe he hath (*e*) done all (*f*) that was in his power to paſs it by the will, and hath put it in the power of his executor to execute it. (*c*) So if he deviſes it to his executors, and they accept the ſame only as executors. 3 Leon. 67. 4 Leon. 5.—So if he deviſes it to his executors for payment of debts. Roll. Abr. 428. 429. (*d*) A woman covenants not to do any act to diſcontinue or countermand an action, and after ſhe marries, *per quod*, &c. this is a breach. Gouldſ. 59. (*e*) *Q.* If extended upon a judgment or recognizance againſt him. And. 124. 3 Leon. 3. (*f*) *Secus* if he deviſes it, if the leſſor will aſſent; for there nothing paſſes till the aſſent of the leſſor obtained. Cro. Eliz. 60.

If

If leſſee for years, (*a*) upon condition not to alien without the aſſent of the leſſor, makes his executor, and (*b*) deviſes it to him, and the executor enters generally, the teſtator not being indebted to any body, this is a forfeiture of the condition.

Roll. Abr. 429. Cro. Eliz. 815. S. C. (*a*) But *per* Stile, 483.

a deviſe is no breach of ſuch covenant. (*b*) Where a deviſe ſhall be a breach of a condition not to alien. Dyer, 45. b. Taunton's caſe. Owen, 14. Cro. Eliz. 330. Gouldſ. 49. 184. Poph. 106. and *vide* Cro. Eliz. 60. So where the condition is, that the leſſee ſhall not alien during his life, and he deviſes it, for the deviſee ſhall be ſaid to be in by aſſignment made by the deviſor in his life-time. Dyer, 45. 4 Co. 119.

If there be a grantee of a reverſion upon condition not to grant it over to *J. S.* by his deed, and he grant the reverſion to *J. S.* by his deed; though the leſſee never attorns, yet this is a forfeiture, becauſe he hath done his endeavour to grant it, and put it in the power of a ſtranger to perfect it.

Roll. Abr. 429.

If the condition of an obligation be, that he ſhall not be aiding and aſſiſting to *E.* in any action to be proſecuted againſt *L.*, the obligee, and after the obligor joins in a writ of error with *E.*, and another againſt *L.*, upon a judgment in treſpaſs againſt them three, which is apparently erroneous; this is not any breach of the condition, for this is not properly an action, but a ſuit to diſcharge himſelf of a tortious judgment, in which they ought all to join.

Hob. 304. Hut. 40. Roll. Abr. 429. S. C. adjudged.

If a man deviſes lands, upon condition that if he does not (*c*) permit the executors of *F.* to take the goods that then were in the houſe, the eſtate ſhould be void, *&c.*; (*d*) a denial by parol is not any breach of the *proviſo*, but it ought to be an act done, as ſhutting the door againſt the executors, or laying his hands on them to reſiſt them, or ſuch like acts; ſo that by reaſon of any ſuch act he did not permit them to take or carry the ſaid goods according to the *proviſo*.

8 Co. 91. Roll. Abr. 430, 431. 2 Brownl. 277. S. C. adjudged. (*c*) But the condition of a bond being to permit the obligee quietly to take, reap, and carry away corn; coming upon the land with ſtaves, and prohibiting the obligee by word, And. 131. was adjudged a breach. (*d*) Jones, 169. and *vide* Roll. Abr. 434. pl. 12. Bulſt. 139.

If *A.* leaſes lands to *B.* for years, and deviſes it to his wife ſo long as ſhe continues a widow, and if ſhe marries, that her ſon ſhall have it; and *B.* dies; and *A.* by (*e*) feoffment conveys the land to the wife, and covenants, that from thence it ſhall be clearly exonerated *de omnibus prioribus bargainis, &c. & aliis oneribus quibuſcunque*, and after the wife marries, and the ſon enters; this is a breach; for the term not being extinct by the acceptance of the feoffment, the land continues charged with this (*f*) poſſibility.

Leon. 92. Hanington and Rider. And. 162. Owen, 6, 7. Gouldſ. 59. S. C. adjudged. (*e*) By fine, according to the report of the caſe in Owen and Goulſ. (*f*) Tenant in tail of a rent, purchaſes the land out of which it iſſues, and makes a feoffment thereof, and covenants that it is free from all former incumbrances; this is a charge, though not *in eſſe*, but in ſuſpence; for if tenant in tail dies, his iſſue may diſtrain, and then the covenant is broken. Owen, 7. But *vide* Co. Lit. 389. a.

If the party who is bound to perform a condition diſables himſelf, this is a breach; as where the condition is, that the feoffee ſhall re-infeoff or make a gift in tail, *&c.* to the feoffor, and the feoffee, before he performs it, makes a feoffment or gift in tail, or

Co. Lit. 221, 222. Poph. 110. Co. 25. a. Roll. Abr. 447.

or leaſe for life or years *in præſenti* or *futuro* to another perſon, or marry, or grant (*a*) rent-charge, or be bound in a ſtatute of recognizance, or become profeſſed; in all theſe caſes the condition is broken, for the feoffee has either diſabled himſelf to make any eſtate, or to make it in the ſame plight or freedom in which he received it, and being once diſabled he is ever diſabled, though his wife ſhould die, or the rent, *&c.* ſhould be diſcharged, or he ſhould be deraigned, *&c.* before the time of the re-conveyance.

5 Co. 21. a. (*a*) Though the grantee brings a writ of annuity, by which the land is diſcharged *ab initio*. Co. Lit. 222. a.

But if feoffee, upon condition to re-infeoff, is diſſeiſed, and after takes (*b*) wife, binds himſelf in a ſtatute, *&c.*; this is no diſability, for that during the diſſeiſin the land is not charged with it; ſo that if the wife die, or the conuzee releaſe, *&c.*, and after the diſſeiſee enters, he may perform the condition.

Co. Lit. 222. a. 2 Co. 59. b. S. P. (*b*) A feme ſole enters into a bond, conditioned that ſhe would from time to time, and at all times, upon requeſt, do all ſuch acts for the aſſuring of lands, &c. at the charge of the obligee, and after marries; and whether this was a breach, Hard. 463. *dubitatur*. It was ſaid, that by the marriage, her huſband had a poſſibility of being tenant by the curteſy, and that now an aſſurance could not be made without fine, and ſo the obligee muſt be at a greater charge than intended.

If there be feoffee upon condition to re-infeoff, or to infeoff a ſtranger, and after another recover the land againſt him by (*c*) default, yet till execution ſued the condition is not broken, as before execution he is not diſabled, for perhaps he will never ſue execution; and if he ſued execution after he has made the feoffment, according to the condition, the feoffor may re-enter for the condition broken.

Roll. Abr. 447. S. P. Bro. Condition, 26. (*c*) *Secus*, if upon a feigned title. Co. Lit. 222. b.

If a man makes a feoffment upon condition, if the feoffor or his heir pay money before a certain day, *&c.*, and the feoffor is (*d*) attainted of treaſon, and executed before the day, yet if his heir is reſtored before the day, he may perform the condition, for that the condition may be performed at any time before the day.

Co. Lit. 221. a. (*d*) So, if the feoffor enters into religion, and before the day is deraigned. Co. Lit. 221. b.

If *A.* leaſes to *B.* for twenty-one years, and covenants at any time during the life of *B.*, (*e*) upon ſurrender of the old leaſe, to make a new leaſe, and after *A.* leaſes to a ſtranger, he hath diſabled himſelf and broken his covenant.

5 Co. 20, 21. Sir Anthony Scot and Main, adjudged. 2 And. 18. S. C. Moor, 452. pl. 619. S. C. Cro. Eliz. 450. 479. S. C. adjudged; and after affirmed upon a writ of error. Poph. 109, 110. S. C. adjudged; and ſaid, that admit the leaſe to the ſtranger was to begin at a day to come, yet the obligation is preſently forfeited. (*e*) So, if the leſſee aſſign his old leaſe, he diſables himſelf from taking benefit of the covenant. Bulſt. 22.

2. What the Party muſt do to entitle him to the Advantage thereof; and herein of Notice, Requeſt, Tender, and Refuſal.

If a leaſe be made reſerving rent, and that for the non-payment the leſſor may re-enter, there muſt be an actual demand made previous to the entry, otherwiſe it is tortious; becauſe ſuch condition of re-entry is in derogation of the grant; and the eſtate at law being once defeated, cannot be reſtored by any ſubſequent payment*.

Co. Lit. 201. b. 202. a. Hob. 207. 5 Co. 56. Dyer, 51. Hob. 331. Plow. 70. 7 Co. 56. Vaugh. 32. See 2 Ld. Raym. 750. 1 Salk. 250. 3 Burr. 1896, 7. * But now, on an ejectment brought

brought in such case, an actual entry is not necessary, the defendant in ejectment entering into a rule to confess lease, entry, and ouster. But tenants may be relieved on paying all rent in arrear, and costs, by motion. See 4 Geo. 2. c. 28., and 11 Geo. 2. c. 19.

So it is if there be a *nomine pœnæ* given to the lessor for non-payment, the lessor must demand the rent before he can be entitled to the penalty; or if the clause be, that if the rent be behind, the estate of the lessee shall cease and be void; in these cases there must be an actual demand made; because the presumption is, that the lessee is attendant on the land, to save his penalty and preserve his estate, and therefore shall not be punished without a wilful default; and that cannot be made appear without a demand be proved, and that it was not answered: (*a*) and the demand in these cases must be made at the day prefixed for the payment, and alleged expressly to have been made in the pleading.

Hutt. 42. 114. Hob. 207. 331. 7 Co. 56. b. (*a*) 20 H. 6. 30, 31. Roll. Abr. 458.

But where the remedy for recovery of the rent is by distress, there needs no demand previous to the distress, though the deed says, that if the rent be behind, *being lawfully demanded*, the lessor may distrain; but the lessor, notwithstanding such clause, may distrain when the rent becomes due: so it is if a rent-charge be granted to *A.*, and if it be behind, *being lawfully demanded*, that then *A.* shall distrain, he may distrain without any previous demand; because this remedy is not in destruction of the estate, for the distress is only a pledge for the payment of it, and the very taking of the distress is a legal demand.

Hob. 207. Hutt. 13. 23. 2 Roll. Abr. 426. Moor, 883.

Where the remedy for non-payment of rent was by way of entry, it was (*b*) formerly holden, that if the rent was made payable at any place off the land, no demand was necessary; because the money being to be paid off the land, was looked upon as a sum in gross, which the tenant had at his own peril undertaken to pay: but (*c*) this opinion hath been entirely exploded: for the place of payment doth not change or alter the nature of the service, but it remains in its nature a rent, as much as if it had been made payable upon the land.

(*b*) Plow. 70. Kidwelly's case. (*c*) 4 Co. 73. Moor, 408. Cro. El. 415. 435. 536.

But where the power of re-entry is given to the lessor for non-payment, without any further demand, there it seems that the lessee hath undertaken to pay it, whether it be demanded or not; and there can be no presumption in his favour in this case, because by dispensing with the demand, he hath put himself under the necessity of making an actual proof that he was ready to tender and pay the rent.

Dyer, 686.

Also, as to the necessity of a demand of the rent, there is a difference between a condition and a limitation: for instance, if tenant for life (as the case was by marriage-settlement, with power to make leases for twenty-one years, so long as the lessee, his executors or assigns, shall duly pay the rent reserved) makes a lease pursuant to the power, the tenant is at his peril obliged to pay the rent without any demand of the lessor; because the estate is limited to continue only so long as the rent is paid; and therefore, for the non-performance according to the limitation, the estate must determine.

Vaugh. 31, 32.

If

Roll. Abr. 449. adjudged by three juſtices. Moor, 602. Like point certified by the judges to the Chancellor for law.

If *A.* levies a fine of lands to *B.* to the uſes of a certain indenture, in which is contained this proviſo, that if *A.* pays or tenders 20*l.* during his life, at the font-ſtone in the church of *S.* to *B.*, that then it ſhould be to the uſe of *A.* in fee, a tender of the ſaid ſum at the ſaid place is void, if he (*a*) gives not notice to *B.*, that he or his deputy may be there to receive it, (*b*) becauſe no day certain was appointed.

8 Co. 92. S. C. cited. 2 Bulſt. 144. S. C. cited. (*a*) But if at any time he meets him at the place, he may tender the money. Co. Lit. 211. Cro. Eliz. 14. (*b*) Yelv. 37. Cro. Jac. 9, 10. Co. Lit. 211. a. Cro. Eliz. 298. 13 Co. 2. Like point; and *vide* Roll. Rep. 373.

Co. Lit. 211. a. 220. S. P.

If *A.* is bound to *B.*, upon condition that *C.* ſhall infeoff *D.* on ſuch a day, *C.* muſt ſeek *D.* and give him notice thereof, and requeſt him to be upon the land at the day, to receive the feoffment.

Winch, 26. Trehern and Claybrook.

If *A.* leaſes his lands for forty years, rendering rent, and deviſes the reverſion to *J. S.* in tail, *&c.* provided that *B.* and his wife ſhall have the rent to their own uſe till *J. S.* comes of age, upon condition that *B.* and his wife, within three months after his death, enter into a bond to his overſeers for the payment of 34*l. per annum*, in ſuch penalty as his overſeers ſhall adviſe; and *A.* dies, *B.* and his wife muſt give notice of this to the overſeers, and at their peril procure them to adviſe, *&c.*

Hob. 24. cited to have been reſolved 26 Eliz.

A. made a deed of feoffment of lands in ſeveral counties, dated the 15th of *October*, 4 *Mar.*, upon condition the feoffee ſhould re-infeoff him of all the lands within twenty days after the date of that deed; and yet becauſe *A.* made his feoffment but of part, within the twenty days, it was holden, the condition was not broken, though all was not re-conveyed within the twenty days, according to the letter of the condition, which is entire; for it was the fault of *A.* it was not conveyed, without which it could not be re-conveyed.

5 Co. 20, 21. adjudged. Moor, 452. S. C. adjudged that covenant lay without making any requeſt, tho' by the covenant the new leaſe was to be made upon requeſt.

If *A.* leaſes to *B.* for twenty-one years, and covenants at any time during the life of *B.* upon ſurrender of the old leaſe, to make a new leaſe for the reſidue of the term; and after *A.* leaſes to a ſtranger; though *B.* by the words of the indenture ought to do the firſt act, *viz.* make a ſurrender, yet becauſe *A.* hath diſabled himſelf to make a new leaſe, *B.* ſhall not be obliged to ſurrender his old leaſe without poſſibility of a new leaſe, but may bring covenant, without making any ſurrender.

Cro. Eliz. 450. Poph. 109. S. C. adjudged.

5 Co. 52. reſolved *per Cur.*

So, if a man covenants to infeoff *J. S.* upon requeſt, and after infeoffs another, *J. S.* may have covenant, without making any requeſt.

18 E. 3. 27. Roll. Abr. 458. 5 Co. 21. and *vide*

If the condition of an obligation be (*c*) to levy a fine to the obligee, he is not (*d*) bound to levy it if the obligee (*e*) doe ſue a writ of covenant againſt him.

Roll. Abr. 422. S. P. *cont.* (*c*) So if the condition be, that a ſtranger ſhall levy a fine to the obligee. Hutt. 48. Winch. 30. ——So if the condition be to acknowledge a judgment to *J. S.* he muſt ſue out an original. Winch. 30. Hutt. 48. (*d*) Where the obligor or covenantor hath diſabled himſelf, the obligee, &c. may bring an action without, &c. 5 Co. 21. Moor, 452. Cro. Eliz. 450. 479. Poph. 109. (*e*) Where the condition is to pay all coſts that ſhall be ſtated by two arbitrators

arbitrators, by the obligor and obligee to be chosen; the obligee must choose an arbitrator before he can shew any fault in the obligor. Vent. 71.

If the condition of an obligation be, that the obligor shall make all the linen the obligee shall wear during his life, the obligee must deliver to the obligor the cloth of which it is to be made; for all contracts are to be interpreted (*a*) according to the intent and subject-matter. Lev. 93. Oles and Thornhill, adjudged, it not appearing the obligor was a sempstress, or such person that used to make linen and find the materials. (*a*) As if a tailor is bound, or promises to make a suit of clothes for me, I ought to deliver him the cloth, because it is usual for him to provide it. Lev. 93. *per Curiam.* ——— But if a shoe-maker is bound to make me a pair of shoes, he is also bound to find the leather, because that is usual. 1 Lev. 93. *per Cur.*

If a man devises land to another, upon condition, that if he pays 4*l.* yearly out of the land to the wife of the devisor for her life; adding over and above, that his full intent and will was, that she should be yearly paid the said rent accordingly; the devisee ought to pay this rent to his wife (*b*) at his peril, without any demand of the wife; otherwise the condition is broken. Roll. Abr. 461. Lane, 78. (*b*) But if a man devises lands to his wife for life, so long as she shall be effectually ready to demise it to his heir at 50*l.* paid yearly, when she shall not dwell on it herself; yet if she goes and lives at another place, the condition is not broken without a tender and refusal to lease. Moor, 626. pl. 860.

If *A.* conveys lands to *B.* in tail, upon condition that *B.*, and the heirs of his body, shall pay to the daughter of *A.* 200*l.*, or so much thereof as shall be unpaid at the death of *A.*, according to the intent of the will of *A.*, and after *A.* by will devises to his daughter 200*l.*, *viz.* 100*l.* to be paid that day twelve-month next after his death, and the other 100*l.* that day twelve-month next after, &c., and dies; *B.* is not bound to pay the 200*l.* without demand; for the payment, by the indenture, is referred to be according to the will, and the 200*l.* was devised as a legacy, which ought to be paid upon demand, and not at the peril of the executor; and therefore the nature of the payment is altered by the will. Poph. 102.

3. What shall be a Dispensation therewith.

If a lease for years be made upon condition not to alien without licence, and after the lessor license the lessee to alien, and die before any alienation, yet the lessee may alien; for the death of the lessor is not any countermand; for this was executed on the part of the lessor as much as it could be. Co. Lit. 52. b. Roll. Abr. 453.

So, if a man leases land upon condition that the lessee shall not alien the land, nor any part thereof, and after he aliens part, with the assent of the lessor, he may after alien the residue without his assent; for all the condition is gone by this; for it cannot be divided or apportioned. Roll. Abr. 471. 4 Co. 120. a.

So, if *A.* leases land to three, upon condition, that they, or any of them, shall not alien without licence of the lessor; and afterwards one aliens with his assent, this discharges all the condition as to the other two. 4 Co. 120. a. Noy, 32. Cro. El. 816. Roll. Abr. 471.

If (*c*) lessee for years hath execution by *elegit* of a moiety of the rent and reversion against the lessor, where the lease is upon condition, this is a suspension of all the condition during the time of Moor, 22. pl. 75. adjudged. (*c*) So if a

ſtranger hath execution by *elegit*.

the extent; and though but a moiety of the rent is extended, yet the entire condition is ſuſpended.

Moor, 71. pl. 193. Dalſ. 72. Moor, 91. and *vide* 4 Leon. 28.

2 Co. 59. adjudged.

If a man makes a feoffment in fee upon condition to re-infeoff, and the feoffor after diſſeiſes the feoffee, and leaſes for years, this is a diſpenſation with the condition during the term.

Cro. Eliz. 665. Owen, 116. S. C.

If a man leaſes for years, upon condition to be performed on the part of the leſſor, and before the time of the performance of the condition he leaſes to a ſtranger for years, by indenture, the condition is not ſuſpended or deſtroyed, but may be performed notwithſtanding; for it is an eſtoppel only between the leſſor and the ſecond leſſee.

Cro. Eliz. 665. *per Cur.*

But if a man makes a feoffment upon ſuch condition, and after levies a fine to a ſtranger, the condition is gone.

Roll. Abr. 453.

If a condition be to recover certain land of *J. S.* and thereof to enfeoff another who is party to the obligation; if he to whom the feoffment is to be made, accept a feoffment of the land before any recovery had by the other, he hath diſpenſed with the condition.

4. How far he, who enters for a Condition broken, ſhall be reinſtated in his former eſtate.

Co. Lit. 202. Roll. Abr. 474. ſame rule.

It is laid down as a rule, that he who (*a*) enters for a condition broken, ſhall be in of the ſame (*b*) eſtate he was before; and therefore ſhall avoid all meſne charges and incumbrances.

(*a*) He that will take advantage of a condition, muſt enter if he can; if he cannot, he muſt claim; for a freehold, whether it lie in grant or livery, cannot ceaſe by condition without entry or claim, though the words are, proviſo that if he do not pay, &c. that then the eſtate ſhall ceaſe and be void, whether the conveyance were by feoffment, bargain and ſale, or deviſe, &c. Co. Lit. 218. (*b*) A remainder is granted upon condition, and after the particular eſtate determines, and the condition is broken, the grantor ſhall have the land in poſſeſſion. 2 Roll. Rep. 60. —— A condition or limitation annexed to an eſtate, ought to deſtroy the whole eſtate. 1 Co. 86. b. 6 Co. 40. b.

22 E. 3. 19. Fitz. Condition, 12. S. C. Roll. Abr. 474.

As if a feoffment is made to *A.* upon condition for the non-payment of certain rent to re-enter, and *A.* dies, leaving a wife; after which the condition is broken by the heir of *A.*; the feoffor ſhall re-enter, and defeat the title of dower that accrued to the wife of the feoffee.

Lit. § 325. Co. Lit. 201, 202.

If a man makes a feoffment, gift, or leaſe, reſerving rent, with a condition that, if the rent be behind, it ſhall be lawful for the feoffor, *&c.* and his heirs into the land to re-enter; in theſe caſes, if the rent be not paid according to the deed, the feoffor or leſſor may enter into the lands, and hold them in his former eſtate, becauſe the feoffment or leaſe was not abſolute, but defeaſible by the non-performance of the condition.

Lit. § 327.

But where a feoffment is made of land, reſerving rent, upon condition that, if the rent be behind, it ſhall be lawful for the feoffor and his heirs to enter and hold the land, and take the profits till he be ſatisfied and paid the rent behind; this is not a condition abſolutely to defeat the eſtate; but the feoffor in this caſe ſhall, upon his entry, only hold the land as a pledge, or in the nature

nature of a diſtreſs, till the rent be paid him, and the profits ſhall not go into the account of the rent, but ſhall be applied to his own uſe, that by ſuch perception the tenant may be obliged the ſooner to pay the arrears of rent.

But if the condition had been, that, if the rent be behind, the leſſor ſhall re-enter, and take the profits thereof until he be ſatisfied; there the profits ſhall go into the account of the rent; and conſequently, when the profits received are equivalent to the arrear of rent, the leſſee may re-enter, and hold it under the former leaſe. Co. Lit. 203.

And though part of the rent be paid him before re-entry, yet if the whole be not ſatisfied he may enter for any part that is arrear; becauſe the condition is to enforce the payment of the whole rent; and therefore he may take advantage for non-payment of any part thereof. Cro. Jac. 511. Co. Lit. 203.

Leſſee for life, and the reverſioner, join in a feoffment upon condition reſerved to the leſſee; if he enter for breach thereof, this ſhall not defeat the entire eſtate. Roll. Abr. 474.

If a man ſeiſed of lands in right of his wife, makes a feoffment in fee upon condition, and dies; and after the condition is broken, and the heir of the feoffor enters (*a*), it is impoſſible he ſhould have the ſame eſtate which the feoffor had at the time of the condition made; for that was in the right of his wife, which was diſſolved with the coverture, and therefore when the heir hath entered for the condition broken, and defeated the feoffment, his eſtate vaniſheth, and preſently the eſtate is veſted in the wife. Co. Lit. 202. a. 336. b. 8 Co. 44. a. S. P.

(*a*) So if a man ſeiſed of lands as heir, on the part of his mother, makes a feoffment in fee upon condition, and dies; the heir of the part of the father, who is heir at common law, ſhall enter for the condition broken; but the heir of the part of the mother ſhall enter upon him, and enjoy the land. Co. Lit. 12. b.

If *ceſtui que uſe* after the ſtatute of 1 *R.* 3. *c.* 1. and before the ſtatute 27 *H.* 8. *c.* 10. had made a feoffment in fee upon condition, and had after entered for the condition broken, though at the time of the condition made he had but a bare uſe, yet by his feoffment the whole eſtate and right being deveſted out of the feoffees, he ſhould have been ſeiſed of the whole eſtate in the land. Co. Lit. 202. a. 1 Co. 133. b. S. P.

Tenant in ſpecial tail hath iſſue; his wife dies, and he makes a feoffment in fee upon condition; the iſſue dies; the condition is broken; the feoffor re-enters; he ſhall be only tenant in tail after poſſibility of iſſue extinct, though when he made a feoffment he had an eſtate-tail. Co. Lit. 202. a.

If a man makes a gift in tail to *A.*, the remainder to *A.* and his heirs, upon condition that he ſhall not alien; the condition is good, as to reſtrain any diſcontinuance of the eſtate-tail, but as to the fee-ſimple it is void and repugnant; and therefore ſome are of opinion that this is a good condition, and that it ſhall defeat the alienation (*b*) for the eſtate-tail only, and leave a fee-ſimple in the alienee. Co. Lit. 224. a.

(*b*) By ſpecial words the condition may extend to the particular eſtate, or to the remainder only. Co. Lit. 230. b.

Cro. Eliz. 239. adjudged.

If the father ſurrenders copyhold lands to the uſe of the ſon in fee, upon condition that he ſhall perform certain covenants, and the ſon after admittance ſurrenders to the uſe of *A.* in fee, upon condition that if the ſon pays ten pounds the ſurrender ſhall be void; and the ſon pays not the 10*l.*, nor performs the covenants, and the father enters, and dies ſeiſed, and the lands deſcend to the ſon, yet *A.* cannot enter upon him; for by the entry of the father both the ſurrenders were defeated, and the ſon may confeſs and avoid the eſtate of *A.*

Co. Lit. 30. b.

A man being entitled to be tenant by the curteſy, makes a feoffment in fee upon condition, and enters for the condition broken, and then his wife dies; he ſhall not be tenant by the curteſy; for though the eſtate given by the feoffment was conditional, yet his title to be tenant by the curteſy was abſolutely extinct by the feoffment.

Co. Lit. 202. a. b. (*a*) Co. Lit. 103. a. 202. b. (*b*) For notwithſtanding the entry for the condition broken, the ſeigniory is extinct, for that was excluſively extinct by the feoffment. Co. Lit. 30. b.

Tenant by homage anceſtrel makes a feoffment in fee upon condition, and enters for the condition broken: it ſhall not be holden by homage anceſtrel again, for the right of the preſcription and privity of eſtate were interrupted for the time: ſo, (*a*) if a copyhold eſcheats (*b*), and the lord makes a feoffment in fee upon condition.

Co. Lit. 202. 252. a. Roll. Abr. 856.

If tenant for life makes a feoffment in fee upon condition, and enters for the condition broken, he ſhall be tenant for life again, but ſubject to the forfeiture; for though the eſtate is reduced, yet the forfeiture is not purged.

4 Co. 82. 2 Roll. Abr. 479.

If the conuzee of a ſtatute, *&c.*, or he that hath lands till ſuch a ſum levied, ſurrenders to the reverſioner upon condition, and after enters for the condition broken, and performs the firſt condition, he ſhall not hold over after the extent incurred, or ſuch time as the money might have been levied.

3 Co. 75. b.

If leſſee for life or years, upon condition to have a fee if, *&c.*, grants his eſtate upon condition, and after enters for the condition broken, and performs the firſt condition, perhaps the fee will accrue, for the poſſibility was not abſolutely deſtroyed; and when he enters for the condition broken, he is in of his old eſtate.

Dyer, 344. a. 4 Co. 24. a. Co. Cop. 82. 88.

If a man makes a feoffment in fee of a manor upon condition, and the feoffee grants eſtates by copy, and then the condition is broken, yet the grants by copy ſhall ſtand good, for he was *legitimus dominus pro tempore*, and the copyholder doth not claim his eſtate out of the lord's, but by cuſtom; and if the grants were made after the condition broken, yet it is all one, for till entry the feoffee hath a lawful eſtate, and the feoffor may wave the advantage of the condition broken: but if a leaſe be made of a manor for years, on condition to be void upon the breach of a certain condition, and the condition is broken, no voluntary grants made afterwards ſhall bind the leſſor, becauſe the eſtate of the leſſee is void: but if it were for life, *&c.*, then the grants were good.

(P) Of performing the Condition: And herein,

1. What Perſons may perform the Condition.

IF a man makes a feoffment in fee, upon condition to be void if the feoffor pays a certain ſum of money to the feoffee, and the feoffor dies before payment, his heir cannot pay it, becauſe the time of payment is paſt; for the condition being general, if the feoffor pays, *&c.*, it is as much as to ſay, if the feoffor during his life pays. Lit. § 337. Co. Lit. 208. a.

But when a day of payment is limited, and the feoffor dies before the day, his (*a*) heir may tender the money, becauſe the time of payment was not paſt by the death of the feoffor. Lit. § 337. Co. Lit. 208. b. 209. a.

(*a*) So may his executors or adminiſtrators, becauſe they repreſent the perſon of their teſtator. Lit. § 337. Co. Lit. 208, 209. a.

J. S. having iſſue three ſons, *A.*, *B.*, and *C.*; *A.* dying in his life-time, having iſſue only a daughter; *J. S.* deviſed certain lands to his wife for life, and after her death to his ſon *C.* and his heirs; provided that if *B.* do, within three months after the death of my wife, pay to *C.*, his executors or adminiſtrators, the ſum of 500*l.*, then the ſaid lands ſhall come to my ſon *B.* and his heirs; the wife lived ſeveral years, and during her life *B.* died, leaving *J. D.* his heir, who not being heir at law to the teſtator, the queſtion was, Whether he could now, after the death of the wife, perform the condition? And though it was objected, that this being a condition precedent, and merely perſonal in *B.*, who had neither *jus in re*, nor *ad rem*, and could (*b*) not therefore deviſe, releaſe, or extinguiſh the condition, and conſequently that his heir could not perform it after his death; yet it was holden, and ſo decreed, that the poſſibility of performing this condition was an intereſt or right, or *ſcintilla juris*, which veſted in *B.* himſelf, and conſequently ſuch right, poſſibility, or intereſt deſcended on his heir, and, according to *Littleton ſupra*, may be performed by him. Eq. Abr. 106, 107. Marks and Marks. 1 Str. 129. S. C.

(*b*) Though a condition in ſtrictneſs of law, is not deviſable, yet, ſince the ſtatute of *Uſes*, the deviſee may take benefit of it by an equitable conſtruction; and in this caſe *B.* might have releaſed or extinguiſhed the condition. Eq. Abr. 107. *per* Lord Chancellor.

If *A.* mortgages his lands to *B.*, upon condition that if *A.* and *C.* pay 20*s.* at a day to *B.*, that then he ſhall re-enter; (*c*) *A.* dies before the day, *C.* may pay the money, *&c.*, and yet the letter of the condition is not performed. Co. Lit. 219. b.

(*c*) So if *C.* dies before the day, *A.* may pay it. Co. Lit. 219.

But if *A.* had been living at the day, and would not have paid the money, but had refuſed to pay it, and *C.* had tendered it, *B.* might have refuſed it. Co. Lit. 219. b.

If *A.* and *B.* levy a fine to the uſe of *A.* in fee, if *B.* does not pay 10*s.* at *Michaelmas* after, and that if he doth then pay the ſaid 10*s.* that then it ſhall be to the uſe of *A.* for life, and after to *B.* in fee, and after *B.* dies before *Mich.*; it ſeems the heir of *B.* may pay the 10*s.*, for this is not more perſonal, being the payment of money, than in the caſe of *Littleton* upon a mortgage. Roll. Abr. 420. The court divided, *viz.* Croke and Jones, that it was perſonal; but Brampſton and Berkley *cont.* Jones, 390. S. C. and the court divided accordingly. Winch. 103, 104.

116. 118, 119. with the arguments at large, but no judgment; and *vide* Co. Lit. 205. that the heir may perform it. [After covenant, to ſtand ſeiſed to the uſe of *B.* and his heirs, with proviſo of revocation on payment to *B.* and his aſſigns; *B.* dies; he may tender to the heir, and revoke. Allen's caſe, Ley. 55. b. Hal. MSS.]

Hob. 285. adjudged. Hutton, 36. S. C. adjudged.

If a man deviſes land to his daughter at her age of eighteen years, and that his wife ſhall take the profits to her own uſe till his daughter comes to eighteen, provided ſhe keep and bring up his daughter at ſchool, *&c.*, and dies; and the wife marries again, and dies; the intereſt in the lands accrues to the huſband; for the keeping and education of the child is not of ſuch particular privity, but it may be effectually performed by another.

49 E. 3. 16. b. Roll. Abr. 421. S. C.

If two are infeoffed to re-infeoff, if one refuſes to re-infeoff, the other cannot perform the condition by a feoffment of the whole.

2 H. 6. 3. b. Roll. Abr. 421. S. C.

If the condition of an obligation be to pay a leſs ſum; if (*a*) my ſervant, by my command, tenders it to the obligee, this is ſufficient.

(*a*) So, if a ſtranger tenders for, and by the aſſent of an infant above fourteen. Moor, 222. pl. 137. *per Curiam.*

Lit. § 334. Watkin and Aſtwick, S. P. tho' tendered for an infant.

If a man makes a feoffment in fee by way of mortgage, upon condition to be void upon payment of money by the feoffor at a day, if a ſtranger of his own head tenders the money, the feoffee is not bound to receive it.

Leon. 34. agreed *per Curiam.* Moor, 222. pl. 3. 61. admitted *per Curiam.* Cro. Eliz. 132. ſaid by Coke to be adjourned. Owen, 34. S. P. *per* Coke.

Co. Lit. 206. b. 207. a.

But if the feoffee accepteth it, this is a good ſatisfaction, and the mortgagor or his heirs, agreeing thereto afterwards, may reenter, but the mortgagor may diſagree thereto if he will.

(*b*) Co. Lit. 206. b. Watkin and Aſtwick, S. P.

Guardian (*b*) in ſocage, or by knight-ſervice, may upon ſuch mortgage tender money in the name of the (*c*) heir.

1 Leon. 34. agreed *per Curiam*; but it being found that the tender was made by his mother, and that he was within age generally, it was preſumed he was above fourteen, and out of her cuſtody. Owen, 137. agreed, but found as before, Moor, 222. pl. 361. admitted *per Curiam*; but found the mother was not guardian in ſocage. Owen, 34. S. C. cited to have been adjudged, that the tender of the mother was not good, becauſe it did not appear within the verdict of what age the infant was. (*c*) But if the heir be an idiot, a ſtranger of his own head may tender the money for him. Co. Lit. 206. b.

Lit. § 336. Co. Lit. 207. b. 5 Co. 96. b. S. P. cited.

If *A.* infeoffs *B.*, upon condition that *B.* ſhall pay money at a day, and *B.* before the day enfeoffs *C.*, now *C.* hath an intereſt in the condition, and may tender the money at the day for the ſafeguard of his eſtate.

Lit. § 336. Co. Lit. 207. b.

And ſo alſo may *B.*, being party and privy to the condition.

2. To whom the Condition is to be performed.

Co. Lit. 210. Dyer, 180, 181. 5 Co. 96.

If a man bargains and ſells lands, with a *proviſo*, that if the *vendor*, before ſuch a day, pay ſo much money *to the vendee*, his heirs or aſſigns, that the ſale ſhall be void; the vendee before the day makes his executors, and dies, and the vendor tenders the money to the executors, this is not good, becauſe the word

aſſigns

assigns must be understood to be assigns of the land in its primary and original signification; and where there is an express provision, to whom the tender and payment is to be made, the executor is excluded; for *expressum facit cessare tacitum* *.

* See *infra*.

But if a man makes a feoffment in fee, upon condition that the *feoffee* shall pay 20*l.* to the *feoffor*, his heirs or assigns, here the primary signification of the word *assigns* fails, because there can be no assignment of the land of which he hath enfeoffed another; and since the original sense of the word fails, lest it should be wholly insignificant, the secondary sense of the word is to be taken, *viz.* the assignees in law, which the executors are *quoad* the personal estate; and therefore the payment is good either to the executor or heir.

Co. Lit. 210. 5 Co. 96, 97.

If the condition be to pay the money to the *feoffee*, his heirs or assigns, and he make a feoffment over, it is in the election of the feoffor to pay the money to the first or second feoffee, because by the words he may pay it either to him or the assignee: so if the first feoffee dies, in this case he may pay it to his (*a*) heir, or the assignee for the same reason; nor is he obliged to take notice of the validity of the second feoffment, to which he is a stranger.

5 Co. 96. Cro. Eliz. 384. Moor, 708. pl. 989. Goulf. 177. Poph. 100.

(*a*) If the condition be to pay to the feoffee, his executors or assigns, and the feoffee makes his sons executors, and dies, and administration is committed during their minority, it is the safest way to pay the money to the executors, or one of them, for the administrator is but a bailiff to them. 3 Leon. 103.

If a man makes a feoffment in fee by way of mortgage, upon condition to be void upon payment of the money by the feoffor at a day, if the feoffee dies before the day, the money shall be paid to the executors, and not to the heirs of the feoffee, because it shall be intended the estate was made by reason of the loan of the money, or for some other duty.

Lit. § 339. Co. Lit. 209. b. *Vide* for this title *Mortgage*.

But if the condition be, that if the feoffor pays, *&c.* to the feoffee or his heirs, if he dies before the day, the payment ought to be made to his heir, and not to his executors; for *designatio unius est exclusio alterius*.

Lit. § 339. Co. Lit. 209. b. 5 Co. 97. Brownl. 66. S. P. adjudged.

If the condition of an obligation be to pay 10*l.* *per annum*, after the death of the obligee, to the executors of the obligee, for the use of his children, and he die without making any executors, the money shall be paid to his administrators.

Hetl. 115. Lit. Rep. 156. S. C. For this *vide* Roll. Abr. 916.

If *A.* pawns a jewel to *B.* for 25*l.*, but no certain time is appointed for the redemption thereof, and after *B.* being sick, his wife in his presence, and with his assent, delivers it to *C.*, and *B.* dies; the money must be paid to the executors of *B.*, and not to C., because by the delivery of the feme, with the assent of the baron, there passed no interest, but a custody only.

Cro. Jac. 244. Sir John Ratcliff and Davis, adjudged. Yelv. 178. S. C. adjudged; and said, it would be so even if he delivered over upon a consideration; and that it was not like a mortgage, for that there be that hath the interest ought to have the money. Bulst. 29, 30. S. C. adjudged, though it appears that *B.* wished *C.* to keep it safely till the money was paid; but 31. by Fleming, Ch. Just. it had been otherwise if *C.* had paid the money, &c. Noy, 137. S. C.

Roll. Abr. 421. Roll. Rep. 373. 3 Bulſt. 168. Bridg. 39. S. C. and S. P.

If the condition be to leaſe certain lands for three lives to the obligee or his aſſigns; and after the obligee demand a leaſe to be made to three ſtrangers for their lives, he ought to make it them accordingly, otherwiſe the condition is broken; for here, by the word *aſſigns*, is intended *aſſigns by nomination*, for he cannot have other aſſigns, inaſmuch as the eſtate is not aſſignable before he hath it.

Hetl, 115. Lit. Rep. 156.

[If the condition of an obligation be to pay 10*l.* *per ann.* after the death of the obligee, to the executors of the obligee, for the uſe of his children, and he die without making any executors, the money ſhall be paid to his adminiſtrators.]

Roll. Abr. 421. Peaſe and Stileman v. Mead, Hob. 9. Godb. 192. S. C.

If a man be bound in 20*l.*, upon condition to pay 10*l.* to ſuch perſon as the obligee ſhall name by his laſt will, and after the obligee name no perſon by his will, the obligor is not bound to pay it to his executors, becauſe the condition hath reference to his nomination.

adjudged; and per Coke, there is a diverſity where the condition is to pay 10*l.* to the aſſignee of the obligee, and where to the obligee or his aſſigns; for in the laſt caſe, it veſts as a duty in the obligee, and ſhall go to his executors. Moor, 855. S. C. adjudged. [The conuſee of a fine leaſes to the conuſor for 99 years, with condition, if the leſſee pays to the leſſor, his heirs and aſſigns, that the uſes limited to the conuſee and his heirs, by an indenture, ſhould ceaſe: the leſſor dies. Lord Nottingham was of opinion, that the uſes ſhould not ceaſe by payment to the adminiſtrator of the leſſor, becauſe he may be an aſſignee in deed as here. 11th May 1679. Sir Andrew Young. Lord Nottingham's MSS. notes.—Upon a fine, the uſe of land was limited to *A.* for 80 years, with a power to *A.* and his aſſigns to make leaſes for three lives, to commence after the determination of that term. *A.* aſſigned over to *B.*; *B.* died, having made his will, and appointed *C.* his executor. *C.* aſſigned over to *D.*; *D.* in purſuance of the power, made a leaſe for life. The queſtion was, whether *D.* was ſuch an aſſignee of *A.* as to have power to make this leaſe; or, whether it ſhould extend only to the immediate aſſignees of *A.*? The doubt in this caſe was the greater, as there had been a deſcent upon an executor. The caſe of Peaſe and Stileman was cited, where it was ſaid, that an executor or adminiſtrator ſhould not, in ſome caſes, be ſaid to be a ſpecial aſſignee. But all the court ſeemed to incline to the contrary, and that *D.* ſhould be called an aſſignee, well enough for the purpoſe of making the leaſes in queſtion, and that ſo ſhould any perſon who came to the eſtate under the firſt leſſee, though there ſhould be twenty meſne aſſignments. And afterwards, in the Michaelmas term following, judgment was given accordingly. Howe v. Whitebanck, 1 Freem. 476. Co. Lit. 210. a. note 1. 13th edit.]

5 Co. 97. Leon. 252.

If *A.* ſeiſed in fee by indenture enrolled, covenants with *B.*, that if *B.* pays to *A.*, his heirs or aſſigns, 400*l.* at a day, that then *A.* and his heirs ſhall ſtand ſeiſed to the uſe of *B.* and his heirs; and *A.* deviſes to his wife during the minority of his ſon, and dies; the money ſhall not be paid to the wife, for ſhe is not aſſignee; the reverſion being in the heirs of *A.*

5 Co. 97.

But if *A.* had made a leaſe for life, the remainder to another in fee, the leſſee for life had been an aſſignee.

5 Co. 97. a.

And it was ſaid, that if *A.* had conveyed over his whole eſtate in part, yet ſo long as *A.* had any part remaining, the tender ought to be made to him.

42 E. 3. 13. b. Roll. Abr. 421.

If the condition of an obligation be to pay 10*l.*, *&c.*, it is a good performance if he pays it to his (*a*) deputy.

(*a*) A bond was conditioned for the delivery of forty pair of ſhoes at *Holbourn-bridge*, within a month, to *J. S.* a common carrier, for the uſe of the obligee, and *J. S.* did not come to *London* within the month, but the obligor delivered them to his porter; and it was adjudged a good performance, for that the delivery to the man was a delivery to the maſter, within the intent of the condition. 2 Mod. 309.

If

If the condition of an obligation is to pay 20*l.* to the obligee, and other the parishioners of *D.*, it (*a*) may be paid to any two of them. Moor, 68. pl. 183.

(*a*) Where the condition is to pay money to baron and feme, it may be pleaded to have been paid to the baron only. Goulf. 73. and *vide* 2 Sid. 41.

3. At what Time it may be performed.

If a man makes a feoffment in fee, upon condition that the feoffor upon payment of such a sum of money to the feoffee without limitation of time should re-enter, the feoffor hath time during life to pay the money to the feoffee during his life; but if either die before that time is elapsed, which is set by the parties for the performance of the condition, the feoffment is absolute: but if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life. Lit. § 337. Co. Lit. 208.

But if the condition be, that the feoffee shall pay money to the feoffor, it must be paid in convenient time, for it is not reasonable the feoffee should have the benefit of the land without payment. 2 And. 73.

If the condition of an obligation be to do a local act to the obligee, to which the concurrence of the obligor and obligee is necessary, as to make a feoffment, *&c.*, (no time being limited) the obligor hath time during his life to perform it, if not hastened by request. Co. Lit. 208. b. 6 Co. 30. b.

But though the condition is local, yet if it may be performed for the benefit of the obligee in his absence, as the acknowledgment of satisfaction upon record, *&c.*, it ought to be done in convenient time. Co. Lit. 208. a. 6 Co. 30. b. Hard. 10. S. C. and S. P. cited.

When by the condition the obligor, feoffor, feoffee, or stranger, are to do a sole (*b*) act or labour, as to go to *Rome*, *&c.*, they shall have time during life, and cannot be hastened by request. Co. Lit. 208. a. 209. b.

(*b*) Which in no manner concerns the obligee, feoffor, &c. nor is for their benefit. 6 Co. 31. a. b. Leon. 125.

The Lord *Clifford* held *&c. in capite*, and the king licensed him to alien to *B.* and *C.*, so that they should give the same to my Lord *Clifford* and the heirs of his body, the remainder over; and the Lord *Clifford*, according to the licence, enfeoffed *B.* and *C.*, and before any re-conveyance the Lord *Clifford* died; and it was adjudged his heir might enter; for if they should make the estate to the issue of the Lord *Clifford*, the king might seize for want of a licence, and that in default of the feoffees. Co. Lit. 202. 2 Co. 80. a. S. C. cited.

When the act, by the condition of an obligation to be done to the obligee, is of its own nature transitory, as payment of money, delivery of charters, and the like, and no time limited, it ought to be performed in (*c*) convenient time. 6 Co. 31. Co. Lit. 208.

(*c*) Roll. Abr. 436. S. C. and several cases there cited to this purpose.

So, if the condition of an obligation be to pay a less sum, and no day of payment limited, he ought to pay it presently, *scilicet*, within a convenient time. Roll. Abr. 436. Cro. Eliz. 798.

If

Roll. Abr. 437. (a) So, where the condition

If the condition of an obligation be to pay a certain ſum to a ſtranger, without limiting any time, this ought to be done (a) in convenient time.

was, in convenient time to aſſure the land for the maintainance of a ſchool, and the deviſee did not do it in eight years, Co. 25. b. it was adjudged a breach.

Roll. Abr. 440. (b) Co. Lit. 212. a. Cro. Car. 284. Cro. Jac. 435. Moor, 367.

If the condition of an obligation be to pay ſo much to a ſtranger ſuch a day; if he pays it before the day, (b) this is a good performance, (c) becauſe payment before contains payment at the day.

pl. 502. and *vide* 2 Sid. 78. (c) And upon *ſolvit ad diem*, ſuch payment may be given in evidence. Moor, 267. Cro. Eliz. 142. And. 198. Sav. 56. Owen, 45. Dyer, 222. Godb. 10. Moor, 47. adjudged.

2 Saund. 80. 1 Sid. 444. 1 Mod. 43. 2 Keb. 612. 619. Richards v. Hodges. See 4 Ann. c. 16. § 12.

[But after a breach the defendant cannot plead his being ready to pay; as, where in debt on a bond, conditioned to ſave a pariſh harmleſs concerning a baſtard child, which the defendant was forced to father, he pleads *non damnificat.*; the plaintiffs reply, that the child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.*; defendant rejoins that he was ready to re-pay the money, and ſave the pariſh harmleſs; upon this they demurred, and had judgment, becauſe the rejoinder is a departure; for the defendant ought to have taken iſſue upon the child's being ready to ſtarve; for if the plaintiffs were once at expence about the child, and were actually damnified, the defendant's being ready to pay the money will not ſave the condition of the bond.]

Roll. Abr. 437.

If a deviſe be to *A.*, upon condition that he pays the debts of the teſtator, he muſt pay them in a convenient time, otherwiſe the condition is broken; but where lands are deviſed to be ſold for that purpoſe, the deviſee is not obliged to pay the debts before he can find a purchaſer for the lands.

2 Co. 78. Lord Cromwell's caſe. 2 And. 69. Moor, 472. S. C. Co. Lit. 222. And. 17. Moor, 105. S. P.

If *A.* conveys a manor, to which an advowſon is appendant, to *J. S.* in fee, upon condition that *J. S.* ſhall re-grant the advowſon to *A.* for his life, and if it happens not to be void in his life, then one turn to his executors; though in this caſe *J. S.* hath all his life to re-grant it, if he be not haſtened by requeſt, and the church do not become void in the mean time, yet if the church become void during his life, before any requeſt, the condition is broken, becauſe the feoffee cannot have all the effect which was intended him by the re-grant, which was to have all the preſentations during his life.

Co. Lit. 208. b. Moor, 472. Goulſ. 117. 2 Co. 79. (d) Where one is to grant a reverſion, he may do it

If *A.* enfeoffs *B.* the firſt of *May*, upon condition that he ſhall grant to *A.* an annuity or rent during his life, payable yearly at *Michaelmas*, and the Annunciation; in this caſe the feoffee hath not time to do it during his life, but he ought to do it (d) before the firſt of the ſaid feaſts, for otherwiſe *A.* cannot have all the advantage of the rent intended him by the condition.

any time during his life, if it ſo long continues a reverſion, if he be not haſtened by requeſt. Lev. 44

If

If an obligor or feoffee be, by force of the condition of a bond or feoffment, to pay money, or make a feoffment to a ſtranger, they muſt do it preſently, and (*a*) muſt give notice to the ſtranger, and they ſhall not ſave the condition by making a tender thereof, if the other refuſes to accept of it, for where one undertakes to do an act to a ſtranger, he muſt at his peril take care of the performance of it. Co. Lit. 208. (*a*) But if the condition be to be performed to the party himſelf only, who is to take advantage of the breach of the condition, the feoffee is not bound to do it before requeſt. Roll. Abr. 439. Moor, 472.

If *A.* be bound to *B.* that *C.* ſhall infeoff *D.*, *C.* has time during his life to do it, unleſs he be haſtened by requeſt; and if *C.* make a tender thereof, and *D.* refuſe, the bond is ſaved; for the obligor undertakes not to do any act himſelf, but his intent is to engage for the readineſs of a ſtranger to do an act to another who ſhall be intended to be a friend of the obligee, and under his influence; but in the ſaid caſe if the condition were, that *C.* ſhould enfeoff *D.* on ſuch a day, *C.* muſt ſeek *D.* and give him notice thereof, and requeſt him to be on the land at the day. Co. Lit. 208. b. 6 Co. 31. a. S. P. *Vide* Perk. 756. *cont.* ‖ ‖ But the text ſeems to be law.

If the condition be to make a gift in tail to the feoffor, the remainder to a ſtranger in fee; the feoffee has time during his life to do it, becauſe the feoffor, who is party and privy to the condition, is to take the firſt eſtate. Co. Lit. 219. b.

If a feoffment be upon condition to re-enfeoff the feoffor and his wife, he (*b*) ought to do it upon requeſt. Roll. Abr. 439. 6 Co. 31.

(*b*) But if not haſtened by requeſt, he hath time during his life, becauſe the feoffor, who is privy to the condition, is to take jointly with her. Co. Lit. 219. Hetl. 59. But if the baron dies, the feoffment muſt be made to the wife without requeſt. Hetl. 56.

If the condition of an obligation be, that whereas *A.* the obligor hath conveyed lands to *B.* the obligee, if *A.* the obligor, and *C.* his ſon, ſhall do all acts and devices for the better aſſurance of theſe lands to *B.*, which ſhall be deviſed by *B.* or his counſel, then the obligation ſhall be void; and after *B.* deviſes and tenders a releaſe to be ſealed by *A.* and *C.* his ſon, and *A.* preſently ſeals, but *C.*, becauſe he was not lettered, nor could read it, prays *B.* to deliver it to him, to ſhew to ſome man learned in the law, who may inform him whether it was according to the condition; and if it was according to the condition, he would ſeal it; this is a breach of the condition, becauſe he did not require the writing to be read to him, and he was bound to take conuzance of the law, whether it was according to the condition, and ſhall not have reaſonable time to ſhew the writing to his counſel learned in the law, to be inſtructed by them. 2 Co. 3. Manſer's caſe. Roll. Abr. 440. S. C.

If the condition be to make ſuch aſſurance, *&c.* to the obligee as the obligee ſhall deviſe, and after the obligee deviſes an indenture, *&c.*, and tenders it to him, and he requires time to ſhew it to his counſel, to be adviſed thereupon, which is denied to him; yet if he does not ſeal it (*c*) preſently, the condition is broken, Roll. Abr. 424. 2 Co. 3. Leon. 62. 2 And. 53. Moor, 182. S. C. (*c*) But

where a man shall have time to advise with his counsel.

broken, because the condition is peremptory, *scilicet*, to be performed presently.

4 Leon. 190. Cro. Eliz. 9. Roll. Abr. 441. Moor, 143.——That if the condition be to make such assurance as his counsel should advise, his counsel ought to draw and engross it, &c. Moor, 595.

Roll. Abr. 441. Wentworth and Wentworth, Stile, 241. S. C. adjudged.

If the condition of an obligation be, if the obligor do at all times hereafter within the space of one month, when he shall be required, make such further act and acts, assurance and assurances, as the obligee shall by his counsel demand, for the recovery of one annuity of 30*l.* due from *J. S.*, then the obligation to be void; in this case if the (*a*) obligee do not demand any further assurance within the month after the making of the obligation, yet the obligor is bound to make further assurance within a month after request made after the month past, since the making of the obligation; because the first words, *scilicet*, *at all times hereafter*, are without limitation; and the other words, *within one month*, *when he shall be required*, refer to the request, *scilicet*, he shall have a month for the making thereof after request; for the most benign construction shall be made to make this agreement effectual; for this is not like a common assurance, by which it is covenanted to make further assurance within seven years, because the use in such case hath interpreted it, that he shall not be troubled beyond seven years.

(*a*) If the condition of an obligation is to pay 50*l.* upon the 10th of *January* next, on three months warning, the obligor must pay the money upon the 10th of *January* next, giving the obligee three months warning; for the words shall be taken most strongly against the obligor. Lev. 85. Raym. 61. but said by Windham, admitting the obligee is to give warning, and omits it, yet the money is not lost, but shall be paid on any three months warning. Keb. 381. 415.

8 H. 4. 14. But for this *vide* Cro. Eliz. 14.

If the condition be to do a thing within a certain time, he may perform it the last day of the time appointed.

Moor, 122. pl. 266. Roll. Abr. 442.

Plow. 173. 5 Co. 114. Co. Lit. 206. 7 E. 4. 3. 9 H. 6. 12. 22 H. 6. 37. 47 E. 3. 26.

If upon a mortgage a tender be made of the money at the place, at any time of the day specified in the condition, and the mortgagee refuse, the condition is saved for ever, and the mortgagor need not stay at the place appointed till the last instant of the day, because by the express letter of the condition, the money is to be paid on the day indefinitely; nor needs there be any new tender afterwards within convenient time, because by the words of the contract both parties ought to acquiesce.

Leon. 101. adjudged.

If the condition of an obligation be, to deliver to the obligee twenty quarters of corn the twenty-ninth of *February* next following the date, and the next *February* hath but twenty-eight days, he is not bound to deliver it till a leap-year.

Cro. Jac. 646. adjudged; but a writ of error being brought, the parties compounded.

If an obligation bear date the 1st of *May*, and the condition is to pay a sum of money the 15th day of *May* next ensuing, this shall have relation to the day, and not to the month, so as to be payable the 15th day of *May* following, and not to the 15th of *May* next come twelve-month, being (*b*) a fortnight after the date.

(*b*) But where being payable the next day, the court held, that it should have relation to the month. Cro. Jac. 677.

So,

So, where an obligation was made the 17th day of *November*, and the condition was to pay 5*l.* the 21ſt of *November* following, and 5*l.* the 20th of *December* next after, it was holden, that the firſt 5*l.* ought to be paid the 21ſt day of *November* next enſuing, and that it referred to the day, and not to the month. Roll. Abr. 442. Price v. Coa. 2 Roll. Abr. 251. S. C.

But it hath been lately adjudged, that a bond dated 12 *May* with condition to pay a certain ſum on the 13th of *May* next following, ſhould have relation to the month, and not to the day; for it is ſaid, the month following as well as the day following, which the preſent month cannot be, and therefore the money not payable before the 13th of *May* come twelve-month; for theſe contracts are to be conſtrued *ſecundum ſubjectam materiam*, and the meaning of the parties. Hill. 5 Geo. 2. in *B. R.* Kettle v. Jones.

If a man enters into a bill obligatory, for the payment of ſeveral ſums of money at (*a*) ſeveral days, an action of debt will not lie till the laſt day is paſt. Co. Lit. 47. 292. b. 3 Co. 22. a. 128. b.

Cro. Jac. 505. Cro. Car. 241. (*a*) If to pay 20*l.* in manner following, *viz.* 10*l.* at one day, and 10*l.* at another day, debt lies not till after the laſt day, becauſe one entire duty; but if a man binds himſelf to pay *J. S.* 10*l.* at one day, and 10*l.* at another day, after the firſt day debt lies for 10*l.* becauſe it is in itſelf a ſeveral duty. Owen, 42 [See *acc.* Coates v. Hewit, 1 Wilſ. 80. Rudder v. Price, 1 H. Bl. 547.]——So if *A.* makes a bill to *B.* for the payment of 20*l.*, *viz.* 10*l.*, *&c.*, and hereby covenants and grants with *B.* that if he makes default in either of the ſaid payments, that he will then pay what of the whole ſhall be unpaid; after default of the firſt day, debt lies for the whole. Leon. 208. adjudged.

So, upon a contract, debt lies not till all the days of payment are paſt; for where there is but (*b*) one contract there can be but one debt, and conſequently but one action of debt for the recovery of it. Co. Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51.

S. P. (*b*) But if a recognizance be to pay money at five ſeveral days, after the firſt day of payment execution lies for the ſum that then ought to be paid; for it is in the nature of ſeveral judgments. Co. Lit. 292. b. And the law is the ſame of ſuch a covenant or promiſe to pay money, *&c.*; for as often as the money is not paid according to the covenant and promiſe, ſo often is there a breach of the covenant or promiſe, and conſequently ſo often an action lies. Co. Lit. 292. b.

If a bill of debt be brought againſt an attorney upon three ſeveral obligations, and upon demand of oyer it appears by the condition of one of the obligations, that the day of payment thereof is not yet come; after a verdict for the plaintiff, upon conditions performed, being pleaded, and coſts and damages given, though the plaintiff cannot have judgment for this obligation, of which the day of payment is not yet come; yet upon his releaſe of coſts and damages, he ſhall have judgment for the other obligations. Hob. 178. Roll. Abr. 785. Saund. 286. S. C. cited.

If by bond, money be payable by inſtalments, and in ſuch manner, that the non-payment of a particular ſum, at a particular day, makes a forfeiture of the whole bond; and accordingly, for the non-payment of ſuch ſum, there is a verdict for the plaintiff, finding it the deed of the party; though in ſtrictneſs the whole bond is forfeited, yet upon the defendant's bringing into court all that the maſter ſhall hold to be due, and letting the verdict ſtand as a ſecurity for future payment, the court will by rule ſtay all further proceedings on the ſaid bond *. Mich. 7 G. 2. Webb v. Divie.

* *Vide* ſtatute 8 & 9 W. 3. c. 11. § 8.

4. At

4. At what Place it may be performed.

Roll. Abr. 445, 446. (*a*) But he may accept it at another place, and it is good. Moor, 367. pl. 502.

If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform it is not obliged to ſeek the party to whom, *&c.* elſewhere, nor is he to whom it is to be performed, (*a*) obliged to accept of the performance elſewhere.

21 E. 4. 6. 20 E. 4. 18. b. (*b*) But where the condition is for performance of homage, or other ſpecial corporeal ſervice, to the perſon of the lord, the tenant by the law of convenience ought to ſeek him in any place in *England*. Co. Lit. 211. a.

Rent reſerved, payable yearly, is to be paid on the land; ſo if a man leaſes, rendering rent, and the leſſee binds himſelf in 20*l.* to perform the covenants; this does not alter the place of payment of the rent, for it may be tendered (*b*) on the land without ſeeking the obligee.

Lit. § 78. Co. Lit. 210.

But if a man makes a feoffment, upon condition that the feoffor, upon payment of 10*l.*, may enter, *&c.*, the money being a ſum in groſs, and collateral to the title of the land, the feoffor muſt tender the money to the perſon of the feoffee if in *England*.

Co. Lit. 210. (*c*) Otherwiſe, if to make an abſolute eſtate of inheritance, unleſs he firſt gives notice that he will do it ſuch a time by feoffment. Allen, 24. Stile, 61. adjudged.

If the condition of a bond or feoffment, is to make a (*c*) feoffment, it is ſufficient to tender it upon the land; becauſe the eſtate muſt paſs by livery.

Co. Lit. 210. 3 Leon. 260. S. P.

If the condition of an obligation or feoffment be, to deliver twenty quarters of wheat, or twenty load of timber, *&c.* to the obligee or feoffee, the obligor or feoffor is not bound to carry the ſame about, and ſeek the feoffee, but the obligor or feoffor, before the day, muſt go to the obligee or feoffee, and know where he will appoint to receive it, and there it muſt be delivered.

Cro. Eliz. 14. Moor, 122. Hawley v. Simpſon, adjudged. Co. Lit. 211. Salk. 140. S. P.

If by the condition of the obligation money be to be paid to the obligee at or before the 29th of *September*, at ſuch a place, it cannot be tendered at the place before the laſt day, unleſs the obligee is there ready to receive it; but if the obligor meet the obligee at a place before the day, he may there tender it, and the obligee ought to receive it.

Moor, 545. Marſh v. Edmunds, Cro. Eliz. 549. S. C. adjudged, that the plea was naught; becauſe he ſhewed not what hour of the day he came, or how long he continued there, nor that his arbitrators were preſent there alſo.

If an obligation be conditioned to be at *A.* at a certain day, there to chooſe two arbitrators, to be joined to two others to be choſen by the obligee, to arbitrate all matters between them, he ought to be there in ſuch a time, that the arbitrators may be choſen and all ended that day; and therefore his pleading, that he was there the laſt inſtant to make his choice, is not ſufficient.

21 Ed. 4. 6. b. Co. Lit. 210. b.

If the condition of an obligation be to pay a ſmall ſum, and no place is limited, he ought to ſeek the obligee wherever he may

may be found; but if the condition be to deliver twenty quarters of wheat, or twenty load of timber, &c. to the obligee, the obligor is not bound to carry the ſame about and ſeek the obligee: but the obligor, before the day, muſt go to the obligee, and know where he will appoint to receive it, and there it muſt be delivered. 3 Leon. 269.

If the condition of an obligation be to pay 10*l.* at *D.* ſuch a day, or 10*l.* at *S.* ſuch a day, if he tenders it at *D.* the firſt day, the condition is ſaved. 21 E. 4. 52. Bro. *Condition*, 174.

If the condition of an obligation be, to appear *coram juſticiariis apud Weſtmonaſterium*, he ought to appear in *C. B.*, and not in *B. R.*, for this is not the ſtile of the King's Bench. Roll. Abr. 545. Muſgrave v. Robinſon.

If a man is bound to pay 20*l.* at any time during his life, at a place certain, the obligor cannot tender the money at the place when he will, for then the obligee ſhould be bound to perpetual attendance; and therefore the obligor, in reſpect of the uncertainty of the time, muſt give the obligee notice, that on ſuch a day, at the place limited, he will pay the money; and then the obligee muſt attend there to receive it. Co. Lit. 211. a. Dyer, 354. pl. 32. Latch. 158. 8 Co. 92. b. [Where the giving of notice becomes impoſſible by the act of the perſon to whom it was to be given, it ſhall be diſpenſed with. Salk. 214.]

By the condition of an obligation, a maſter is bound to make his apprentice free, on requeſt, at the end of ſeven years; and in debt on this obligation the maſter pleads, that *ad finem* of the ſaid ſeven years, or after, till the time of action brought, he was not requeſted; and it was holden, that in this caſe the requeſt was material, being part of the condition; and *Holt* held, that the requeſt here ought to have been on the moſt convenient time of the laſt day of the ſeventh year, and that it would come too late the next day; but *Powell* inclined, that a requeſt in a day or two after the ſeven years would do well. 6 Mod. 227. 259. Fitzhugh v. Dennington. 2 Salk. 585. S. C. adjudged *per totam Curiam*, on a writ of error of a judgment in the marſhal's court for the plaintiff, and the judgment there reverſed. 2 Ld. Raym. 1094. 3 Salk. 309. pl. 1.

5. What ſhall be ſaid a ſufficient Performance.

If a man makes a feoffment in fee, upon condition that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or adminiſtrators, 100*l.*, that then the feoffor ſhould re-enter; the feoffee makes a feoffment over, and dies; the feoffor pays the 100*l.* within the year, and the heir pays back 30*l.*; this is a partial and fraudulent payment; and no good performance of the condition, to defeat the eſtate of the [ſecond] feoffee; but if the whole money had been paid, it had been good; becauſe the payment is to be made to the perſons mentioned in the condition, and not to the aſſignee of the land, who is not named therein. Co. Lit. 95. b. 96. a. Cro. Eliz. 383, 384. Moor, 708. Goulſ. 177. Poph. 99. Co. 209. Godb. 299. S. C. between Goodall and Wiat.

If *A.* is bound to *B.* in an (*a*) obligation, conditioned that *A.* ſhall deliver to *B.* before ſuch a day an obligation, in which *B.* is bound to *A.*; if *A.* ſues *B.* upon the obligation, and recovers, and after, before the day, delivers it to *B.*, this is no performance Cro. Eliz. 7. Moor, 709. Goulſ. 177. Leon. 52. S. P. (*a*) Sid. 48.

Raym. 25. Keb. 103. Like point in caſe of a covenant.

ance of the condition; for notwithſtanding the delivery of the obligation, he may take benefit of the judgment; and ſo the intent of the condition is not performed.

———So in caſe of a promiſe. Roll. Abr. 448.

Raym. 464. 2 Jones, 191. S. C. between Griffith and Goodland, adjudged, though objected caſe would lie, and no covenant; for

If *A.*, being a common brewer, covenants that *B.* ſhall have ſeven parts of all his grains made in his brew-houſe, for ſeven years, and after *A.* puts in great quantities of hops into his malt, of which the grains were made, by means whereof the grains are ſpoiled; this is a breach; becauſe in all contracts the intention of the parties is to be conſidered; and here it was the intention of the parties, that *B.* ſhould have the grains for the uſe of his cattle, and they will not eat them when hops are put into them.

that it was performed by the delivery of the grains, the plaintiff ſhewing for a breach, that the defendant had *ſubdole & callide*, to deceive the plaintiff of the benefit of the covenant, mixed hops with his malt, by which he had diſabled himſelf to perform the intent of the agreement.

Raym. 464. (*a*) If the condition of a bond be to pay 50 *l.* though it is

So, if I covenant to deliver ſo many yards of cloth, and cut it in pieces, and deliver it, this is a breach; for the law regards the (*a*) real and faithful performance of contracts, and diſcountenances all ſuch acts as are done *in fraudem legis*.

not ſaid of money, yet it muſt be ſo intended; and the obligee cannot tender fifty pound weight of ſtone. Sid. 151. Said by Twiſden, that he remembered it to have been adjudged.—[So, if a tenant, who hath covenanted to leave, at the end of the term, ſo many acres of hop-land; leave them in patches, having grubbed up the land in ſeveral parts between; this is clearly a breach.]—But if a man covenants that his ſon, then *infra annos nubiles*, ſhall marry the daughter of *B.* before ſuch a day, and he marries her accordingly, but at the age of conſent diſagrees to the marriage, yet is the covenant performed; for it was a marriage, though ſubject to be defeated by diſagreement, and no other could be had within the time. Owen, 25. adjudged.

Backe v. Proctor, Dougl. 382.

[If the condition of a bond be to *render a fair, juſt, and perfect account in writing of all ſums received;* if the obligor neglect to *pay over* ſuch ſums, it is a breach of the condition.]

Allen, 68. Stile, 107. adjudged.—So, if a man be bound to make an

If a man aſſumes to make a ſurrender of a copyhold, upon requeſt, he is not bound to make it into the hands of two cuſtomary tenants; for that is but a particular way of making a ſurrender, grounded upon a particular cuſtom.

aſſurance as the obligee ſhall deviſe, he is not bound to acknowledge a fine by *dedimus*; for that is but a ſpecial way of taking the cognizance. Allen, 69.—*Secus* if there is a proviſo that he ſhall not go above five miles from his houſe, and his houſe is above five miles from *Weſtminſter*. Allen, 69.—Covenant to make an eſtate to *A.*, and it is made to *B.*, to the uſe of *A.*, and whether good, Godb. 95. *per Curiam dubitatur*, and *vide* Cro. Eliz. 825.——If one man is bound to make to another a ſure ſufficient, and lawful eſtate in certain lands, by the advice of *J. S.*; if he makes an eſtate to him according to the advice of *J. S.*, be it inſufficient, or not lawful, he is excuſed of the obligation. 5 Co. 23. b.—Where the condition is to deliver a releaſe to the obligee, it is not enough to ſay that it was written, and wax affixed to it, and that he was ready to ſeal and deliver it, but that the obligee refuſed to accept; for he ought to have done all that he could; and he might have ſealed it notwithſtanding. 2 Roll. Rep. 238.

And. 27. Bendl. 36. 3 Leon. 1. S. C. adjudged.

If a man by indenture bargains and ſells his lands to another in fee, and covenants to make thereof to the vendee a good and ſufficient eſtate before *Chriſtmas* next, and before *Chriſtmas* the vendor cauſes this deed to be enrolled, yet this is not a good performance

formance; for by the intention of the covenant, ſome other aſſurance was to be made.

If one be obliged to aſſure twenty acres of land, the acres ſhall be accounted according to the eſtimation of the country where the land lies, and not according to the meaſure limited by the ſtatute. Cro. Eliz. 476. 665. 6 Co. 67. Poph. 55. Cro. Eliz. 681.

If *A.* covenants with *B.* to make ſuch aſſurance of all his lands at the coſts of *B.*, as *B.* or his counſel ſhall (*a*) adviſe, *B.* may require one aſſurance for one parcel, and another aſſurance for another parcel; for being to be made at the coſts of *B.*, it is no prejudice to *A.* Moor, 570. (*a*) If *A.* covenants to make ſuch aſſurance of lands to *B.*, as the counſel of *B.* ſhall deviſe, *B.* himſelf, though learned in the law, cannot deviſe the aſſurance, but it ought to be deviſed by ſome of his counſel; for if the party himſelf might adviſe it, then it would be no plea to ſay *quod concilium non dedit adviſamentum.* 5 Co. 19. b. Cro. Eliz. 297. S. C. Roll. 466. S. P. *cont.*

But if the aſſurance is to be made at the coſts of the *covenantor*, if an aſſurance of part only is required, he muſt make it; but then he is diſcharged from making any aſſurance of the reſidue. Moor, 570. Cro. Eliz. 681.

If the condition of an obligation be, that the obligor, before *Michaelmas*, ſhall make, *&c.* all and every reaſonable act and thing for aſſuring the manor of *D.* to *J. S.* and his heirs, and the obligee requeſts him generally to convey, the obligor muſt make an aſſurance; and if thereupon the obligor makes a feoffment, and the obligee after requeſts a fine, the obligee muſt acknowledge it; and ſo upon every requeſt, he ought to make ſeveral aſſurances. Yelv. 44. Moor, 682. S. C. adjudged, the condition being to do *all acts, &c.* to be required by the obligee; but ſaid, if it had been to be deviſed by the obligee or his counſel, he ought to have ſhewed he had deviſed, and required ſuch a particular feoffment or fine.

If a man covenants to make further aſſurance, and to do any act or acts, *&c.*, which ſhall be deviſed, *&c.*, and a note of a fine is tendered, and he is required to acknowledge it before a judge of aſſiſe, he muſt acknowledge it, though no writ of covenant is depending; for he hath covenanted to do every act; and this note of a fine is an act; and whether it be well levied, or to no purpoſe, is not material. Cro. Jac. 251. Moor, 810. S. C. adjudged; becauſe the note is an act preparatory for the fine: and the writ of covenant may be ſued out after; and ſo it is an act for further aſſurance, though the writ of covenant is not depending. Bulſt. 90. S. C. and *vide* Latch. 186. And. 56.

If *A.* (*b*) enfeoffs *B.*, upon condition that *B.* ſhall make a gift in tail to *A.* and his wife, and the heirs of their two bodies, remainder to the right heir of the feoffor, and *A.* dies; *B.* ought to make an eſtate for life to the wife, (*c*) without impeachment of waſte, remainder to the heirs of *A.*; for the eſtate ſhall be made as near the intent of the condition as it can be. (*b*) Lit. § 352. Co. Lit. 229. *Vide* Jones, 180. Roll. Abr. 451. Eq. Abr. 19. and *poſt.* (*c*) And yet if the wife accepts the eſtate for life, without this clauſe, it is good; becauſe the eſtate for life is the ſubſtance of the grant, &c. Co. Lit. 219. b.

[The condition of a bond was, that the obligor ſhould leave 200*l.* to the children by his intended wife jointly: the obligor left Taylor v. Bird, 1 Wilſ. 280.

left four children, and by will gave the eldeſt ſon an eſtate in land of more than the value of 50*l.*, and to the other three 50*l.* a-piece, to be paid as they ſhould reſpectively attain their ages of twenty-one. By the court—The giving the three children the ſeveral legacies of 50*l.* each, to be paid at twenty-one, and the landed eſtate to the eldeſt child, is not a performance of the condition: there is a great difference between leaving the children 200*l.* jointly, and giving them ſeveral legacies at twenty-one; it was intended there ſhould be a benefit of ſurvivorſhip, and the land cannot ſurvive: beſides, there is no preſent proviſion for the children, which was plainly intended to be made by the bond; therefore, there muſt be judgment for the plaintiff.]

Owen, 52. Leon. 74. Goulſ. 71. Roll. Abr. 444.

If the condition be in the copulative, and it is not poſſible to be performed, it ſhall be taken in the (*a*) disjunctive.

(*a*) As if the condition be, that he and his executors ſhall do ſuch a thing, this is in the disjunctive, becauſe he cannot have an executor in his life-time. 21 Ed. 4. 44. b. Roll. Abr. 444. S. C.——So, if the condition be, that he and his aſſigns ſhall ſell certain goods, this is in the disjunctive, becauſe both cannot do it. 21 E. 4. 44. b. Roll. Abr. 444. S. C.

Co. Lit. 225. a. Moor, 239. Owen, 52. Goulſ. 71. And. 161. Leon. 244. Cro. Eliz. 269.

If a leaſe be made to huſband and wife for twenty-one years, if the huſband or wife, or any child between them, ſo long lives; and the wife dies without iſſue, yet the leaſe ſhall continue during the life of the huſband; for the disjunctive referreth to the whole, and disjoineth the latter part, not only as to the child, but alſo to the baron and feme; ſo that the ſenſe is, if the baron, feme, or any child, ſhould ſo long live.

Co. Lit. 225. a. Leon. 243. Cro. Eliz. 270.

So if an uſe be limited till *A.* ſhall come from beyond ſea, and attain to his full age, or die: if he comes from beyond ſea, or attains his full age, the uſe ceaſes.

Palm. 76.

If a deviſe be made upon a disjunctive condition, to be performed by the deviſee, he hath his (*b*) election.

(*b*) So if the condition be to enfeoff the obligee of *D.* or *S.* the obligor hath his election. 18 E. 4. 17. b. 5 Co. 22. a. But for this *vide* title *Election*, and Roll. Abr. 446.

Cro. Jac. 504. adjudged.

If an obligation be conditioned to pay *B.* or his heirs, annually 12*l.* at *Midſummer* and *Chriſtmas*, or to pay him or his heirs at either of the ſaid feaſts, 150*l.*, the obligor hath election to pay the 12*l.* or the 150*l.*, though he may at any time determine the payment of the 12*l.* by the payment of the 150*l.*

2 Sid. 107. Sir Paul Neele and Reeve, adjudged.

If *A.* covenants with *B.*, that *A.* or his ſon *C.*, or either of them, ſhall work with *B.* at the grinding and poliſhing of glaſs, *B.* paying to each of them ſo much, *&c.*, and *B.* requeſts *C.* to work with him, *&c.*; if he doth not, the covenant is broken, for *B.* had the election to require both, or any one of them to work with him.

Lev. 54. Sayer and Glean, adjudged. (*c*) *Vide* Cro. Eliz. 380.

If an obligation be conditioned to pay money, if a ſhip puts to ſea, or the goods, or the obligor return ſafe, and the obligor dies before his return, yet the money is payable; for all thoſe things being contingent, and uncertain which of them will happen, the law ſupplies the words *which ſhall firſt happen*, and foreclоſes the election of the obligor; (*c*) and is not like the caſe where a man

man is bound to pay money at *Lady-day* or *Michaelmas*, and he dies after *Lady-day*, and before *Michaelmas*.

[Where the condition of a bond was, that the defendant ſhould not marry any other perſon but the plaintiff, and ſhould pay 1200*l.* in caſe ſhe did ſo, or refuſed to marry the plaintiff within a month after her father's death; and the defendant married in her father's life-time; the court ſtrongly inclined to think the bond forfeited, and the money immediately payable.] Box v. Day, 1 Wilſ. 59.

So where the condition of a bond was, that the obligor ſhould bring the ſon and daughter of *J. S.* at their full age, to give ſuch releaſes as a third perſon ſhould require; the defendant pleads, that the ſon is alive, and under age; and on demurrer to this plea, it was held, that the force of the bond was not ſuſpended till they are both of age, becauſe it is to be taken not conjunctively, but reſpectively and diſtributively; for the obligor undertakes that the daughter ſhall releaſe at her full age, as well as the ſon; and if ſhe does not, the condition is broken. Reſvel and Coats, adjudged.

If the condition of an obligation be to pay 30*l.* or twenty kine, within a month after the death of *K.*, at the election of the obligee, he muſt, at his peril, make his election within the time limited; for the obligor is not bound to tender both; but where the condition is to pay ſuch a day 10*l.* in gold or ſilver, at the election of the obligee, if he does not make his election before the day, yet the duty remains payable, being parcel of the penalty. Leon. 69. Moor, 241.

If the condition of an obligation be, that if the obligor, within ſix months after the death of *B.*, ſhall aſſure a rent of 20*l.* yearly to *C.*, as the counſel of *C.* ſhall adviſe, at the coſts and charges of *C.*, if *C.* require the ſame; or if the obligor ſhall not grant the rent, if then he ſhall pay to *C.* 300*l.*, the obligation ſhall be void; and *B.* dies, and *C.* tenders no grant of the rent within the time; the obligor is not bound to pay the 300*l.* Mod. 265. adjudged by three judges *niſi*, againſt Windham, who ſaid the condition is not diſjunctive till requeſt to ſeal a deed of annuity; and that therefore the obligor ought to pay the 300*l.* 2 Mod. 201. S. C. adjudged *per totam Curiam.*

If the condition of an obligation be, that the obligor ſhall work out 40*l.* at the uſual prices in packing, when the obligee ſhall have occaſion for himſelf or friends to employ him therein, or otherwiſe ſhall pay him 40*l.*, if the obligee hath no occaſion to make uſe of him in packing, he muſt pay the 40*l.* 2 Mod. 304. Wright and Bull, adjudged.

(Q) What ſhall excuſe the Non-performance: And herein,

1. Of the Act of God.

REGULARLY, if a condition, which was poſſible at the making thereof, (*a*) becomes impoſſible by the act of God, the obligation is diſcharged. Roll. Abr. 449. Co. Lit. 206. a. Same rule.

(*a*) Where the ſickneſs of the wife will excuſe the huſband and wife from levying a fine, the condition being to levy it upon the *reaſonable* requeſt of the obligee. Moor, 124. pl. 270. Leon. 304.

But for this *vide* title *Bail.* And Roll. Abr. 449.

If a man be let to mainprize, it is a good plea at the day when the manucaptors ought to have the body, &c., for the manucaptors to say that he who was let to mainprize was dead before the day, so that they could not have his body at the day.

Roll. Abr. 450.

If a man covenants to build an house before such a day, and after the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant, for the not doing thereof before the day; for the law will not compel a man to venture his life for it; but he may do it after.

5 Co. 22. Laughter's case. Poph. 98. Moor, 357. Cro. Eliz. 398. S. C.

If the condition consists of two parts in the disjunctive, in which the party hath an election which of them to perform, and both possible at the time of making the condition, and one becomes impossible afterwards by the act of God; this shall excuse the performance of that and the other also; for otherwise his election should be taken away by the act of God.

The condition being, that if *B.* aliened his wife's lands, if then he purchased other lands of as much value, to his wife and her heirs, or should leave her the value by his will, then the bond should be void, and he aliened his wife's lands; and before any purchase made the wife died, leaving *B.*; Gaudey held, that he ought to purchase lands to the heir of the wife. *Et vide* Cro. Eliz. 277. 864. Moor, 432. 645. 2 Jones, 95. 3 Keb. 738. 761. 770. Mod. 265.

Salk. 170. pl. 2. *Per* Treby, Ch. Just.

But it hath been holden, where the condition was to make the obligee a lease for life, by such a day, or pay him 100*l.*, that though the obligee die before the day, his executor shall have the 100*l.*, and the ground of *Laughter*'s case was denied to be universal.

5 Co. 22. Cro. Eliz. 780. S. P.

If a condition consists of two parts, of which one was not possible, at the making of the condition, to be performed, he ought to perform the other.

21 E. 3. 30. Roll. Abr. 450.

As if the condition be to infeoff *J. S.* or his heirs, when he comes to such a place; he is bound to infeoff *J. S.* when he comes, because the other is not possible; for he cannot have an heir during his life, and so he had not any election.

Roll. Abr. 450. Jones, 180. Palm. 552. and *vide* Cro. Eliz. 399.

If a condition of an obligation be to make an assurance of certain land to the obligee and his heirs, and after the obligee dies, yet he ought to make the assurance to his heir; for this copulative *and his heirs* shall have the signification of a disjunctive.

3 Mod. 233. Vern. 35. 8 Mod. 23. 10 Mod. 18. 334. 370. 372. 11 Mod. 45. 12 Mod. 404. Case *Temp. Talb.* 109, 110.

Roll. Abr. 451. N. Bendl. 35. S. P. *cont. per* Montague.

If the condition of an obligation be to infeoff two before such a day, and one die before the day; yet he ought to infeoff the other.

Roll. Abr. 451. Wood and Bates. But Jones, 171. S. C. adjudged, *cont. per*

If the condition of an obligation be, that whereas a marriage is intended between *A.* and *B.* if the said marriage takes effect, and if *B.* the wife survives *A.*, and does not receive 300*l.* of *A.* by his will, or by the custom of *London*, within three months after the death of *A.*, that then if the obligor pays to *B.*, or her executors,

executors, 500*l.*, within six months after, the obligation shall be void; and after the marriage takes effect, and *B.* survives *A.*, and dies within three months, without receiving any thing of the said 300*l.* by the will of *A.*, or by the custom of *London*; it seems the death of *B.*, within the three months, shall not excuse the obligor to pay the 500*l.* to the executors of *B.*, because it is not any disjunctive condition of which the obligor hath any election to do the one or the other; but the condition is, that if a stranger does not pay so much within a time, that he himself will pay another sum, so that the death of the party, who is to receive from the stranger, shall not excuse the obligor *. *totam Curiam.* Palm. 513. S. C. adjudged *cont.* and it was said that there was no difference when the election is in a stranger, or in the obligor. * The text seems to be law.

If *A.* binds himself apprentice to *B.* for seven years, and *B.* enters into a bond to *A.*, conditioned to pay *A.*, his executors or assigns, 10*l.* at the time of the end or determination of his apprenticeship, and *A.* serves six years, and then dies; the money shall not be paid to his executor, though it was objected that his apprenticeship ended at his death. 2 Brownl. 97. Cheyney and Sell. Godb. 153. S. C. adjudged.

If *A.* enters into a bond to *B.*, conditioned that *C.* should perform an award to be made between *B.* and *C.*, and it is awarded that *C.* shall pay to *B.* 10*l.* at *Michaelmas*, and 10*l.* at *Lady-day*, yet because the sum awarded is a duty, it is as if the condition of a bond had been for the payment of the money; and if not paid, the bond is forfeited. 2 Leon. 155. Kingwell and Chapman. Cro. Eliz. 10. S. C. adjudged.

But if the condition of an obligation be, that the obligor shall infeoff the obligee at such a day, and before the day the obligor dies, and the land descends to his heir; the condition is become impossible by the act of God, and the performance thereof excused. 2 Leon. 155. Co. Lit. 218. a. S. P.

But it hath been holden in equity, that if the condition of a bond be to settle certain lands in such a manor, by such a day, though the obligor die before the day, by which the bond is saved at law, yet an execution ought to be decreed in specie. Eq. Abr. 18. Decreed accordingly, and said to have been often done.

One devised to his eldest daughter upon condition she should marry his nephew, on or before her attaining the age of twenty; the nephew died young, and the daughter never refused, and indeed never was required to marry him: after the death of the nephew, the daughter, being about seventeen, married *J. S.*; and it was adjudged that the condition was not broken, being become impossible by the act of God. Salk. 170. pl. 1. Thomas and Howel, adjudged in *C. B.* and affirmed in *B. R.* Skin. 301. pl. 5. 319. pl. 1. S. C. adjudged.

2. Of the Act of Law.

If an annuity be granted upon condition that the grantee shall be attorney for the grantor, in all pleas; if he be after made sheriff, yet this shall not excuse him from the performance of the condition; but he ought to be his attorney; otherwise the condition is broken. Roll. Abr. 451.

If *A.* devises land to *B.* and his heirs, upon condition that he, his heirs and assigns, with the issues and profits of the land, shall pay yearly so much for certain charitable uses, and dies, and Roll. Abr. 451. Slade and Thompson,

adjudged. Cro. Jac. 374. Roll. Rep. 198. 3 Bulſt. 58. S. C. adjudged.

after the deviſee dies, his heir within age, and in ward to the king, the payment ſhall be excuſed, during the time the king hath him in ward; for by the intent of the condition, the payment ought to be made with the iſſues and profits, which are transferred, by act in law, to the king.

Hard. 10, 11. S. P. appears, and long argument, whether the king ſhould be bound by the condition.

Yelv. 207. Roſſe and Pie, adjudged. Bulſt. 155. S. C. *per Curiam*, and ſaid that though the hands of the judges were ſhut, and foreclosed by the *certiorari*, yet they might have entered his appearance. Cro. Jac. 281. S. C. adjudged, and that he ought to have procured his appearance to be recorded.

If a recognizance be conditioned for the appearance of *B.* at the next aſſiſes holden for the county of *S.*, and before the next aſſiſes, *B.* ſues a *certiorari* out of the *King's Bench*, to remove the recognizance, and at the next aſſiſes delivers the *certiorari* to the judge, yet this doth not excuſe his appearance; for though the *certiorari* was the command of the king, yet the purchaſe thereof was the act of *B.*, and he could by no ſuch ſlight ſave his recognizance.

2 Lev. 26. Vent. 175. 2 Keb. 831. S. C. adjudged, againſt the opinion of Twiſden.

If a man hath good title to land, by virtue of a fine, and ſells the ſame, and covenants with the vendee, his heirs and aſſigns, that he ſhall enjoy againſt him and *B.*, and all claiming under him; and after by an act of parliament, reciting that *B.* had ſettled this eſtate upon *C.*, and that certain perſons had unduly procured the ſaid fine from her, it is enacted, that the fine ſhall be void, and that every perſon may enter, as if no ſuch fine had been; and after one enters, claiming title under *C.*, this is a breach of the covenant; for the act makes no new title, but removes the obſtruction of the old; and it was ſaid, that doubtleſs *B.* was named in the covenant for this purpoſe, in caſe this fine unduly obtained ſhould be avoided.

3. Of the Act of the Parties.

8 Co. 92. Co. Lit. 206. S. P. Upon the condition of a feoffment.

If the condition of an obligation be, that the obligor ſhall enfeoff the obligee of the land, before ſuch a day, and after, before the day, the obligee diſſeiſe the obligor, and keep it by force till after the day, ſo that the obligor cannot enter, this will excuſe the performance of the condition.

Roll. Abr. 453. but 454. S. C. *cont.* and *vide* Cro. Eliz. 374. S. C. adjudged, it not being alleged that the leſſor held him out, and diſturbed him in doing it. Moor, 402. Owen, 65. Godb. 69. (*a*) But if it had been a covenant adhering to the land, and in reſpect of the enjoyment thereof, it would have been otherwiſe; but then it muſt have been ſhewn that he held him out of poſſeſſion. Moor, 402. pl. 534. Owen, 65.

If leſſee for years covenants to drain the water which is upon the land, before ſuch a day, and after the leſſor enters before the day, and there continues till the day is paſt, yet this ſhall not excuſe the performance of the covenant, (*a*) becauſe this is collateral to the land.

Bro. Covenant, 31. Roll. Abr. 453.

If a man be bound to build an houſe, *&c.* he is excuſed if the obligee will not ſuffer him to build it; for he cannot come upon the land againſt his will.

So,

So, if a condition be to repair a houſe, he is excuſed thereof, if a ſtranger, by the command of the obligee himſelf, diſturbs him, and will not ſuffer him to do it. 9 H. 6. 44. b. Roll. Abr. 453.

If the condition be to erect a mill, and the obligor comes to the obligee, and ſays all is ready for the erecting thereof, and demands of him when he ſhall come with the mill to erect it; if the obligee ſays he will not have the mill, and entirely diſcharges him of the mill, this ſhall excuſe him of the performance. 3 H. 6. 37. Roll. Abr. 453, 454.

If leſſee for years of an houſe covenants to repair it, and to leave it in as good plight as he found it, and after certain ſparks of fire come out of the chimney of the leſſor, into an houſe not much remote, by which the houſe of the leſſee is burnt, this will excuſe the performance of the covenant to the leſſee; ſo that he is not bound to rebuild, becauſe this comes by the act of the leſſor himſelf. Roll. Abr. 454.

If a leaſe be made upon condition that the leſſee ſhall not permit or harbour any whore within the houſe to him let, and that if he ſuffers ſuch woman to ſtay there ſix weeks after warning, *&c.*, it ſhall be lawful for the leſſor to enter; and after the leſſee ſuffers ſuch woman to be there, and warning is given him by the leſſor, although after the leſſor commands the woman to ſtay there for ſix weeks, yet this ſhall not excuſe the performance of the condition, becauſe the leſſor did not do any act; and notwithſtanding the command, the leſſee (*a*) might have removed her. 35 H. 6. 162. 8 Co. 91. b. Godb. 70. S. C. cited. (*a*) If a bond be conditioned to procure a marriage between the obligee and *B.* before a certain day, and before the day the obligee calls *B.* whore, and tells her if he marries her, he will tie her to a poſt; by reaſon whereof the obligor could not procure *B.* to marry him; this will excuſe the non-performance. Cro. Eliz. 694. Admit *per Cur.* but then it muſt be ſhewn in pleading, that the obligor did what he could to procure her to marry, &c.

But if the leſſor ouſts the leſſee, and by force, and againſt the will of the leſſee, puts in the woman, and violently makes her ſtay there by force, againſt the will of the leſſee, for ſix weeks, this ſhall excuſe the performance of the condition. 35 H. 6. 162. 8 Co. 92.

If *A.* is bound to *B.* that *J. S.* ſhall marry *Jane G.* before ſuch a day, and before the day *B.* marries her, he ſhall take no advantage of the condition, becauſe by his means it could not be performed. Co. Lit. 206. b.

If a man makes a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, *&c.* to the feoffee, at a day; if at the day the feoffee is out of the realm, the feoffor is not bound to ſeek him, or to go out of the realm to him; and therefore, becauſe the feoffee is the cauſe that the feoffor cannot tender the money, the feoffor may enter into the land, as if duly tendered. Co. Lit. 210. b.

If *A.* leaſes to *B.* for years, upon condition that if *B.* pays money to *A.*, or his heirs, at a day, that *B.* ſhall have the fee; and before the day, *A.* is attainted of treaſon, and executed; now though the condition became impoſſible by the act and offence of *A.*, yet *B.* ſhall not have a fee; becauſe a precedent condition to increaſe an eſtate muſt be performed; and if it becomes impoſſible, no eſtate ſhall riſe. Co. Lit. 218. a.

3 Leon. 159. adjudged, Bedel's caſe.

If *A.* leaſes to *B.* certain lands for years, rendering 40*l.* *per ann.*, and a ſtranger covenants with *A.* that *B.* ſhall pay unto him the 40*l.*, for the farm and occupation of the lands; and before any day of payment, *A.* ouſts *B.* of his farm, *B.* is excuſed of the payment of the rent; for the covenant was, that *B.* ſhould pay 40*l.* for the farm and occupation; ſo that it is a conditional covenant; and there ought to be *quid pro quo;* and here the conſideration upon which the covenant is conceived, *viz.* the farm, and the occupation of it, is taken away by the act of *A.* himſelf.

Cro. Eliz. 672.

A. entered into a bond to *B.*, conditioned to ſave *B.* harmleſs from a bond made to *C.* for payment of 100*l.* at a day and place, and at the day of payment *A.* was going to the place to pay it, and *B.* by covin cauſed *A.* to be impriſoned till after ſunſet, to the intent the 100*l.* ſhould not be paid; and this being pleaded to an action of debt upon the bond, it was adjudged upon demurrer, that ſuch a bare ſurmiſe was no bar.

8 Co. 76. b. Strafford's caſe adjudged. 2 Brownl. 252, S. C. adjudged.

If the king grants a reverſion in tail, upon condition that if the grantee pays 20*s.* at the receipt of the *Exchequer*, *&c.*, the grantee ſhall have a fee; if afterwards the king, under his great ſeal, refuſes to receive the money, yet if the grantee tenders it at the receipt of the Exchequer, he ſhall gain a fee; for the king by no means can countermand or hinder the increaſe of the eſtate in ſuch caſe.

Hob. 103. adjudged. So, if by pleading it had been applied to the leaſe, *&c.*

If the condition of an obligation be, that the obligor ſhall pay 10*l.* to the obligee, which is for the rent of certain lands, and the obligee enters upon the land, and ſo ſuſpends the rent, yet this ſhall not excuſe * the payment; for it is but a recital that it was for rent, and not material.

* But entry and eviction before rent due, avoids payment in covenant, &c. for the rent as rent.

Hetley, 54. Jeakil and Linn, adjudged. So, in caſe an obligation for payment of the rent. Cro. Car. 415.

If a parſon by indenture leaſes his parſonage for years, rendering rent, and the leſſee covenants to pay his rent, and before any day of payment, the parſonage (*a*) is ſequeſtered for the non-payment of the firſt fruits, yet the leſſee ſhall not be excuſed of the payment of his rent.

(*a*) Otherwiſe if leſſee for years is evicted by a prior title. Roll. Rep. 198. Yelv. 23.

Poph. 39. Cro. Eliz. 313. Owen, 104. Moor, 597. S. C. adjudged.

If *A.* leaſes lands to *B.* for ſeventeen years, and after *B.* enters into an obligation to *A.*, conditioned to pay an annual rent to *C.* for the term of ſeventeen years, if *C.* lives ſo long, and the ſaid *B.*, or his aſſigns, or any claiming under him, ſhall or may ſo long enjoy the ſaid land; and *B.* after ſurrenders to *A.*; yet he muſt continue the payment of the rent, becauſe merely collateral, and to be made to a ſtranger.

Poph. 40. Owen, 104. Cro. Eliz. 313. Like point by Popham; for that the obligee ſhould not take advantage of his own act.

But if the condition had been that *C.* during the term ſhould hold part, without the interruption of *B.* or his aſſigns, if after the ſurrender, *A.* had interrupted him, *B.* ſhould not have forfeited his bond.

If the condition of an obligation be, that the ſon of the obligor ſhall ſerve the obligee for ſeven years, if he tenders his ſon, and the obligee (*a*) refuſes, it is no forfeiture. 22 E. 4. 26. Roll. Abr. 455.

(*a*) So, if he takes him, and after, within the term, commands him to be gone. Roll. Abr. 455.

If the condition of an obligation be to pay a ſmall ſum, and the obligee refuſe it at the day, though this ſaves the penalty, yet the principal money (*b*) muſt be paid; for it ſtill remains a debt. 20 E. 4. 1. b. 22 E. 4. 26. Roll. Abr. 448. Co. Lit. 207. S. P. be-

cauſe the ſum mentioned in the condition is parcel of the obligation; and the obligee hath remedy for it by law. Cro. Eliz. 755. S. P. (*b*) And therefore if an action be brought againſt him upon the obligation, and he plead the tender and refuſal, he muſt alſo plead that he is yet ready to pay the money, and tender it in court. Co. Lit. 207. a.—But if the plaintiff will not then receive it, but takes iſſue upon the tender, and it be found againſt him, he hath loſt the money for ever. Co. Lit. 207. a. Hob. 198, 199. Noy, 110.

But if the condition of an obligation of 100*l.* be for the delivery of corn, timber, *&c.*, performance of an arbitrament, or other act, *&c.*, this is collateral to the obligation, and no parcel of it; and therefore a tender and refuſal is a perpetual bar. Co. Lit. 207. a.

4. Of the Act of a Stranger.

Regularly, if the condition be to be performed by a ſtranger, and he refuſe, the obligation is forfeited; for the obligor hath taken upon him that the ſtranger ſhall do it. Roll. Abr. 452.

As if the condition be that my ſon ſhall ſerve *J. S.*; if he will not, my obligation is forfeited. 22 E. 4. 26. b.

A. and *B.* ſubmit themſelves to the award of *C.*, and *A.* enters into an obligation to *C.* to ſtand to the award; and *B.* alſo; and *C.* awards *A.* to pay 10*s.* to *B.*, who tenders it, and *B.* refuſes; the obligor is excuſed (*c*) becauſe *B.* is not a mere ſtranger, but privy, and ſo is the obligee. 22 E. 4. 25. b. Roll. Abr. 452.

(*c*) So, if a recognizance, bond, *&c.*

is made to *A.* to the uſe of *B.* conditioned to pay money, &c. to *B.* and *B.* refuſes, &c. Cro. Eliz. 755. Cro. Jac. 14.

But if the condition be, that the ſon of the obligor ſhall marry the daughter of the obligee, if the daughter of the obligee refuſe the ſon, yet the condition is forfeited; for the daughter is a mere ſtranger, and the obligor hath taken upon him that his ſon ſhall marry her. Hutt. 48. Winch, 30. 3 Bulſt. 30.

So, if the condition (*d*) be to enfeoff a ſtranger, who refuſes, yet the obligation is forfeited. (*d*) 2 E. 4. 2. 39 H. 6. 10. b. Co. Lit. 209. S. P.—But otherwiſe if to be made to the obligee, or to any other for his benefit. Co. Lit. 209. a. *Secus*, where the condition is that a ſtranger ſhall enfeoff a ſtranger. Co. Lit. 209. a.

If there be a feoffment upon condition to enfeoff a ſtranger, if the ſtranger refuſes, yet the condition is broken, becauſe the intent was not that the feoffee ſhould retain it. 19 H. 6. 34. b. Co. Lit. 209. 1 Leon. 266. 2 Leon. 222. S. P.

But otherwiſe it had been if the condition was to make (*e*) a gift in tail to a ſtranger, and he refuſes; for there the intent was that he ſhould have the reverſion. 2 E. 4. 2. Co. Lit. 209. Leon. 266. 2 Leon. 222. S. P.

(*e*) So, if the condition be, that he ſhall grant a rent-charge to a ſtranger, and he refuſes, becauſe intended the feoffee ſhould retain the land. Co. Lit. 209.

If

Roll. Abr. 453. 2 Leon. 114. 3 Leon. 142. S. C. Godb. 47. S. C. and S. P. *per Curiam*, and ſaid whether the obligee occupy by right or wrong,

If the condition of an obligation be, that whereas the obligor and obligee are jointly ſeiſed of the office of the court of admiralty; if the obligor ſhall permit the obligee to uſe the ſaid office, and to take the profits thereof only to his own uſe during his life, without interruption made by the obligor, then, *&c.*; although after the admiral dies, and the new admiral grants the ſaid office to a ſtranger, (as he may by law,) and he interrupts and ouſts the obligee, yet if the obligor after this interrupts the obligee alſo, the condition is broken.

the obligor is not to interrupt him againſt his own bond.

Co. Lit. 208. b.

If *A.* is bound to (*a*) *B.* to pay 10*l.* to *C.*, if *A.* tenders it to *C.*, and he refuſes, the bond is forfeited.

(*a*) Otherwiſe if bound to pay it to the obligee, or his aſſigns, and the obligee appoints *C.* to receive it as his aſſignee, and it is tendered to *C.* and refuſed by him. Dalſ. 38.

Cro. Eliz. 656. adjudged.

If *A.* diſſeiſes *B.*, and after leaſes to *C.* for years, and *C.* covenants at the end of the term to leave and yield up the tenements well repaired to *A.*, and after *B.* enters, *&c.*, *C.* is excuſed.

5 Co. 23. b. adjudged. Cro. Eliz. 716. S. C. Moor, 645. And Cro. Eliz. 864. S. C. cited. and *vide* like point, Lit. Rep. 13.

If the condition of an obligation be, that the obligee ſhall in *Michaelmas* term next give unto the obligor, *&c.* ſuch releaſe as by the judge of the prerogative court ſhall be thought meet; the obligor ought to procure the judge to deviſe and direct ſuch releaſe; for the judge is a ſtranger to the condition, and the condition is for the benefit of the obligor, and he hath (*b*) taken upon him to perform it at his peril.

Lev. 101. Sid. 313. (*b*) So, if the condition of an obligation be, that a ſtranger ſhall releaſe all the right which he hath, or pretends to have in a certain manor, the obligor muſt procure him to make a releaſe *de facto* though he hath no right. Sand. 215.

Winch, 26. 69.

If *A.* leaſes his land for forty years, rendering rent, and deviſes the reverſion to *J. S.* in tail, *&c.*, provided that *B.* and his wife ſhall have the rent to their own uſe till *J. S.* comes of age, upon condition that *B.* and his wife, within three months after his death, enter into a bond to his overſeers for the payment of 34*l.* *per ann.*, in ſuch penalty as his overſeers ſhall adviſe, and *A.* dies, *B.* and his wife muſt give notice of this to the overſeers, and at their peril procure them to adviſe.

Conſtable.

(A) How choſen and appointed.
(B) Who are obliged to ſerve.
(C) Of their Power and Duty in acting without any Warrant from a Juſtice of the Peace.
(D) Of their Power and Duty in executing Warrants.

(A) How choſen and appointed.

CONSTABLES appear to have been officers of great (*a*) antiquity; for by the laws of king *Alfred*, the freemen were to digeſt themſelves into decennaries and hundreds, and every ten freeholders choſe an annual officer, whom they called conſtable, borſholder, tithingman, or headborough, as head of the decennary; theſe, in every hundred where there was a feudal lord, were ſworn in, and admitted by the lord or his ſteward in his leet; but where there was no ſuch feudal lord, the ſheriff in his torn had the ſwearing and placing of them in: alſo, if there was no feudal lord of the hundred, an annual officer was choſen, who was to preſide over the whole hundred, who was called the high conſtable; but if the hundred was feudal, as it often antiently was, then ſuch lord of the hundred adminiſtered the office himſelf.

Of the high conſtable of *England*, *vide* title *Courts, and their juriſdiction in general.*

(*a*) Were before the ſtatute of *Winchester*. 2 Hawk. P. C. c. 10. § 33. 4 Inſt. 267. *Vide* Somner's *Antiquities Canterbury*. Lamb. Conſtable, 8. [That both high and petit conſtables were of earlier date than this ſtatute, is ſatisfactorily proved in the introduction to a little treatiſe, entitled "*The Office of Conſtable*," publiſhed in 1791.]——By common law, they are to be choſen by the leet or torn. 4 Inſt. 265.—And by 2 Hawk. P. C. c. 10. § 37. it is difficult to determine to whom the power of chuſing them doth of common right belong; for by Dalt. Sheriff, 400. Roll. Rep. 34. both high and petty conſtables are to be choſen and appointed by the ſheriff in his torn; and by 2 Jones, 212. Lamb. Conſtable, 8. Salk. 175. pl. 1. 2 Salk. 502. pl. 2. 5 Mod. 124. 11 Mod. 215. 12 Mod. 88. 115. 180. Comb. 351. Skin. 635. pl. 4. 669. pl. 6. Ld. Raym. 69. St. 13 & 14 Car. 2. c. 10. they are to be choſen by the decennary; but it ſeems clear, that whether a conſtable is to be choſen by the ſheriff or decennary, yet he is to be ſworn and placed in his office by the ſheriff, as being judge of the court. Alſo it ſeems certain, that a cuſtom either way is good. 2 Hawk. P. C. c. 10. § 38. And that a ſheriff or ſteward, having power to place a conſtable in his office, have by conſequence a power of removing him. Bulſt. 174. 2 Hawk. P. C. 63.

It ſeems by the better opinion, that a cuſtom in a town, that the inhabitants thereof ſhall ſerve the office of conſtable by turns, is good, and that the objection, that by ſuch means it may come to a woman's turn to ſerve, is of no force, ſince ſhe is allowed to make

Sid. 355. 2 Hawk. P. C. c. 10. § 37.

(a) 2 Term Rep. 406. admitted. 2 Stra. 943.

make a deputy (*a*), or procure one to ſerve for her, who ſhall be conſidered as the proper officer.

Cro. Car. 389. *cont.*

Salk. 175. pl. 2. 176. Mod. 13. 12 Mod. 180, 181. 2 Stra. 1050. 2 Jones, 212. Allen, 78. Dalt. c. 121. (*b*) Salk. 176. pl. 2. 2 Stra. 798. *cont.* Buſt. 174.

Alſo, the office of conſtable being neceſſary for the preſervation of the peace, juſtices of the peace have by an uninterrupted uſage, not now to be diſputed, taken upon them not only to ſwear conſtables who have been choſen at a torn or leet, but alſo to nominate and ſwear conſtables, where none have been ſworn at ſuch courts, through the neglect of the ſheriff or lord, and alſo to (*b*) diſplace thoſe who have been ſo choſen; and this point hath been carried ſo far as to allow the ſeſſions of the peace to ſwear one conſtable who had been elected at the leet, and unduly rejected by the ſteward, who had ſworn another in his place.

[The ſeſſions have no right to appoint under this ſtatute, unleſs there hath been a default at the leet. Rex v. Goudge, 2 Str. 1213. See Rex v. Lone, Fitzg. 192. and R. v. Routledge, Doug. 536. S. P. argued.]

And by the 13 & 14 *Car.* 2. *cap.* 12. *par.* 15. reciting, "That "the laws and ſtatutes for apprehending rogues and vagabonds "had not been duly executed, ſometimes for want of officers, by "reaſon lords of manors do not keep court-leets every year for "making them;" it is enacted, "That in caſe any conſtable, "headborough, or tithingman, ſhall die, or go out of the pariſh, "any two juſtices of the peace may make and ſwear a new con-"ſtable, headborough, or tithingman, until the ſaid lord ſhall "hold a court, or until next quarter ſeſſions, who ſhall approve "of the ſaid officers ſo made and ſworn as aforeſaid, or appoint "others, as they ſhall think fit; and if any officer ſhall continue "above a year in his or their office, that then in ſuch caſe the "juſtices of the peace in their quarter ſeſſions may diſcharge ſuch "officer, and may put another fit perſon in his or their place, "until the lord of the manor ſhall hold a court as aforeſaid."

The caſe of the Conſtable of *Holmby*, Mod. 13. S. C. 2 Keb. 557. S. C.

The juſtices of the peace of the county of *Northampton*, at their general ſeſſions, choſe a conſtable for *Holmby*, and for not coming in to take the oath, proceeded againſt him; which proceedings being removed by *certiorari* into *B. R.*, it was moved on affidavits, that there had not been a conſtable there for fifty years before, that he might be diſcharged, alleging likewiſe, that *Holmby* was a privileged place, and that all the inhabitants were the Duke of *York*'s tenants: but the court held, that they (*c*) could not diſcharge him on motion, and ſaid, that they muſt determine the matter by action of falſe impriſonment, or ſome other way, and inclined ſtrongly, that he could not any way be diſcharged; for *per Cur.*, though originally conſtables were choſen in leets, yet the conſtable being an officer, whoſe duty it is to keep the peace, the juſtices may chooſe him in caſes of neceſſity; as in the hamlets about the *Tower*, the juſtices, by reaſon of the increaſe of buildings, where there was formerly but one conſtable, did chooſe five; and it was ruled they might do ſo; and they ſeemed to incline, that though formerly there had been none, yet they might chooſe one if they ſhould think it convenient.

(*c*) That the court of King's Bench has the ſupreme power of ordering an inferior juriſdiction to ſwear, reſtore, or diſcharge a perſon choſen conſtable, and of awarding a *mandamus* where it ſhall be neceſſary.

Vide Roll. Abr. 535, 2 Roll. Rep. 82. 2 Hawk. P. C. c. 10. §47.

A perſon

A perſon duly elected conſtable refuſing to take upon him the office, may, if preſent, be (*a*) fined by the court; and if abſent, on having a certain time and place appointed him for the taking of the oath before (*b*) a juſtice of peace, may, after notice of ſuch appointment and preſentment at the next court, be amerced.

Cro. Car. 567. Co. Ent. 572. 5 Mod. 130. Salk. 175. pl. 1. Ld. Raym. 69. 8 Co. 38.

(*a*) But cannot be lawfully committed without more. 2 Hawk. P. C. c. 10. § 46. (*b*) 2 Str. 1149.

Alſo, in either caſe he may be indicted, either before juſtices of *oyer* and *terminer*, or at the ſeſſions of the peace; but ſuch indictment ought ſpecially to ſet forth the manner of every ſuch (*c*) election, appointment, (*d*) notice, and refuſal, and before (*e*) whom the court was holden.

2 Hawk. P. C. c. 10. § 46. 2 Stra. 920. Fitzgib. 192. Barnard. K. B. 413.

11 Mod. 215. 12 Mod. 180. See Caſ. 480. (*c*) That it is inſufficient to ſay in general, that the party was *debito modo electus*, or *legitime electus*. 5 Mod. Rep. 96. 129. adjudged. (*d*) That the ſpecial circumſtances of ſuch notice muſt be ſet forth. Allen, 78. 5 Mod. 96. 130. Keb. 418. adjudged. (*e*) Mod. 24. *vide* 2 Sand. 290.

Neither is an indictment for not finding a ſufficient perſon to ſerve the office of conſtable good, unleſs ſuch indictment ſhew that the party refuſed to ſerve it himſelf.

Keb. 416. 2 Hawk. P. C. c. 10. § 46.

Penalty on conſtable neglecting to provide waggons, *&c.* for the army, 30 *Geo.* 2. *cap.* 6. *ſect.* 41. Or for the mariners, *cap.* 11. *ſect.* 25. Or for the militia, *cap.* 25. *ſect.* 50. For taking money to excuſe from quartering ſoldiers, *cap.* 6. *ſect.* 66. Or mariners, *cap.* 11. *ſect.* 9. *

*See further the Table to the Statutes, tit. *Conſtable.*

(B) Who are obliged to ſerve.

IT ſeems agreed, that all (*f*) ſworn attornies, and all (*g*) other officers whoſe attendance is required in the courts in *Weſtminſter-hall*, are not obliged to ſerve or execute any inferior pariſh office, and that where they are choſen, though by a (*h*) particular cuſtom, with reſpect to their eſtates or otherwiſe, they may have a writ of privilege, for no cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them.

Vide title *Privilege.* (*f*) Noy, 112. March, 30. Cro. Car. 389. 2 Keb. 477. (*g*) That practiſing barriſters at law, and the ſervants of members of parliament, have the ſame privilege. Mod. 22. Mod. 13. (*h*) 2 Keb. 508. Cro. Car. 389. Lev. 265, 266. 2 Hawk. P. C. c. 10. § 39. 2 Keb. 578.

So, if an alderman of *London* has an houſe at *D.* in the county of *Eſſex*, and he, as an inhabitant there, is choſen conſtable, yet he is not compellable to ſerve, for that as an alderman he is bound to be preſent in the city, for the good government thereof.

Alderman Abdy's caſe, Cro. Car. 585. Jones 462. S. C.

But a captain of the king's guards being preſented to ſerve as conſtable, in purſuance of a cuſtom in reſpect of his lands in a town, cannot claim this privilege; for though by his office he is bound to a perſonal attendance on the king, yet ſuch office being of late inſtitution, ſhall not prevail againſt an ancient cuſtom.

Vide Keb. 309. Sid. 272. 355. Lev. 233. Keb. 933.

Yet

2 Hawk. P. C. c. 10. § 41. (a) Keb. 439. *cont.* 2 Keb. 578. (b) But no

Yet if ſuch an officer, or a (*a*) gentleman of quality, who hath no ſuch office, or a practiſing phyſician, be choſen conſtable of a town, which has (*b*) ſufficient perſons beſides to execute this office, and no ſpecial cuſtom concerning it, perhaps he may be relieved by the *King's Bench*.

privilege can exempt fitting perſons from ſerving the office of conſtable, where there are not ſufficient beſides them to execute it. 2 Hawk. P. C. c. 10. § 41. Sid. 272. Keb. 933. *Vide* tit. *Privilege*.

Rex v. Genge, Cowp. 13.

[One who is reſiant within a *private leet* within the hundred, is not therefore exempt from ſerving the office of conſtable for the hundred: and a cuſtom to elect ſuch an one is good.

Rex v. Clarke, 1 Term Rep. 679.

A younger brother of the corporation of the *Trinity-houſe* is not as ſuch exempt from ſerving the office of headborough.

Rex v. Mierre, 5 Burr. 2787.

Perſons naturalized being excluded from taking any civil office of truſt, are thereby rendered ineligible to this office.

6 Mod. 42.

No perſons who keep a publick houſe ought to be conſtables. They are expreſsly prohibited in *Weſtminſter* by ſt. 29 *Geo.* 2. *c.* 25.]

[(*c*) It ſeems that by the equity of this ſtatute, and the ancient cuſtom of the realm,

By the 5 *H.* 8. *cap.* 6. "The wardens and fellowſhip of ſurgeons infranchiſed in *London*, and all barber ſurgeons admitted and approved according to the ſtatute made in that behalf, not exceeding the number of twelve, ſhall be diſcharged of conſtableſhip and watch, *&c.* (*c*)"

all ſurgeons have been allowed the like privilege. 2 Keb. 578.—The like exemption is given to ſurgeons and barbers, by 18 Geo. 2. c. 15. § 10. for making the ſurgeons and barbers of *London* two diſtinct corporations.]

[(*d*) It ſeemeth to have been holden, that the equity of this act doth

By the 32 *H.* 8. *cap.* 40. "The preſident of the commonalty and fellowſhip of phyſick in *London*, and the commons and fellows of the ſame (*d*), ſhall not be choſen conſtables in the city of *London*, or ſuburbs of the ſame, *&c.*"

not extend to other phyſicians not mentioned in it; perhaps for this reaſon, becauſe phyſicians have no ſuch ſpecial cuſtom for their diſcharge, as ſurgeons are ſaid to have. 2 Hawk. P. C. c. 10. § 44.]

[By 1 W. & M. c. 18. diſſenters appointed to the office of high or petit conſtable,

By the 6 *&* 7 *W.* 3. *cap.* 4. "All perſons uſing the art of an apothecary, who have been brought up and ſerved as apprentices in the ſaid art for ſeven years, according to the ſtatute of 5 *Eliz. cap.* 4., ſhall be freed and exempted from the office of conſtable.

and ſcrupling to take it in regard of the oaths, ſhall and may execute it by deputy. By 10 & 11 W. 3. c. 23. an exemption is granted to the original proprietor or firſt aſſignee of a certificate for proſecuting certain felons to conviction, (called a *Tyburn*-ticket,) if a pariſh, (or as in *London*,) a ward-office within the pariſh or ward in which the felony happened, to be only once uſed. But note: this is no exemption from ſerving the office for a *manor*, nor, as it ſeemeth, for a vill or townſhip. 2 Burr. 1182. By 2 Geo. 3. c. 20. § 86. ſerjeants or privates in the militia are exempted during the time of their ſervice, unleſs they ſhall conſent thereto. By 31 Geo. 2. c. 17. in *Weſtminſter*, perſons aged 63. A college-barber at *Oxford*, though reſident in the city out of college, ſeemeth to be exempted by the privilege of the univerſity, from ſerving this office for the city. R. v. Routledge, Dougl. 531. But the degree of Maſter of Arts, if the graduate be not reſident in the univerſity, affords no exemption. See Herſon's caſe, Vin. Abr. tit. *Court of King's Bench* (I), pl. 1. *Court-leet* (U), pl. 5. *Conſtable* (B), pl. 3.]

2 Show. 75. The King and Bencof-

A. was indicted for not taking on him the office of high conſtable; and the queſtion on a ſpecial verdict was, Whether a tenant

tenant in ancient demeſne may be made conſtable of an hundred, which reaches farther than the demeſnes? and it was adjudged that he might. worth, Vent. 344. S. C. adjudged.

(C) Of their Power and Duty in acting without any Warrant from a Juſtice of the Peace.

AS conſtables were originally inſtituted for the better preſervation of the peace, they may by the common law arreſt (*a*) felons, and all ſuſpicious perſons that go abroad in the night, and ſleep by day, or reſort to bawdy-houſes, or keep ſuſpicious company. 2 Hawk. P. C. c. 10. § 34. c. 12. § 7. 4 Bl. Comm. 292.

[(*a*) They are juſtifiable in arreſting perſons directly charged with felony, although it ſhould afterwards appear that no felony had been committed. Samuel v. Payne, Dougl. 359. And where a felony hath actually been committed, they are juſtified in making an arreſt, provided they act *bonâ fide*, and in purſuit of the offender, upon ſuch information as amounts to a reaſonable and probable ground of ſuſpicion. In this caſe, indeed, a private perſon may arreſt, though not in the former. Ledwith v. Catchpole, Cald. 291.—If they have notice that a burglary hath been committed, it is their duty to purſue the felon immediately, though in the night. Cro. El. 652.]

Alſo, by the (*b*) ancient common law, the conſtable was to preſent at the torn or leet all thoſe within his precinct who were not admitted into ſome tithing, and who had not ſworn to the king's allegiance; and it ſeems, that by (*c*) the law in uſe at this day, he ought to preſent (*d*) all offences inquirable in the torn or leet. (*b*) Lamb. Conſtable, 5, 6. 45 E. 3. (*c*) Crompt. 212. Dalt. Sheriff, 388. See Raſt. Ent. 151.

(*d*) Yet in the oath ſet down by Kitchen, 47., he only ſwears to preſent all bloodſhed, outcries, affrays, and reſcouſes done within his office.

A conſtable is not only empowered, as all private perſons are, to part an affray in his preſence, but is bound at his peril to endeavour it, not only by doing his utmoſt himſelf, but alſo by demanding the aſſiſtance of others, which they are bound to give him under pain of fine and impriſonment. 3 Inſt. 158. H.P.C. 135. Lamb. 132. Dalt. c. 8.

And it is ſaid, that if he ſees perſons actually engaged in an affray, whether the violence were done or offered to another, or even to himſelf, or ſee them upon the very point of entering upon an affray; as where one threatens to beat another, *&c.*, he may either carry the offender before a juſtice of peace, in order to his finding ſureties for the peace, *&c.*, or may impriſon him himſelf a reaſonable time till the heat be over, and afterwards detain him till he give ſuch ſurety by bond: but he ſeems to have no power to commit the offender in any other manner, or for any other purpoſe; for he cannot commit him to gaol till he ſhall be puniſhed; neither ought he to lay hands on thoſe who barely contend with words, without any threats or perſonal hurt; but all he can do in ſuch caſe is to command them, under pain of impriſonment, not to fight. Lamb. 132. Dalt. c. 1. 8. Bro. Surety, 23. 36. Cro. Eliz. 375. 9 E. 4. 26. a. Moor, 284. 22 E. 4. 35. b. 10 E. 4. 18. 5 H. 7. 6. a. Savil, 97. Roll. Rep. 238. 2 Bulſt. 329.

* It is more adviſeable for the conſtable to carry the offender immediately before a juſtice of the peace.

If an affray be in a houſe, the conſtable may break open the doors to preſerve the peace, and if affrayers fly to a houſe, and Dalt. c. 8. 67. 13 E. 4. 9. a. 7 E. 3.

12. b. H.P.C. 92. 135. and he freſhly follow, he may break open the doors to take them.

Lamb. 133. Cro. Eliz. 375. Owen, 105. But he cannot of his own authority compel a man to find ſureties, who is delivered into his hands, as having broken the peace in his abſence, but ought to carry him before a juſtice of the peace; neither can he arreſt a man for an affray out of his view, without a warrant from a juſtice of the peace, unleſs a felony were done, or likely to be done.

Moor, 284. Owen, 98. 2 Hawk. P. C. c. 12. § 19. If a conſtable ſee a perſon expoſe an infant in the ſtreet, who refuſes to take it away, he may lawfully apprehend and detain ſuch perſon till he or ſhe ſhall conſent to take care of it. And ſo may a private perſon.

(D) Of their Power and Duty in executing the Warrants of Juſtices of the Peace.

(a) 5 Mod. 130. Salk. 175. pl. 2. (b) Salk. 381. 2 Roll. Rep. 78. AS the conſtable is the proper officer to a juſtice of peace, he is bound to execute his warrants. Hence it hath been (a) reſolved, that where a ſtatute authorizes a juſtice of the peace to convict a man of a crime, and to levy the penalty by warrant of diſtreſs, without ſaying to whom ſuch warrant ſhall be directed, or by whom it ſhall be executed, the conſtable is the (b) proper officer to ſerve ſuch warrant, and indictable for diſobeying it.

Roll. Abr. 591. Moor, 845. Crompt. 222. 3 Bulſt. 77. Dalt. c. 1. Yet inaſmuch as the office of conſtable is wholly miniſterial, and no way judicial, it ſeems that he may appoint a deputy (c) to execute a warrant directed to him, when by reaſon of ſickneſs, abſence, or otherwiſe, he cannot do it himſelf: but without ſome ſuch ſpecial cauſe a conſtable cannot make a deputy.

S. C. Roll. Rep. 274. Sid. 355. Lev. 233. March, 30. 2 Keb. 309. 321. [3 Burr. 1259. Cald. 252. 1 Term Rep. 682. (c) And the deputy is within the equity of ſt. 7 J. 1. c. 5. Moor, 845. 2 Term Rep. 395. St. 29 Geo. 2. c. 25. § 2.]

Salk. 176. Ld. Raym. 545. 1 H. Bl. 15. [By 29 G. 2. c. 25. the *Weſtminſter* conſtables are to be appointed out of the different pariſhes for the whole city and liberty. In *London*, alſo, by ancient cuſtom, the conſtables, though appointed in particular wards, of which there are twenty-ſix, have power to ſerve warrants and execute their office throughout the city.] If a warrant be directed generally to all conſtables, no one can execute it out of his own precinct; but if it be directed to a particular conſtable by name, he may execute it any where within the juriſdiction of the juſtice.

6 Co. 54. 9 Co. 69. A ſworn conſtable in executing a warrant need not ſhew it to the party, although he demand a ſight of it; but in making an arreſt he ought to acquaint him with the ſubſtance of it.

2 Hawk. P. C. c. 13. § 28. [And all private perſons to whom warrants ſhall be directed, and even officers, if they be not ſworn and commonly known, and even theſe, if they act out of their own precincts, muſt ſhew their warrants, if demanded. And it is enacted by 27 *Geo.* 2. *c.* 20., "That in all caſes where any juſtice of the peace is required or empowered by any ſtatute to iſſue a warrant of diſtreſs for the levying of any penalty inflicted, or any ſum of money

"money thereby directed to be paid—the officer executing ſuch "warrant, if required, ſhall ſhew the ſame to the perſon whoſe "goods and chattels are diſtrained, and ſhall ſuffer a copy thereof "to be taken."] § 2.

An unlawful arreſt without a juſtice's warrant, cannot be made good by a warrant taken out afterwards. Dyer, 244. Fitz. Bar. 248.

If the conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large on his promiſe to return again, he (*a*) cannot, by force of the ſame warrant, arreſt him again. Crompt. 149. 2 Keb. 705. Crompt. 148. 2 Keb. 206. Dalt. c. 117.

13 E. 4. 9. a. (*a*) But by the better opinion, if the party voluntarily returns into cuſtody, the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of the warrant. 2 Hawk. P. C. c. 13. § 9.

A conſtable cannot juſtify an arreſt by force of a warrant from a juſtice of the peace, which expreſsly appears on the face of it to be for an offence whereof a juſtice of peace hath no juriſdiction; or to bring the party before him at a place out of the county for which he is a juſtice. 14 H. 8. 16. Crompt. 147, 148, 149. 2 Str. 1002.

But it ſeems that he ought to execute a general warrant to bring a perſon before a juſtice to anſwer ſuch matters as ſhall be objected againſt him on the part of the king. Dalt. c. 117. 2 Hawk. P. C. c. 13. § 10.

[A *general* warrant to apprehend all perſons ſuſpected, without naming, or particularly deſcribing any perſon in ſpecial, is illegal and void for its uncertainty; for it is the duty of the magiſtrate, and ought not to be left to the officer, to judge of the ground of ſuſpicion. And a warrant to apprehend all perſons, guilty of a crime therein ſpecified, is no legal warrant: for the point, upon which its authority reſts, is a fact to be decided on a ſubſequent trial; namely, whether the perſon apprehended thereupon be really guilty or not. 4 Bl. Comm. 291. 3 Burr. 1742. 1 Bl. Rep. 562. 11 St. Tr. 307. 321. Comm. Jour. 22 & 25. Apr. 1766.]

Alſo by the better authorities it ſeems holden, that it is not material whether the party arreſted by virtue of a warrant from a juſtice of peace, were guilty or innocent, or whether the felony, &c. were actually committed or not; for it would be a great diſcouragement to officers, to ſubject them to actions in ſuch caſes, for doing what they apprehend to be their duty; and the liberty of the ſubject ſeems ſufficiently ſecured by ſubjecting the juſtice to an action. But for this *vide* 2 Hawk. P. C. c. 13. § 11. Skin. 568. [A warrant properly penned, (even tho' the magiſtrate who iſſues it ſhould exceed his juriſdiction,) will, by ſtat. 24 Geo. 2. c. 44., in all events indemnify the officer who executes the ſame miniſterially. 4 Bl. Comm. 291.] And how far a conſtable may execute a general warrant to make a general ſearch for felons or ſtolen goods. 2 Hawk. P. C. 82. [and 11 St. Tr. 321. 2 H. H. P. C. 313. 321.]

[If a conſtable be ſued for any thing done in the execution of his office, he and all who aſſiſt him may plead the general iſſue, not guilty, and give the ſpecial matter in evidence; and on a verdict for the defendant, or on the plaintiff's becoming nonſuit or diſcontinuing, he ſhall have double coſts. And the action can be laid only in the proper county; for, if upon not guilty pleaded, it appear that the fact was done in another county, the jury ſhall find the defendant not guilty. St. 7 Ja. 1. c. 5. St. 21 Ja. 1. c. 12.

No action is to be brought againſt a conſtable, till demand of copy of the warrant, and the ſame hath been refuſed or

neglected for the ſpace of *ſix* days after ſuch demand, 24 *Geo.* 2. *c.* 44. *ſ.* 6.

Anon. 1 Sa. 446. Money v. Leach, 3 Burr. 1742. Sty. 393.

Where the officer is not acting in the execution of his office; or not purſuing the directions of his warrant; theſe acts afford him no protection.]

Coparceners.

In *Coparcenary* theſe Things are to be conſidered:

(A) The Nature and Reaſon of ſuch Inheritance.

(B) The Nature of ſuch Eſtate, in reſpect of Actions by or againſt Parceners.

(C) Of a Partition, when the Things are dividable or entire, and the Manner thereof.

(D) Of Partition by the Writ *de Partitione faciendâ.*

(E) Of *Hotchpot*, and the Nature and Incidents of this Kind of Partition.

(F) Of the Nature and Incidents of the Eſtate after Partition made.

(A) The Nature and Reaſon of ſuch Inheritance.

Bracton, lib. 2. c. 30. Lit. § 241. [Parceners are ſo called, becauſe partition lies between them.

IF one ſeiſed of an eſtate of inheritance die, leaving only daughters, ſiſters, aunts, or other females of kin in equal degree, and the eſtate deſcend to any of theſe, they are ſaid to hold in *coparcenary*, and to make but one heir to their anceſtor.

Lit. § 241. And none are called parceners by the common law, but females, or their heirs of females. *Id.* § 254. By cuſtom indeed, brothers may be parceners, as by the cuſtom of gavelkind in *Kent*. *Id.* § 265. But in either caſe, this manner of holding ariſeth only by operation of law, namely, by deſcent: for, if ſiſters purchaſe lands, they are joint-tenants, and not parceners. *Id.* § 254.

Co. Lit. 164. b. This came

In this inheritance ſometimes the deſcent is *in capita*; as where a man hath iſſue two daughters, and dies, the deſcent is *in capita*

pita; therefore each ſhall inherit alike: and ſometimes the deſcent is *in ſtirpes*; as if a man hath iſſue two daughters, and dies, and the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter; all theſe four ſhall inherit, but the daughter of the youngeſt ſhall have as much as the three daughters of the eldeſt.

over to us from the civil law, and they took the deſcent *in ſtirpes* for this reaſon, that the child was entitled to his portion by the law of nature during the father's life, though he was not to poſſeſs it, or be a complete heir according to the civil law of the country, till after his death; and that founded the fiction, that the children ſhould ſtand in the place that he poſſeſſed.

If a man hath iſſue two daughters, and the eldeſt hath iſſue ſeveral ſons and daughters, and the youngeſt hath iſſue ſeveral daughters, the eldeſt ſon of the eldeſt daughter ſhall only inherit *his* anceſtor; but all the daughters of the youngeſt ſhall hold their mother's moiety in coparcenary with him. Co. Lit. 164. b.

If a man ſeiſed of lands in fee hath iſſue two daughters, and one of them is attainted of felony, and the father dies, both daughters being alive, one moiety ſhall deſcend to the innocent daughter, and the other moiety ſhall eſcheat: but if a man make a leaſe for life, remainder to the *right heirs* of *A.*, being dead, who hath iſſue two daughters, whereof one is attainted of felony, it ſeems the remainder is not good for a moiety, but void for the whole. Co. Lit. 163. For in the firſt caſe the lord by eſcheat muſt make a title to deveſt the eſtate, which was once lawfully veſted in the anceſtor, which he cannot do, becauſe there is no defect in this caſe, ſince the anceſtor may be legally repreſented, and the innocent daughter may legally repreſent; and therefore there can be no title in the lord to evict that moiety, though he has title to the moiety of the offending daughter, who after her crime can repreſent no man: but in the ſecond caſe, the ſiſters are to make title to the remainder, which they cannot do, becauſe, to make title to the remainder, they muſt bring themſelves within the words of the donation, and the innocent daughter cannot take upon her the character of an heir alone, ſince they both make but one heir to the anceſtor, and both cannot join, becauſe one is attainted and incapable of that character.

(B) The Nature of ſuch Eſtate, in reſpect of Actions by or againſt Parceners.

PARCENERS, in reſpect of their anceſtor, make but one heir; and therefore, to recover the poſſeſſion of their common anceſtor, they muſt join in the *præcipe*: ſo when they come into poſſeſſion before partition, they are ſeiſed of an undivided poſſeſſion, though having a right to a writ *de partitione faciendâ*, they have a right to ſever and divide the poſſeſſion that before was joint in them. Co. Lit. 164.

In replevin, the plaintiff declared for taking bricks, *&c.*, and the defendant made conuzance as bailiff to one *John Bennet* and *Grace* his wife, ſetting forth, that one *Simon Bennet* was ſeiſed in fee of the lands, *&c.*, and made a leaſe thereof for forty years, rendering rent, and died, and the lands deſcended to his daughters and co-heireſſes, one whereof married the ſaid *John Bennet*, and the other was the Counteſs of *Saliſbury*, and ſo made conuzance for a moiety of the rent; and upon demurrer judgment was given for the plaintiff; becauſe one coparcener cannot make 5 Mod. 141. Ld. Raym. 64. pl. 1. Skin. 596. Mich. 7 W. 3. between Stedman and Page. Carth. 364. S. C. adjudged; where it is

said *per Cur.* that when one ſiſter diſtrains, ſhe ought to avow in her own right, and alſo as bailiff to her other ſiſter, for the entire rent. Salk. 390. S. P. adjudged between Stedman and Bates, where it is ſtated, that the defendant made conuſance as bailiff to the Counteſs of *Saliſbury*.

avowry for a moiety of the rent before partition, though they have ſeveral inheritances.

Co. Lit. 164. a. 2 Keb. 700. Bro. tit. *Several Prec.* (1.)

If co-heirs are diſſeiſed before partition, their poſſeſſory action muſt be joint, for their remedy muſt follow the nature of their poſſeſſion, and that being joint, the action muſt be joint too; but if they had made partition before the diſſeiſin, then their poſſeſſions would have been ſeveral, and then they could not have recovered by a joint *præcipe*, or on a joint demiſe in an ejectment.

Co. Lit. 164. a. Bro. tit. *Several Prec.* (1.) *Joinder in Action*, 43. But where a joint right deſcends from one common anceſtor;

But there is a difference between an action poſſeſſory and an action droiturel; for though the poſſeſſory action be joint, becauſe it follows the nature of the poſſeſſion, which was joint, yet the droiturel action muſt be ſeveral, where the right deſcending was ſeveral; as if two coparceners be diſſeiſed, and each die, having iſſue, each of their iſſue muſt have ſeveral *præcipes*, becauſe in their droiturel action each of them counts on the ſeveral right deſcending from their ſeveral anceſtor, and not from the joint poſſeſſion their anceſtor enjoyed.

as where a man is diſſeiſed and leaves two daughters, there they muſt both join in an action, and ſo muſt their iſſue, if they die before recovery of their right, becauſe their remedy muſt follow their right. Co. Lit. 164. a.

Bro. tit. *Copar.* (2).

Two parceners in tail alien and die, leaving iſſue; the iſſue of each ſhall have a ſeveral remedy, and when one of them recovers, the other cannot enter with him, becauſe the alienation of their ſeveral anceſtors amounted to a partition; for by ſuch alienation each conveyed diſtinctly and ſeparately that moiety which belonged to her, and ſo broke and divided the eſtate.

Co. Lit. 164.

Though parceners before partition have one entire freehold in reſpect of any ſtranger's *præcipe*, yet to many purpoſes among themſelves they have in judgment of law ſeveral freeholds; for each parcener, where there are two of them, has really but a title to a moiety of the land, and is not, as in caſe of jointenancy, ſeiſed *per my & per tout*: the ſame law holds where there are more parceners, for in ſuch caſe each has but a title, in judgment of law, to her proportion; therefore parceners may enfeoff each other of their ſhare, as well as convey it to ſtrangers.

Co. Lit. 164.

The parol ſhall demur during the minority of one of the daughters, becauſe both of them muſt be in court, to demand as one heir to their anceſtor, and the infant cannot appoint an attorney to continue the ſuit in court for her.

2 Roll. Abr. 254.

If one coparcener enter upon the diſcontinuee of her father, and is afterwards diſſeiſed by him, and thereupon brings an aſſiſe, and recovers by falſe verdict, the other coparcener may enter and hold in coparcenary with her; for though the action was not well laid, yet ſhe recovered as heir to the common anceſtor, and conſequently under that title, which is common to both the parceners, ſince they both make but one heir to the common anceſtor.

So

So, if two parceners bring a *formedon*, and one of them is ſummoned and ſevered, and the other recovers a moiety, and enters by execution, the ſevered parcener ſhall enter with the other, and enjoy the land in parcenary, for the ſeverance is only an order of the court for diſuniting joint intereſts, when one of the parties is negligent in proſecuting or defending, and not a diſheriſon; therefore the ſevered parcener may well enter into the land which the other recovers as heir to the common anceſtor, ſince both make but one heir to him: otherwiſe, if the perſon ſummoned and ſevered releaſes or aliens her part, for then ſhe has departed with all her title to the inheritance, and conſequently can never pretend to any ſhare in an intereſt which ſhe has thus conveyed away to another. Bro. tit. Copar. (2.)

Parceners ſhall join in *aſſiſe of mortdanceſter*, though in different degrees. *St. Gloc.* 6 *Ed.* 1. *c.* 6.

(C) Of Partition, when the Things are dividable or entire, and the Manner thereof.

A Villein is an inheritance individable in its own nature; yet if he deſcend to coparceners, the profit of him may be divided; as one of them may have the ſervice of him one day, one week, or the like, and the other another day, week, &c. Co. Lit. 164. b.

So an advowſon is in itſelf entire; yet in effect the ſame may be divided between parceners, for they may agree to preſent by turns; however, this was holden only a partition of the preſentation (*a*), for the advowſon continued in the right of coparcenary, and they muſt all have joined after ſuch partition in a writ of right of advowſon; but ſince the ſtatute 7 *Ann. c.* 18.* their joining does not ſeem neceſſary. *Vide Com. Incom.* 72. Co. Lit. 164. b. 2 Roll. Abr. 255. If a partition be made of a manor to which an advowſon belongs, without mention made of the advowſon, it ſhall remain in common among them. F. N. B. 62.

[(*a*) But ſee Biſhop of *Saliſbury* v. Phillips, Carth. 505. and 1 Salk. 43.]

* By this ſtatute, where partition is made to preſent by turns, each ſhall be ſeiſed of a ſeparate eſtate.

A rent-charge is partible among co-heirs, and by the act of law the tenant is ſubject to their ſeveral diſtreſſes, which is no injury to him if he punctually diſcharge his duty, ſince he is not thereby burthened with an increaſe of rent. Co. Lit. 164.

Reaſonable eſtovers, as houſe-bote, hay-bote, &c., appendant to a freehold; corody incertain, granted to a man and his heirs; a piſcary incertain; or common *ſans* number; cannot be divided between co-heirs, becauſe a partition of them would enlarge the original grant beyond the intention of the grantor, and likewiſe prove a greater charge than was originally intended to the tenant of the ſoil; but the manner of enjoying them among co-heirs, is commonly ſettled in the following method. If any other inheritance deſcends to them beſides, then the eldeſt only ſhall take them, and the reſt ſhall have a contribution or allowance in value out of the other inheritance which deſcended to them; but if Co. Lit. 165. a.

no other inheritance deſcended to them, then one ſhall take the eſtovers, piſcary, &c. for a fixt time, as a month, a year, &c., and the other for the like time after, which will effectually ſecure the owner of the ſoil from any prejudice; or in caſe of the piſcary one may have the firſt fiſh, the other the ſecond, &c.; or one of them may have the firſt draught, and the other the ſecond, &c.

2 Roll. Abr. 255. Co. Lit. 165. a.

So in caſe of a park or mill which cannot be divided, the one to have the firſt beaſt, the other the ſecond, &c.; and in caſe of the mill, the one to have it for a time certain, and then the other for the like time; or the one to have the firſt toll-diſh, and the other the ſecond, &c.

But this muſt be underſtood of a partition before the ſtatute of *quia emptores*

If there are three coparceners of a manor who make partition, each ſhall have a manor and court-baron within her purparty.

; for though that ſtatute allows of the creation of a rent to make partitions equal, yet it will never allow the erection of new manors by partition made of an old manor, ſince ſuch partitions, as appears, may be equal without ſuch new creations. Dav. 61. 2 Roll. Abr. 257. 6 Co. 69.

Co. Lit. 165. a. 2 Roll. Abr. 254. *cont.*

If an earl hath his dignity to him and his heirs, and dies, leaving only a daughter, the dignity ſhall deſcend to the daughter; for it is agreeable to the original intention of the grant, that it ſhould devolve on ſuch ſingle perſon; but if there had been ſeveral daughters, though the poſſeſſion of the earldom, like other lands, be divided among them, yet the dignity itſelf ſhall return to the crown, who may confer it on which daughter it pleaſes; but no partition can be made of it between the daughters, becauſe it is not partible in its own nature; for that would be to make ſeveral honours out of one, contrary to the grant; and the eldeſt alone cannot have it, becauſe all make but one heir; therefore, to prevent diſputes, it returns to the crown from whence it proceeded.

Co. Lit. 165. [But this doctrine is over-ruled by a late authority. For, upon the death of the Duke of *Ancaſter* and *Koſteven*, July 8, 1779,

But there is a difference between a dignity or name of nobility, and an office of honour; for if a man holds a manor of the king to be high conſtable of *England*, and dies, having iſſue two daughters, this office ſhall not return to the crown; for if it ſhould return to the crown the manor muſt go with it, which would deſtroy the grant itſelf; therefore if the eldeſt daughter marries, her huſband ſhall exerciſe the office alone, and before her marriage it ſhall be exerciſed by ſome ſufficient deputy.

ſeiſed in fee of the office of *great chamberlain* of *England*, leaving two ſiſters his co-heireſſes, the judges gave it as their opinion in the Houſe of Lords, *that the office belongs to both ſiſters; that the huſband of the eldeſt is not of right entitled to execute it; and that both ſiſters may execute it by deputy to be appointed by them; ſuch deputy not being of a degree inferior to that of a knight, and to be approved of by the king.* See Journ. Dom. Proc. 25th May 1781, the printed caſes of the ſeveral claimants, and the Parl. Regiſt. for 1780-1, v. 4. 258 to 297.]

Co. Lit. 165. a. 2 Roll. Abr. 254. A corony certain

If a caſtle, uſed for defence of the realm, deſcend to two or more co-heirs, this ſhall not be divided, becauſe that would expoſe it to the circumvention of enemies, when the garriſon was under diſtinct intereſts and powers; but a caſtle deſigned only for

for private uſe may be divided, becauſe none of theſe inconveniencies will follow, may be divided. Co. Lit. 164. b.

A reverſion may be divided, *viz.* that one ſhall have the reverſion of ſo many acres, and the other the reverſion of other acres. F. N. B. 62.

A. ſeiſed of the manor of *D.* in fee, by indenture enrolled bargains, *&c.* the ſame to *B.* in fee, provided always, and the ſaid *B.* does covenant, *&c.* to and with the ſaid *A.*, his heirs and aſſigns, that he the ſaid *A.*, his heirs and aſſigns, may dig for ore in the lands, (which were great waſtes,) parcel of the ſaid manor, and dig turf alſo for the making of alum; and three points were reſolved, 1ſt, That this did amount to a grant of an intereſt and inheritance to *A.* to dig, *&c.* 2dly, That notwithſtanding this grant, which is like common *ſans* number, *B.* and his heirs may dig alſo, for the grant is not framed ſo as to exclude him. 3dly, That *A.* may aſſign his whole intereſt to one, two, or more; but then they can make no diviſion of the intereſt ſo aſſigned, for that would be a ſurcharge to the tertenant, but they muſt work together with one ſtock; and for this reaſon *A.* cannot aſſign part of his intereſt in the waſte, and retain another part to himſelf; the plain conſequence of thoſe reſolutions is, that if this inheritance deſcend to coparceners, it is not partible among them. Co. Lit. 164. b. 165. a. Lord Montjoy's caſe. [This caſe is reported in Godb. 17. 1 And. 307. and Mo. 174. Anderſon gives the opinion of the judges, as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indiviſibility*; nor is it one of the queſtions ſtated by Anderſon to have been referred to the judges.—In Mo. 707. the ſame caſe is cited *arguendo*; and there four judges are repreſented to have been equally divided in opinion as to the firſt point mentioned by Lord Coke. But, according to Anderſon, the difference of opinion was only, whether any remedy was furniſhed by law for the intereſt reſerved to Lord Montjoy by the proviſo. As to this latter point, ſee 8 Co. 46. Noy, 145. Co. Lit. 13th edit. 165. a. note 1.]

Coparceners may voluntarily agree according to their numbers to make partition; as if there be two of them, to divide the tenements between them in two parts, in ſeveralty and of equal value, and they may chooſe certain friends to make partition in the form aforeſaid; in which caſe the eldeſt ſhall chooſe firſt, and ſo on according to the priority of age, unleſs it be otherwiſe agreed among them; for they may agree that one ſhall have ſuch tenements, and another ſuch, *&c.*, without any *primer* election; ſo if by common agreement the eldeſt ſiſter makes partition in the form mentioned, to prevent partiality, ſhe ſhall chooſe laſt. Lit. § 243, 244, 245. Hob. 107.

This part, which the eldeſt takes by virtue of her priority of age, is called the *enitia* (*a*) *pars*, and is purely perſonal, ſo that it differs from any privilege which the law gives the eldeſt without her act, for ſuch a privilege ſhall deſcend; as if there be two parceners of an advowſon, and they cannot agree to preſent, the law gives the firſt preſentment to the eldeſt, and this privilege ſhall deſcend to her iſſue; nay, her aſſignee (*b*) ſhall have it, and ſo ſhall her huſband, who is tenant by the curteſy; and the reaſon of this difference is, becauſe the *enitia* is only the honorary reſpect paid to age among equals; but where it is not a reſpect merely to age, nor purely honorary, but a real benefit, there it ſhall deſcend not only to the iſſue, but ſhall go to the aſ- Lit. § 245. Co. Lit. 166. Kelw. 1. a. 49. a. 2 And. 21. [(*a*) *Enitia pars* is called, in old books, *æiſnetia*, which is derived of the *French eiſne*, for eldeſt, as much as to ſay the part

of the eldeſt. Co. Lit. *ib.* (*b*) *Qu.* of this; and ſee the caſes *ſupra*, Cro. Eliz. 18. and note 2 Co. Lit. *ubi ſupr.* 13th edit.

ſignee and tenant by the curteſy; for ſince they come in the place of the perſon in whom it firſt veſted, they are entitled to all the benefits the law gave him; but the mere reſpect to age was only perſonal.

Lit. § 246. There is another manner of voluntary partition or allotment, and that is, when after partition each diviſion is written in a little ſcroll, and that is covered all over with wax, like a little ball, ſo as the ſcroll cannot be ſeen, and then all the balls are put into a hat, to be kept in the hands of an indifferent perſon, after which the eldeſt daughter draws firſt, and then the reſt according to their ſeniority.

F.N.B. 62. L. Coparceners may agree to make partition for life, or for a fixt term of years; for private perſons, for their own convenience, may make contracts to bind themſelves, as long as thoſe contracts are conſiſtent with law.

Lit. § 251, 252. *Note*: To theſe grants no deed is neceſſary, tho' a rent be granted by equality of partition. Co. Lit. 169. a. But in exchange a deed is neceſſary; ſo when jointenants make partition. Co. Lit. 169. 2 Roll. Abr. 255. [A parol agreement for a partition in part executed, will, it ſeems, be eſtabliſhed in equity. 1 Atk. 542. 1 Vern. 472.]

If two houſes deſcend to two parceners, one worth 20*s.* *per annum*, and the other but 10*s.*, each parcener ſhall have a houſe; but ſhe that has the houſe worth 20*s.* *per annum* ſhall pay to the other and her heirs 5*s.* *per annum* thereout, that the partition may be equal, and diſtreſs may be of common right, for this 5*s.* *per annum*, into whoſe hands ſoever the houſe comes.

2 Roll. Abr. 257. Rent granted for equality of partition ſhall go in coparcenary; and if ſuch rent be granted to two ſiſters, it ſhall not ſurvive. Bro. tit. *Copar.* (6.) Co. Lit. 169. b. If two coparceners, ſays my Lord Coke, alien by deed indented both their parts to another in fee, rendering a rent to them two and their heirs, they are not jointenants of this rent, but ſhall have it in the courſe of coparcenary. Co. Lit. 169. b. But *qu.*; for the 38 E. 3. 26. b. which he cites to warrant this opinion, ſeems to maintain the contrary; for this rent being newly created by the deed, and a new purchaſe, muſt be governed by the words thereof; and of this opinion he himſelf ſeems to be. Co. Lit. 12. b.

If one upon partition grants a rent to another generally, for equality of partition, without taking notice out of what land it is to ariſe, yet it ſhall ariſe out of the part of the grantor, for being granted for equality, *&c.* ſufficiently explains that.

Lit. § 255. If two parceners of land in fee, at full age, make an unequal partition, yet it ſhall bind them; for as the lands being in fee may be aliened, ſo they may be diſpoſed of by partition: beſides, the parties being of full age are preſumed to know what they do, and therefore their acts are binding upon them.

Lit. § 258. Co. Lit. 171. But if one of them had been within age, it would not have bound; for though partition, if equal, will bind an infant, becauſe compellable to make partition, and whatever one is compellable to do, may be done by the ſame perſon voluntarily; yet when the partition is unequal, and the leſs part allotted to the minor, this ſhall not bind her; for then the ſecurity which the law has provided for infants, to prevent them from being overreached, would be uſeleſs.

But

But yet ſuch unequal partition is not abſolutely void, but the infant has election either to affirm it at full age, by taking the profits of the unequal part allotted to her, or to avoid it, either during her minority, or at full age, by entering into the other part with her ſiſter. Co. Lit. 171. But Q. if ſhe takes the profits after full age, of an exact moiety of the whole, what effect this will be of?

A *prochein amy* may make partition on behalf of an infant, and it will bind the infant if equal; for the *prochein amy* is appointed by the law to take care of the inheritance of the infant, and this ſeparation and diviſion of his part from what belongs to another, is ſo far from being a prejudice to the infant, that it is really for his benefit and advantage. 2 Roll. Abr. 256.

If a partition between parceners of tailed lands be equal when it is made, no alienation by one of them after ſhall avoid it, or let in her iſſue upon the other, becauſe they were at firſt compellable to make partition, and the partition they did make was binding, becauſe it was juſt and equal. Co. Lit. 173. b. *acc.* 2 Vern. 232, 3. But if ſuch partition be unequal, tho' they are bound by it during their own lives, yet the iſſue of the coparcener, who had the leſs part allotted to her, is not bound, but may enter and occupy in common with her aunt.

If lands in fee and in tail, of equal value, deſcend to *A.* and *B.* as coparceners, who make partition, and *A.* has all the fee-ſimple lands, and *B.* the tail, the iſſue of *B.* cannot avoid the partition as to the fee-ſimple lands; but the iſſue of *A.* may avoid the partition as to the lands in tail, if *A.* aliens any part of the fee-ſimple lands; for the iſſue of both having *per formam doni* an equal right to the tailed lands, the act of their anceſtor, unleſs an equivalent be left to deſcend, ſhall not bar them of ſuch right: but as to the fee-ſimple lands, the allotment thereof by *B.* to *A.* was equivalent to an alienation of *B.*'s part therein, which would have bound her iſſue: but if *A.* had left the whole fee-ſimple lands to deſcend to her iſſue, then ſuch iſſue could not avoid the partition, becauſe a full recompence deſcended to him; and alſo, becauſe it would be unjuſt that he ſhould defeat the partition for the tailed lands, when the iſſue of *B.* is bound, and cannot avoid the partition for the fee-ſimple lands. Lit. § 260. Co. Lit. 172. b. 173. a. F. N. B. 62. M. In this caſe, if *A.* ſhould make a gift in tail of her part, the reverſion is no recompence to her iſſue, becauſe that may be docked by a common recovery; but if *A.* had made only a leaſe for life, it would be otherwiſe, becauſe the tenant for life could not hurt the reverſion. Co. Lit. 173. a. And in this caſe, if a writ of partition had been brought, neither of the coparceners would have been obliged to take all the tailed lands, but they and the fee ſimple lands would have been divided in moieties equally between them, to avoid the inconveniencies that might happen upon allotting the whole tailed lands to one. Co. Lit. 173. b.

If parceners of *non ſane* memory make partition, unleſs it be equal, it ſhall only bind the parties themſelves, but not their iſſue. Co. Lit. 166. a. And the reaſon that it binds the parties themſelves, is the ſame that all other contracts bind them. [But ſee F. N. B. 202. D. 2 Bl. Comm. 291, 2.]

If two parceners ſeiſed in fee take huſbands, and the huſbands make partition equal in value, this ſhall bind the wives and their heirs, becauſe being compellable by law to make partition, they may by agreement make it without proceſs of law: but if the partition Lit. § 257. Co. Lit. 171. a. 11 Aſſ. p. 23. 8 Co. 101.

b. [In 1 Atk. 541. there is a case, in

partition had been unequal, the wife who suffered by the inequality might have avoided it after her husband's death, and so might her heirs.

which Lord Hardwicke is represented to say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, Mr. Hargrave takes this doctrine of Littleton and Coke, that such partition will bind the wives, *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See *acc.* F. N. B. 62. F. Co. Lit. 171. a. note 2.]

Co. Lit. 46. a. Dyer, 52. a.

If there are two coparceners, and one of them lets her part to another for years, and after, on a writ of partition brought against the lessor, too little is allotted to the lessor; some hold, that the lessee cannot avoid it, because he will not be allowed to object partiality to men on their oaths, and to the proceedings of a court of justice thereon: but if two parceners are of three acres of land, each of equal value, and one coparcener lets her part, and after they agree to make partition, and one acre is only allotted to the lessor, the lessee is not bound by it, but may enter and take the profits of another half acre, which justly belongs to him, for the gross and apparent partiality of the partition.

2 Roll. Abr. 256.

A partition that shall bind on account of its equality, must not only be founded on an equality in the value of the land, but likewise on an equality of advantage and profit redounding from each share to the several owners; as if one share be incumbered with an assise, from which the other is free, though each share be equal in its intrinsic value, yet the partition is not equal; for the expence of managing the assise, from which the other is free, which is a real action, and therefore dilatory and expensive, may eat up the whole profits of that part which it incumbers, and so make the partition unequal.

Co. Lit. 170. b.

When a partition is unequal, the whole must be avoided, because what is the surplusage of the unequal part, cannot be distinguished but by a new division; also the inequality makes the partition, which consisted in the equality of it, voidable in the whole.

Co. Lit. 167.

Besides the several sorts of partition already mentioned, there are likewise these following: 1st, Where lands descend in coparcenary, and they agree that one of them shall have and occupy the land from *Easter* till the first of *August* in severalty, and that the other shall have and occupy the land from the first of *August* till *Easter* yearly, to them and their heirs.

Co. Lit. 167. b. F. N. B. 62. K.

Also, if two coparceners have two manors by descent, and they make partition, that one shall have the one manor for one year, and the other the other manor for the same year, and so *alternis vicibus* to them and their heirs; this is a good partition, and each of them has an inheritance, though they have the occupation but for a fixt term.

2 Fulb. Paral. fol. 57. b. cites

[So, if one release to the other with warranty, this hath been holden to be a good partition.

44 E. 3. F. Abr. tit. *Counterplea de vouch.* 22. 34 E. 1. *Partition*, 17.

Morrice's case, 6 Co. 12. b.

So, there may be a partition by judgment, exclusive of that on the writ *de partitione faciendâ*.]

(D) Of Partition by the Writ *de Partitione faciendâ.*

THE writ *de partitione faciendâ* lies for one coparcener againſt another, when ſhe will not agree to make partition voluntarily, or by one parcener againſt three or four, or generally againſt all thoſe that will not conſent to make partition, by them that do conſent. Lit. § 247. Co. Lit. 167. a. Booth, 244. F.N.B. 62.

The manner of making partition by this writ is thus: 1ſt, The writ of partition is directed to the ſheriff, to ſummon the refractory coparcener, to ſhew cauſe why ſhe will not make partition, according to the laws and cuſtom of the kingdom, of thoſe lands which ſhe and the other coparcener or coparceners hold *ſimul & pro indiviſo* of the inheritance of their (*a*) common anceſtor. F.N.B. 62. Booth, 244. (*a*) But it ſeems not to be abſolutely neceſſary to mention in the writ, that the inheritance is of the common anceſtor. 3 Leon. 231. F. N. B. 62. A. B. But ſee Cro. El. 64.

In this action there are two judgments; the firſt is *quod partitio fiat inter partes prædict. de tenement. prædict. cum pertinentiis*, and upon this there goes out a judicial writ to the ſheriff, to make partition, which recites firſt the writ of partition and judgment, and then commands the ſheriff, together with twelve men of the vicinage, *&c.*, to go in perſon to the tenements to be divided, and there, in the preſence of the parties, (if they appear on ſummons to be made,) by the oath of theſe twelve men, to make an equal and fair partition, and allot to each party their full and juſt ſhare, and then return the inquiſition of the partition annexed to the writ, under the ſeals of the ſheriff, and the jurors, whoſe names are likewiſe to be returned. Booth, 245. Lit. § 248. Co. Lit. 167. b. 168. a.

When the inquiſition is thus returned, upon motion made to the court the ſecond judgment is given in this manner, *ideo conſiderat. eſt per Cur., quod partitio firma & ſtabilis in perpetuum teneatur.* Co. Lit. 169. a. This partition by judgment binds infants and feme coverts. Co. Lit. 171. b. In this manner of partition there is no preference of one ſiſter to another; ſo that it is left to the diſcretion of the ſheriff who ſhall have firſt. Co. Lit. § 249.

If errors happen in executing a writ of partition, and one of the defendants releaſes all errors to the plaintiff, this ſhall not bar the other. Cro. Eliz. 65.

According to the direction in the judicial writ, the ſheriff muſt be upon the lands in perſon; and if he were not, the court upon information thereof, before filing the return, will order the filing to ſtay; and if upon examination it be ſo found, will award a new writ; for in all caſes where the writ commands the ſheriff to go in perſon, as in waſte, *&c.*, there the writ is his commiſſion, from which he cannot deviate; but if the ſheriff return, that he was there in perſon, and this return be received and filed, then any information to the contrary comes too late, becauſe by the filing it is become matter of record, againſt which no averment *in pais* lies; neither can the party have error upon the return. Cro. Eliz. 9, 10. Clay's caſe

There

Fitz. B. 62. Booth, 245. [See this ſtatute, and the ſubſequent ſtatutes upon this ſubject, tit. "*Joint-tenants and Tenants in Common*," I. 7.]

There are ſome alterations made in this writ by the 32 *H.* 8. *cap.* 32., which gives it to more perſons than could bring it at common law.

Co. Lit. 175. a. 167. Dyer, 98. Lit. § 264.

At common law this writ lay for one coparcener, tenant of the freehold, againſt the other, and againſt the alienee of ſuch coparcener.

but it lay not for the alienee, nor for the tenant by the curteſy; nor if one coparcener had made a leaſe for life, could ſhe after bring ſuch writ during the continuance of ſuch eſtate. Co. Lit. 167. a.

Co. Lit. 175. a. Dyer, 243. pl. 55.

If three coparceners are, and the eldeſt purchaſes the part of the youngeſt, yet ſhe ſhall have a writ of partition at common law againſt the middle ſiſter; for though ſhe has one part by purchaſe, yet this does not ſtrip her of the character of a coparcener.

Co. Lit. 175. Dyer, 243. F. N. B. 61. S.

So in a ſtronger caſe, if three coparceners are, and the eldeſt marries, and her huſband purchaſes the part of the youngeſt, though he is a ſtranger and no parcener, yet he and his wife ſhall have at the common law a writ of partition againſt the middle ſiſter.

Co. Lit. 175.

Tenant by the curteſy ſhall have a writ of partition upon the ſtatute 32 *H.* 8. *cap.* 32.

Co. Lit. 175. a.

And as by the ſtatute one jointenant, or tenant in common, may have a writ of partition againſt another, ſo at this day the alienee of one parcener may have a writ of partition againſt the other parcener, becauſe they are tenants in common.

And. 30. pl. 72. Co. Lit. 175. b. Kelw. 208. Dyer, 128. Ballard v. Ballard. Bendl. 42. pl. 76.

But if three coparceners are, and a ſtranger purchaſe the part of one of them, he cannot join with either of the two coparceners in a writ of partition, either at common law, or by force of the ſtatute; for the words of the preamble of the ſtatute are, *and none of them by law doth or may know their ſeveral parts*, &c., *and cannot by the laws of this realm make partition without their mutual conſents;* now in this caſe one of them, *viz.* the parcener, may have a writ of partition at common law, and therefore cannot come within the preamble and intent of the act, and ſo cannot join with the purchaſer in a writ of partition brought upon it.

Dalſon, 59.

It ſeems, if, after the awarding of the judicial writ, and before the return of it, the defendant dies, yet the partition is good, and the writ ſhall not abate, becauſe before the death of the defendant judgment was given, that partition ſhould be made; and though upon the return of the judicial writ there is another judgment given, yet that is given in confirmation of the firſt judgment: it ſeems like a caſe upon the return of the judicial writ, no exception can be taken to it; therefore it is not material whether the defendant be dead or alive, ſince he can have no advantage by any plea on the return of the writ.

Dalſon, 28.

A writ of partition is brought againſt two, and one of them appears and grants the partition, and the other makes default; *Dyer* is of opinion, that the judicial writ ſhall be awarded to the

the ſheriff with a *ceſſet executio*, till the parcener who made default comes in, for all muſt be included in a partition by writ, becauſe it is final; otherwiſe, in a partition by agreement.

Three coparceners, and one of them aliens in fee her part, and then one of the other two brings a writ of partition againſt the alienee and the other parcener *upon the ſtatute*; and becauſe this writ lay at common law in this caſe, and the ſtatute doth not give it, but where the common law would not allow it, it was reſolved that the writ ſhould abate. Dyer, 243. pl. 55.

A writ of partition brought by a coparcener and her huſband, in which the coparcener, who was formerly married to a peer, of the name of *Powis*, is ſtiled *D'na Anna Powis uxor* of her preſent huſband; this was reckoned a *miſnomer*, though ſhe was a woman of quality by birth; upon which a new writ was brought *ad reſpondend. H. & Annæ uxori ſuæ nuper uxori domini Powis defunct.*; and in the count it was ſet forth, that the plaintiff coparcener was co-heir in tail with the defendants of the inheritance of their common anceſtor, without ſhewing the commencement of the tail, and allowed to be well enough in this action, in which the poſſeſſion of the defendants is affirmed, and no land demanded from them, but only a fair and equal diviſion, that each may know their ſeveral ſhares. Dyer, 79. pl. 51. Howard and Duke of Suffolk. Mo. 21.

[If the count ſtate that the plaintiff and defendant were ſeiſed in fee, and it be found that the defendant hath only an eſtate-tail, the writ abates.] Cro. Eliz. 759.

(E) Of *Hotchpot*, and the Nature and Incidents of this Kind of Partition.

A Man ſeiſed of lands in fee-ſimple, as for inſtance, of thirty acres of land, each of the annual value of 12*s*., hath iſſue two daughters, one of whom being married, the father gives ten acres of the thirty to the huſband, with his wife in frankmarriage, and then dies, leaving the reſidue; in this caſe the unmarried ſiſter ſhall enter into and enjoy the reſidue, unleſs the huſband and wife will put the ten acres given in frankmarriage, with the twenty acres into *hotchpot*, that is to ſay, *together*; and then, finding each acre to be of the ſame yearly value, allot fifteen acres to the unmarried ſiſter, and take five acres to the ten which they have already in frankmarriage, which puts them on an exact level with the ſiſter that is unmarried; for upon the death of the anceſtor the remnant ſhall deſcend to the other coparcener, becauſe the gift in frankmarriage ſhall *prima facie* be intended a ſufficient advancement of the other ſiſter, and as full a ſhare of the inheritance as ſhe could have pretended to in caſe it had entirely deſcended in coparcenary: but if theſe lands given in frankmarriage are of leſs value than thoſe that deſcend to the unmarried ſiſter, then, as hath been ſaid, ſhe ſhall have the benefit of a partition in the manner before expreſſed; for it would Lit. § 266, 268, 269. Co. Lit. 165. a.

be

be an unreaſonable conſtruction, to make what was deſigned for her advancement, turn to her prejudice, eſpecially when we conſider, that this gift in frankmarriage was made by a tenant in fee, who might have diſpoſed of it as he pleaſed.

Lit. § 269. In this manner of partition the lands given in frankmarriage cannot be allotted to the other coparcener, for they muſt deſcend according to the form of the gift; and if they ſhould be transferred to another, contrary to the original intention of the donor, the iſſue of ſuch marriage would avoid the alienation.

Lit. § 273. Co. Lit. 179. a. If the lands given in frankmarriage be of equal value at the time of the gift with the reſidue that continues in the hands of the anceſtor, and remain ſo upon the death of the anceſtor, they ſhall never be put into *hotchpot*: but if in this caſe the lands given in frankmarriage, without default of the donees, decline in value by the act of God; or if the donor purchaſe more land after the gift; or if the remnant be improved in his hands, ſo that the lands, which deſcend to the other ſiſter, are of greater value than thoſe given in frankmarriage; then the partition in *hotchpot* ſhall be made, that each ſiſter may have her juſt and equal proportion.

Lit. § 272. Co. Lit. 178. b. The lands given in frankmarriage, and the lands in fee-ſimple, which deſcend to the other ſiſter, muſt move from the ſame anceſtor, otherwiſe there ſhall be no *hotchpot*.

Lit. § 275. Co. Lit. 179. b. This way of partition by *hotchpot* is appropriated to lands in frankmarriage; for if an anceſtor enfeoff one of his daughters of part of his lands, or purchaſe lands to him and her and their heirs, or make her a gift in tail, ſhe ſhall have her full ſhare of the remnant without putting her ſhare into *hotchpot*.

The reaſon ſeems to be this, that when ſhe is enfeoffed, &c. ſhe is conſidered as a purchaſer, and what ſhe acquires by purchaſe can never be made a pretence to exclude her from what comes to her in a courſe of deſcent.

Lit. § 274. Co. Lit. 179. If lands in fee-tail deſcend from the donor in frankmarriage, the donee ſhall have an equal ſhare of them without putting the lands given in frankmarriage into *hotchpot*; for ſhe claims the lands in tail *per formam doni*, by force of which gift both parceners muſt equally inherit, becauſe both make up but one heir to the anceſtor, and conſequently one without the other cannot claim under the words of the donation.

Co. Lit. 176. a. If lands given in frankmarriage are of greater value than the lands deſcended in fee-ſimple, the other ſiſter has no remedy againſt the donees; for it was lawful for the donor, being tenant in fee-ſimple, to diſpoſe of his own lands at his will and pleaſure.

Lit. § 270. Co. Lit. 178. a. If the donees in frankmarriage, and all the other parceners die before partition made in *hotchpot*, yet the benefit of this kind of partition ſhall deſcend to their iſſues.

Co. Lit. 177. b. [See Co. Lit. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.] This kind of partition hath the ſame incidents with the common partition; ſo that the donee, if empleaded of the lands in frankmarriage, ſhall have aid of the other parcener; for it is unreaſonable, that what was deſigned for the donee's advancement, ſhould put her in a worſe condition than ſhe would have been if the gift had not been made.

(F) Of the Nature and Incidents of the Eſtate after Partition made.

THOUGH the law gives every parcener a power to ſever her own moiety, and to carry it over into the family into which ſhe marries; yet ſince the partition is compulſory, the law will not put parceners in a worſe condition after partition than if they had enjoyed their moieties without diviſion; and therefore on a ſuit commenced for any part, or an eviction of any part after partition, they ſhall have like remedy as if they had enjoyed in common; in which caſe, if a ſuit had been commenced, both parties muſt have been empleaded, and on the recovery there had been an equal loſs to both: therefore after partition there is a warranty annexed to each part, ſo that if either be empleaded ſhe may vouch her ſiſter, and thereby deraign the warranty paramount annexed to the purchaſe of the anceſtor; and if ſhe loſes, ſhe may recover one moiety of her loſs in value againſt the other ſiſter. Co. Lit. 173. b. 4 Co. 121. Buſtard's caſe.

So if parceners enjoy in common, and any part is evicted by entry without action, they ſhall enjoy what is left in common: therefore, that parceners may not be in a worſe condition by the partition which the law compels them to, there is a condition annexed to the partition, that if either the whole of any one ſhare, or an eſtate for life, or in tail, be thereout evicted by entry without action, that the party ſo evicted may enter on her ſiſter's moiety, and avoid the partition by enjoyment of an undivided moiety of what is left.

But if after partition either ſiſter aliens with warranty, and the alienee is empleaded, he ſhall only vouch the alienor to recover in value, who may with the other ſiſter deraign the warranty paramount; for as the parceners ſhall not be in a worſe condition by the partition than if none had been made, ſo they ſhall not be in a better by the warranty or condition which the law annexes upon the partition: now if a parcener before partition aliens her part with warranty, and the alienee is empleaded, he can only vouch his warrantor, who may vouch the other ſiſter to deraign the warranty paramount, but not to recover in value; for there is no reaſon that the ſiſter, who did not enter into the contract of warranty, ſhould be ſubject to it; ſince it is fit that ſhe, whoſe folly it was to inſure the title, ſhould anſwer for the conſequences of it. Hob. 21. 26. 2 Roll. Rep. 418. Co. Lit. 174. a.

If one ſiſter after partition aliens to her heir apparent and dies, and the ſon is empleaded, though he be in by the feoffment of his mother as a purchaſer, yet he ſhall pray in aid of the ſurviving parcener to deraign the warranty paramount: for though he claims the land by purchaſe from his mother, and ſo never having it in parcenary cannot recover *pro rata*; yet upon the contract of warranty, whereby the vendor did warrant to the anceſtor and his heirs, he, together with his aunt, make up one heir Co. Lit. 174. a. 2 Roll. Abr. 418.

heir to ſuch anceſtor; and therefore they muſt join to deraign the warranty; otherwiſe there is not that heir before the court, that by virtue of ſuch contract is to take the benefit of the warranty.

Co. Lit. 174. b. If a man ſeiſed of lands in fee have iſſue two daughters, and make a gift in tail to one of them, and die ſeiſed of the reverſion in fee, which deſcends to both the ſiſters, and the donee or her iſſue be empleaded, ſhe ſhall not pray in aid of the other ſiſter to deraign the warranty paramount, becauſe this eſtate was never in coparcenary, and by conſequence they never poſſeſſed as heir to the common anceſtor, whereby they may pray in aid of each other; and there being no warranty in deed annexed to the tail granted, ſhe has no means to bring in her ſiſter, without whom ſhe cannot take benefit of the original contract of the warrantor, ſince ſuch warranty ran to the heirs of the anceſtor, and the tenant in tail and the other ſiſter make but one heir to the anceſtor.

Mo. 95. If two acres deſcend to two parceners, and one of them before partition grants a rent-charge out of one of the acres, and afterwards upon partition the acre charged is allotted to the other ſiſter, ſhe ſhall hold it diſcharged; for a parcener before partition, having no ſeparate title to a diſtinct moiety, cannot pretend to charge any particular part of the lands, ſo as to make it ſubject to that charge in the hands of another who does not hold under her; therefore this grant by the ſiſter, who at the time of the grant had only a title to an indiſtinct and undivided moiety, ſhall never affect the other parcener who does not claim under her, and who at the time of the grant had as good a title to that acre out of which the rent was to ariſe, as the grantor had.

Copyhold.

(A) The Nature of the Tenure, and what ſhall be deemed Copyhold.

(B) In what reſpect Copyholds partake of the Nature of Freehold Lands.

(C) What Acts of Parliament ſhall be ſaid to extend to Copyholds: And herein,

1. Of

1. Of the Statute *De Donis*, the entailing of Copyholds by Cuſtom, and the Manner of docking ſuch Entails.
2. Of ſuch Statutes as may be ſaid to relate to them.

(D) Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates.

(E) Of particular Cuſtoms that are good, and peculiar only to ſome Copyholds.

(F) Of granting Copyhold Lands: And herein,

1. What Perſons may make good Grants.
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3. What Things may be granted to be holden in Copyhold.
4. Of the Operation of the Grant, and the Eſtate and Intereſt that paſs thereby.

(G) Of Surrenders, Preſentments, and Admittances: And herein,

1. Of the Neceſſity of a Surrender, and where the Copyholder ſhall be ſaid to be in before Admittance.
2. Where the Want of a Surrender will be ſupplied in Equity.
3. What Perſons may ſurrender.
4. What Perſons may accept ſuch Surrenders, and make Admittances.
5. What Words or Acts amount to a Surrender.
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7. Of the Conſtruction to be made when the Surrender, Preſentment, and Admittance, differ.
8. Of the Time of making the Surrender, Preſentment, and Admittance, and where they ſhall be effectual, though any of the Parties die before they are completed.

(H) Of the Operation of the Surrender in paſſing the Eſtate: And herein,

1. Of the Perſons to take, and what ſhall be ſufficient Certainty in the Deſcription of them.
2. What ſhall be ſaid to paſs by the Surrender.
3. What Eſtate or Intereſt paſſeth by the Surrender.
4. Of the Power and Authority of the Lord and Steward: And therein of the Difference of their Acts.

(I) Of Fines payable by Copyholders: And herein,

1. Where a Fine ſhall be ſaid to be due, and by whom, and to whom payable.
2. At what Time and Place payable.
3. Of the Certainty and Reaſonableneſs of the Fine.
[4. Remedy for the Fine.]

(K) Of the Extinguiſhment of the Copyhold: And herein,

1. Where the whole Copyhold ſhall be extinguiſhed or ſuſpended.
2. Where Part only, or what is incident to it, ſhall be extinguiſhed.

(L) Of Forfeiture: And herein,

1. Of Forfeiture for Non-attendance at Court, and not doing Service.
2. Forfeiture for Non-payment of Rent.
3. Forfeiture in the Copyholder's taking upon him to diſpoſe of the Copyhold, and make Leaſes.
4. Of Forfeiture in committing Waſte; and therein of the Lord's or Tenant's Intereſt in the Trees.
5. Forfeiture by Incloſure.
6. Forfeiture for Treaſon and Felony.
7. In what Caſes a Forfeiture of Part ſhall be a Forfeiture of the Whole.
8. Who ſhall be affected by a Forfeiture, or take Advantage thereof.
9. What Perſons ſhall be excuſed from a Forfeiture.
10. Where the Forfeiture ſhall be ſaid to be diſpenſed with.

(M) Copyhold, where and how to be ſued for and recovered.

(A) Of the Nature of the Tenure, and what ſhall be deemed Copyhold.

THE (a) original of this tenure aroſe from grants of lands made by lords to their villeins, to hold of them by baſe tenures: thoſe villeins or tenants were enrolled on the lord's roll, and ſaid to hold by copy thereof; and were capable of taking no greater

(a) As to the name and origin of copyhold, *vide* 9 Co. 76. Co. Lit.

greater eſtate than at the (*a*) will of the lord; for otherwiſe, they had been infranchiſed: yet to prevent the frequent ending of theſe eſtates, they granted them in fee, but ſtill at the will of the lord; who, notwithſtanding ſuch grant, (*b*) might have ouſted them when he pleaſed: but this, being a very great inconvenience, (*c*) was, it ſeems, altered by ſome poſitive law, (though ſuch law does not now appear,) which (*d*) preſerved their eſtates to them and their heirs, doing their ſervices, but yet in other reſpects left them only eſtates at will.

57. b. 2 Roll. Rep. 236. 2 Bl. Comm. 90. Dougl. 724. n. 2 Wooddeſ. Syſt. View, 36. (*a*) Lit. § 172. 4 Co. 21. a. (*b*) Co. Copyholder, 6, 7. (*c*) Preced. Chan. 574. (*d*) They are now eſtabliſhed by cuſtom, and ſuch tenant, ſo long as he doth his ſervices, and doth not break the cuſtom of the manor, is not to be ejected by his lord. 4 Co. 21. b. 22. a. [He is called tenant at will *ſecundum conſuetudinem manerii*; which words, *ſecundum conſuetudinem manerii*, were not to bound the lord's pleaſure in the determination of his will, but meant only, that the tenant, as long as he continued tenant, was to hold the land under thoſe terms and conditions which the cuſtom had eſtbaliſhed. 1 Str. 452.]

Lands, parcel of the manor of *C.* in *Wilts*, and parcel of the dutchy of *Cornwall*, although they paſs by ſurrender and copy of court-roll, yet if by the rolls or copies they appear only to have been granted *tenendum* (*e*) *ſecundum conſuetudinem manerii*, and not (*f*) *ad voluntatem domini manerii*, they are not copyhold, but a cuſtomary freehold.

Carth. 432. Gale and Noble, reſolved on a trial at bar, and a verdict for the plaintiff accordingly, againſt whom there was a verdict at *niſi prius*, for a forfeiture by committing waſte, he and all the other tenants taking them to be copyhold. Comb. 387. S. C. reſolved accordingly. (*e*) That he was ſeiſed *ſecundum conſuetudinem manerii*, does not neceſſarily import a copyhold. 3 Bulſt. 230. Roll. Rep. 411. 5 Co. 84. 2 Vent. 144. [Cro. Car. 229. 1 Lutw. 126. 1 Salk. 365. 2 Lutw. 1171. Bl. Law Tracts, vol. i. p. 154. 8vo. edit.]——The copyholds are parcel of the manor, and not held *ut de manerio*, *vide* Salk. 185. pl. 4. 186. 3 Lev. 405. 1 Ld. Raym. 43. (*f*) The omiſſion of theſe words aided after verdict. Salk. 364. pl. 5. 365. 2 Ld. Raym. 1225. [But if not ſtated, or found, or pleaded to *be demiſable by copy of court-roll time out of mind*, it cannot be adjudged copyhold. Newman v. Newman, 2 Wilſ. 125.]

The biſhop of *N.*, 10 *H.* 8., was ſeiſed of the manor of *N.* in right of his biſhoprick, and, at a court holden within the ſame manor, granted parcel of the demeſnes of the ſaid manor to one *T.* and his heirs, by copy; whereas, in truth, the land was never demiſed by copy before; and ſo the land continued in copy till 23 *H.* 8., when *T.* committed a forfeiture, and the biſhop ſeiſed the land, and granted the ſame again by copy to *T.* in fee, from which time it continued in copy till the 8th of *Eliz.*, which was forty-ſeven years; and it was holden by the whole court, that fifty years continuance is requiſite to faſten a cuſtomary condition upon the land againſt the lord; and that though the original commencement of granting thoſe lands by copy, was 10 *H.* 8., from which time to 8 *Eliz.* was above ſixty years; yet that the ſeiſure for a forfeitute which happened 23 *H.* 8. interrupted utterly the continuance from the time, which might by the law have perfected the cuſtomary intereſt; ſo that the commencement of the copyhold was to be reckoned from 23 *H.* 8., which not being ſufficient time to make good a cuſtom, the lord might enter upon the copyholder as upon his tenant at will.

3 Leon. 107. Style, 141. Taverner and Cromwell. *Vide* 4 Co. 24.

[A copyhold cannot be created by operation of law; for it is not a creature of law, but of fact; it muſt have cuſtom to ſupport

2 Term Rep. 425. *per Cur.*

ſupport it, and cannot be created by any other mode, unleſs an act of parliament, which might operate as an eſtoppel to any man to ſay it had not exiſted time out of mind.]

(B) In what Reſpect Copyholds partake of the Nature of Freehold Lands.

4 Co. 22. a. Co. Copyh. 117.

MY Lord *Coke* ſays, that copyholders have only a fee-ſimple *ſecundum quid;* that though they are tenants at will, yet their eſtates ſhall deſcend to their heirs, and ſuch deſcent ſhall be governed by the rules of the (*a*) common law; but not *ſimpliciter* to have all the collateral qualities of eſtates in fee-ſimple.

[(*a*) A cuſtom, therefore, that where there was no ſon or daughter, the land ſhould deſcend to the eldeſt ſiſter, was holden not to entitle, by implication, the eldeſt niece. For if the cuſtom is not fully explicit, the common law muſt regulate the courſe of deſcent. 1 Term Rep. 466.]

4 Co. 21. a. Moor, 125. pl. 272. adjudged. *Vide* 4 Leon. 38.

Therefore where a copyholder by licence made a leaſe for years, and the leſſee entered, and the leſſor died, leaving iſſue a ſon and a daughter by one venter, and a ſon by another; the eldeſt ſon died; it was adjudged the daughter of the whole blood ſhould inherit; (*b*) for the poſſeſſion of the leſſee for years was the poſſeſſion of the elder brother, who may have poſſeſſion before admittance.

(*b*) The ſame law of a guardian. Co. Copyh. 95. Dyer, 292. Cro. Car. 411. Roll. Abr. 502. That there ſhall be a *poſſeſſio fratris* before admittance. Roll Abr. 502. 3 Leon. 70. Mod. 120. Moor, 272. 597. Vent. 261. Daliſ. 110. S. P. but ſaid, that if the lord, by cuſtom, during the nonage of the heir, demiſes it to a ſtranger for years, this will not make a *poſſeſſio fratris*; and *vide* Co. Copyh. 95., where my Lord Coke ſaith, that if the leaſe for years determine, and the elder brother die before entry, the youngeſt brother ſhall inherit; but *quære?* Gilb. Ten. 150-1.

4 Co. 23. a. 30. b. 6 Mod. 63.

But though it be governed by the rules of common law concerning deſcents, yet it partakes not of the nature of freehold lands in other reſpects; for it is not aſſets in the heir's hands; neither ſhall a woman be endowed of it, nor a man be tenant by the curteſy, unleſs by ſpecial cuſtom; nor ſhall a deſcent take away an entry.

4 Co. 23. a. Co. Copyh. 141. Supplement, 59. Cro. Eliz. 717. *cont.*

A man ſeiſed of copyhold lands in right of his wife, ſurrenders to the uſe of another in fee, this is no diſcontinuance, but the wife may enter after the death of her huſband; for this is not like a feoffment at common law *, which by the notoriety of it took away the entry of the wife, for the benefit of ſtrangers, that they might not be at a loſs againſt whom to bring their *præcipes;* for in caſe of copyhold lands, as there is no ſuch inconvenience, ſo the nature of the conveyance will not admit of ſuch expoſition.

* By 32 H. 8. c. 28. § 6 the huſband is diſabled from diſcontinuing his wife's eſtate.

Moor, 753. 4 Co. 23.

So, if a tenant for life ſurrender to the uſe of another in fee, it is no forfeiture; for it may be ſeen by the court-rolls who is tenant; and ſo the ſtranger is at no loſs to ſue.

Co. Copyh. 97. Cro. Car. 366.

If a copyholder in fee ſurrenders to the uſe of *A.* and *B.*, and the longer liver of them, and that for want of iſſue of *A.* the lands

lands ſhall remain to the youngeſt ſon of *J. S.*; in this caſe *A.* has but an eſtate for life; for an eſtate tail in copyhold lands ſhall not paſs by implication. Brownl. 127.

A man may ſurrender a copyhold eſtate to the uſe of his wife; for ſhe takes the eſtate from the lord, as an inſtrument to convey the eſtate to her; and ſo it comes not within the reaſon of other caſes, that they being but one perſon cannot contract; for he gives the eſtate to the lord, and he admits the feme to it. 4 Co. 29. b.

There can be no occupant of a copyhold eſtate, becauſe of the prejudice it would do the lord; and therefore if a copyholder being tenant *pur auter vie* die, the lord ſhall enter. Salk. 188. pl. 7. 2 Ld. Raym. 994. 6 Mod. 63. *per* Holt, Ch. Juſt.

[A copyholder *ex parte maternâ* deviſed to his heir, who died before admiſſion: it was holden, that the eſtate ſhould deſcend to the heir on the part of the mother.] Smith v. Triggs, 1 Str. 487.

(C) What Acts of Parliament ſhall be ſaid to extend to Copyhold Eſtates: And herein,

1. Of the Statute *De Donis*, the entailing Copyhold Eſtates by Cuſtom, and the Manner of docking ſuch Entails.

THE entailing of copyholds, and whether they are within the ſtatute *de donis*, appears to have been matter of great controverſy; and it ſeems now agreed, that the ſtatute *de donis* creates no entail of copyhold lands, becauſe they are entirely ſubject to the cuſtom of the manor, and governable by it; and becauſe they are not within the word *tenementa*, which comprehends only an eſtate of freehold. Co. Lit. 60. 3 Co. 8. Heydon's caſe. Sid. 314. Roll. Abr. 506. S38. [Cro. Car. 42.]

Alſo it ſeems now agreed, that if the cuſtom of the manor has admitted of limitations of remainders upon ſuch gifts, that then the cuſtom of the manor, (*a*) purſuing the model of the ſtatute, creates a good entail; but ſuch entail doth not ariſe by virtue of the ſtatute; but it ſhall be preſumed there was the ſame law of that manor by cuſtom time immemorial, as began in the kingdom by the ſtatute.

(*a*) My Lord Coke ſays, Co. Lit. 60. that by the cuſtom of the manors, the ſtatute co-operating with it, copyholds may be entailed; but there cannot be an eſtate tail in copyholds by cuſtom only, nor any eſtate tail by the ſtatute only; the meaning of which ſeems to be, that eſtates tail were before the ſtatute, as to the manner of the limitation, by the cuſtom of ſome manors; as, that an eſtate was granted to a man and the heirs of his body begotten, the remainder over to another; but that in other reſpects, thoſe eſtates were not eſtates tail before the ſtatute; as, that the tenant ſhould no ways alien to debar his iſſue, or them in remainder; and that if he diſcontinued, they ſhould have a *formedon* in deſcender or remainder; but theſe things were introduced by the ſtatute upon the eſtate, which was the ſame in limitation by the common law. And this ſeems ſupported by the following authorities: Carter, 22. Cro. Eliz. 307. 717. 907. Moor, 173. 188. Leon. 175. Poph. 128. Sid. 268. Cro. Car. 45. Moor, 637. 3 Co. 8. 9 Co. 105. a. 3 Lev. 327. 4 Mod. 86.*

* By a modern reſolution, a copyhold to huſband for life, wife for life, then to the heirs of the bodies of huſband and wife, remainder in fee to the ſurvivor, is an *eſtate-tail* after poſſibility of iſſue extinct in the wife who ſurvives, and the eſtate veſts in the perſon who is heir of the body of both huſband and wife. Sutton v. Stone, M. 1740. 2 Atkyns, 101. See farther the notes at the end of this diviſion.

Cro.Car.44, 45. Rowden and Maltſter. See Co. Copyholder prefixed to Co. Lit. fo. 59. § 49.

A copyhold was ſurrendered to the uſe of the copyholder's laſt will, who deviſed it to *J. S.* in tail, *&c.*; *J. S.* hath iſſue, and ſurrenders to the uſe of his wife for life; and it was adjudged, that ſince the jury found it was not the cuſtom of the manor to have an eſtate tail in the copyhold, that *J. S.* had a fee conditional; and that by his having of iſſue, he had performed the condition; and the ſurrender to the uſe of his wife was good.

3 Co. 8. b. Co. Lit. 60. b. Roll. Abr. 838.

But though, by cuſtom time out of mind, copyholds may be entailed, yet it is no proof of ſuch cuſtom, that an eſtate hath been granted to a man and the heirs of his body; for that may be a fee conditional; but it muſt be ſhewn that a remainder hath been limited over, and enjoyed, or that the iſſue hath recovered after the alienation of his anceſtor, or the like.

Co. Lit. 60. Sid. 314. Moor, 358. (*a*) But a recovery with vouchee, doth not of common right bar the entail of a copyhold eſtate; but that as to the entailing of them, cuſtom is requiſite; ſo, without cuſtom, the entail cannot be cut off: The reaſons are, that, without an intended recompence in value, no recovery ſhall bind, and the ſurrenderee comes in the *poſt* by the lord, and is not in the *per* by the party, and ſo no warranty can be annexed of common right; for no eſtate leſs than a freehold, is capable, of common right, of having a warranty annexed to it. Moor, 358. 753. Cro. Eliz. 380. 907. 4 Co. 23. Cro. Eliz. 391. Raym. 164. Lev. 136.

Theſe entails, like all others, may be docked; but the manner of doing it differs according to the cuſtom of the manor; the more common way of barring ſuch entails is by recovery in the lord's courts, which is (*a*) always allowed where the cuſtom of entailing prevails, to avoid the danger of perpetuity in ſuch copyholds.

Co. Lit. 60. b.

Alſo, according to the cuſtom of ſome manors, a ſurrender to the lord is equivalent to a recovery at common law, and ſhall bar ſuch entails.

Moor, 188. 2 Vern. 705. Co. Copyh. 135. Style, 450. Sid. 314. 2 Sand. 422. * There may be a good cuſtom in a manor, that tenant in tail may ſurrender, and bar his iſſue, without ſuffering a recovery; or that he may ſuffer a recovery in the manor-court, which ſhall have the ſame effect. Everall v. Smalley, M. 17 Geo. 2. Stra. 1197. Wilſ. 26.——In a manor where copyhold may be entailed, either by ſpecial cuſtom, or by the general doctrine of ſurrender in fee, *vel aliter*, &c. if a cuſtom does not appear to bar by recovery in that manor, it may be barred by ſurrender; for otherwiſe it would create a perpetuity. Moore v. Moore, T. 1755. 2 Vezey, 596.——And this by ſurrender to the uſe of the will only. *Ibid.* Car. v. Singer, p. 1750. in C. B. 2 Vezey, 603. [Note, the three ways of barring entails of copyholds mentioned in this caſe; namely, recovery, ſurrender, and forfeiture and re-grant.]——By cuſtom it may be barred by ſurrender; and wherever tenant in tail of a freehold can bar the eſtate by any means, there tenant in tail of *ſuch* copyhold may bar by ſurrender. Martin v. Mowlin, P. 33 Geo. 2. 2 Bur. 969.—In ſuch manor, if *A.* deviſes to his ſon *B.*, and *C.* his wife, and the heirs of the body of *B.* of *C.* begotten; this eſtate may be barred by ſurrender of *B.* alone. *Ibid.*

And in ſome manors, a forfeiture committed by tenant in tail, of the copyhold, and the lord's making three proclamations, and ſeiſing the copyhold, and re-granting it to the copyholder, has been allowed a good cuſtom to bar the entail. So it is if tenant in tail ſurrenders to the purchaſer and his heirs, who commits a forfeiture, and the lord, as before, ſeiſes it, and makes proclamations; this is a bar of the entail, and the cuſtom allowed good *.

2. Of ſuch Statutes as may be ſaid to relate to them.

3 Co. 7. Leon. 4. Moor, 128.

The general rule laid down for the expoſition of ſtatutes, as to their extending or not extending to copyhold eſtates, is this, that

that where an act of parliament alters any estate, interest, tenure, or custom, or service of the manor, or doth any thing in prejudice either to the lord or tenant, there the general words of an act of parliament will not extend to copyhold estates; but where an act is generally made for the publick good, and no prejudice accrues to the lord, &c., there copyholders are bound by them. Cro. Car. 42, 43. Skin. 297. Salk. 185. pl. 2. 4 Mod. 83.

(a) Copyholders are within the statute of limitations; for that is an act made for the preservation of the publick quiet, and no ways tending to the prejudice of the lord or tenant. Moor, 410. (a) But debt for a fine is not within the statute of limitations. 2 Keb. 536.

It seems (b) formerly to have been the better opinion, that a grantee or surrenderee of reversions of copyholds could not take advantage of a covenant broken, by 32 *H.* 8. *c.* 3.; because he comes in in the *post*, and not in the *per;* and the lord would have a tenant put upon him without his admittance; but it (c) has been solemnly adjudged, that this being a beneficial law, it shall extend to copyholds. (b) Co. Copyh. 151. 156. Suppl. 106. Cro. Car. 24. Lex. Custom. 253. Yelv. 135. 222. Cro. Jac. 305.

Hob. 177. Cro. Eliz. 17. Keb. 356. (c) 4 Mod. 82 to 86. adjudged between Cope and Glover. 3 Lev. 326. S. C. adjudged. Skin. 297. 305. pl. 1. S. C. adjudged. Salk. 185. pl. 2. S. C. adjudged.

The 32 *H.* 8. *cap.* 28. of the husband's discontinuing of the wife's lands, extends to copyhold estates. Co. Copyh. 152. Supp. 68.

4 Co. 23. But whether the other branch of it, or the 13 Eliz. c. 10. concerning leases made by husband and wife, tenants in tail, or ecclesiastical persons, extend to copyhold, *vide* Cro. Car. 44. Co. Copyh. 151. Co. Lit. 44. a. 6 Co. 37. 3 Lev. 327. And *vide* tit. *Leases*.

Copyholds are not within the 11 *H.* 7. *cap.* 20., which makes void the alienation of the wife of any estate which she hath in dower, for life, or in tail, jointly with her husband, &c.; for thereby an entry being given to the next heir, he would come in to be tenant, without the admittance of the lord. 2 Sid. 41. 73. 3 Lev. 327. 4 Mod. 85.

The 27 *H.* 8. *cap.* 10., for executing uses to the possession, extends not to copyholds; neither doth that branch of the act concerning jointures extend to them; so that if a jointure be made to a woman of copyhold lands, that will be no bar to her dower. Co. Copyh. Cro. Car. 44. 4 Mod. 85.

But yet the statute of *Merton*, that gives damages in a writ of dower, where the husband died seised, extends to copyholds, though the word *seised* is properly applicable to freeholds; but this is by force of the equity of the statute. 2 Inst. 325. Cro. Car. 43. 4 Co. 30. b. Co. Copyh. 152.

The statute of *Westm.* 2. *cap.* 3. in all its branches extends to copyhold lands; for it is an act made to redress wrong, and no way prejudicial to the interest either of the lord or tenant, either in the *cui in vita* given to the wife upon the husband's discontinuance, the receipt of the wife, &c., or *quod ei deforciat* to particular tenants. Co. Lit. 369. b. Co. Copyh. 152. 4 Mod. 84. 3 Lev. 327.

It is enacted by 31 *H.* 8. *cap.* 13. that if any abbot, &c. shall make any lease of lands, &c., in the which any estate for life, &c. then had its being and continuance, then every such lease to be void. A copyhold was let by copy for life, and then the reli- 3 Co. 7. Heydon's case. Leon. 4. Moor, 128. Cro. Car. 42, 43.

gious houſe granted a leaſe of it to another for eighty years; and the queſtion was, Whether a copyhold eſtate for life was within the words of the act, *in the which any eſtate or intereſt, &c.?* and it was reſolved that the leaſe was void, and that the copyholder had an eſtate or intereſt for life.

Co. Lit. 369. Co. Copyh. 152. 4 Mod. 84. 3 Lev. 327. The 32 *H.* 8. *cap.* 9., againſt *champerty*, extends to copyholds, for the words, *if any bargain, buy or ſell any right or title;* ſo that they are within the words of the act, being made to ſuppreſs wrong, and within the equity of it, neither lord nor tenant being prejudiced by it.

Cro. Car. 44. Co. Copyh. 151. 4 Mod. 85. The 31 *H.* 8. *cap.* 1. and 32 *H.* 8. *cap.* 32., concerning partitions, extend not to copyholds, becauſe the act provides it ſhall be done by writ of *partition;* and copyhold lands are not empleadable at common law.

3 Co. 9. Co. Copyh. 149. Gilb. Ten. 185. Sav. 67. Roll. Abr. 888. Cro. Car. 44. Hardr. 433. O. Benl. 163. 3 Read. Stat. Law. 123. 2 Inſt. 396. The ſtatute of *Weſtm.* 2. *cap.* 20., which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or conſent.

Co. Copyh. 145. By 2 *Ed.* 6. *cap.* 8. it is expreſsly provided, that copyholders ſhall have the like traverſe and remedy where their intereſt is not found by the office, as freeholders and others have; and ſo alſo upon 12 *Eliz. cap.* 8.

Co. Copyh. 146. By 1 *Ed.* 6. *cap.* 14. it is expreſsly provided, that no copyhold ſhould come into the king's hands by diſſolution of monaſteries; which clauſe was put in for the benefit of lords of manors.

Co. Copyh. 146. The forging of court-rolls is expreſsly within 5 *Eliz. cap.* 14. as well as forging any other charter, deed, or writing ſealed, whereby to defeat a copyholder or freeholder.

Cro. Car. 550. 568. Co. Copyh. 146. But the ſtatute of 34 and 35 H. 8. c. 4. did not extend to them; therefore it was neceſſary to make a ſubſequent law to include them. 4 Mod. 84, 85. Copyholds are within the ſtatutes of bankrupts, for the ſtatute of 13 *Eliz. cap.* 7. expreſsly mentions them; and though other ſtatutes do not, yet they being made for further remedy, are to be expounded by the former, eſpecially ſince that hath taken care that no prejudice ſhould happen to the lord.

Co. Copyh. 147. Leon. 97, 98. Owen, 37. 2 Inſt. 737. Cawley, 107. 2 Hawk. P. C. c. 10. § 16. Copyholds are within the 35 *Eliz. cap.* 2., againſt recuſancy, and forfeitable for the recuſant's life, but the forfeiture goes to the lord, not to the king, by the expreſs words of the ſtatute; but it ſeems that copyholds are not within the 29 *Eliz. cap.* 6. or 3 *Jac.* 1. *cap.* 4. in reſpect of the prejudice that would accrue to the lord by the loſs of his ſervices.

Co. Copyh. 149. The 16 *R.* 2. *cap.* 5. which makes it a forfeiture of lands, *&c.* to purchaſe bulls of the pope, extends not to copyhold lands for the prejudice the lord would ſuſtain if the king ſhould have the lands.

9 Co. 105. a. Co. Copyh. 153; but ſee 5 Co. 125. The ſtatute of fines extends to copyhold lands, becauſe it was made to avoid controverſies, and is no ways prejudicial to the lord.

[Reſulting

[Reſulting truſts of copyholds, as well as freeholds, are within the ſtatute of frauds. But Lord *Hardwicke* hath been repreſented to ſay, that copyholds are not within the 14 *Geo.* 2. *c.* 20. § 9. relative to eſtates *pur auter vie.* Withers v. Withers, Ambl. 151.

Q. Whether the ſtatute of 27 *Eliz. c.* 4. againſt covinous and fraudulent conveyances extends to copyholds?] Cowp. 705.

Copyholds are not within the 31 *Eliz. cap.* 7. of cottages.

The 17 *E.* 2. *cap.* 10., which giveth the wardſhip of idiots' lands to the king, he finding them convenient maintenance out of the profits thereof, extends not to copyhold lands, for the prejudice that would thereby enſue to the lord; but yet all alienations made by an idiot, of his copyhold lands, after office found, ſhall be avoided by the king. Bulſt. 50. Co. Copyh. 152. 4 Co. 126. b.

A copyholder is not within the ſtatute 12 *Car.* 2. *cap.* 24. to diſpoſe of the cuſtody of his infant heir, becauſe of the meanneſs of his eſtate, and the prejudice that would accrue to the lord of the manor; and therefore the lord, or thoſe entitled by the cuſtom, ſhall have the cuſtody of him. 3 Lev. 395. Clench and Cudmore. 2 Lutw. 1181. S. C. Comb. 243. S. C.

(D) Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates.

THERE are two ſorts of cuſtoms; firſt, General, which extend to all kinds of manors, which are warranted by the common law, and of which the courts take notice; ſecondly, Particular cuſtoms, which muſt be pleaded. Salk. 184. pl. 1.

By the general cuſtom, and of common right, every copyholder may take hedge-bote, houſe-bote, and plough-bote, upon his copyhold; but yet this power may be reſtrained by cuſtom; as that the copyholder ſhall not take it, unleſs by the aſſignment of the lord, or his bailiff. 13 Co. 68. Godb. 172. 2 Brownl. 329.

Every copyholder may make a leaſe for a year, and ſuch leſſee may maintain an ejectment; for as the common law warrants ſuch leaſe, ſo it gives him a remedy for the recovery of it. 4 Co. 26. a. Cro. Eliz. 461.

A copyholder may (*a*) ſurrender to the lord by attorney in court, becauſe he may do that *communi jure;* and ſo the common law gives him power to do it by attorney, as an incident to his eſtate. So a ſurrender to the lord out of court is *de communi jure*, and therefore the copyholder may, as it ſeems, do it by attorney (*b*), and ſo it ſeems to the (*c*) ſteward; but if the ſurrender be to two cuſtomary tenants, there it cannot be done by attorney without a ſpecial cuſtom *. Cro. Jac. 526. Cro. Eliz. 443. *cont.* Cro. Car. 273. Leon. 36. Co. Copyh. 92. (*a*) Admittance by the lord in court, or out of court, ſeems to be *de communi jure*; but *quære*, whether *de communi jure* he is to admit by attorney; and *vide* 9 Co. 75. Leon. 36 *cont.* Co. Lit. 59. 3 Bulſt. 80. and 2 Sid. 37. 61. That the lord is not compellable to admit by another, becauſe the corporal ſervice of fealty is due from every copyholder. [(*b*) It is expreſsly denied by Lord Hardwicke, that a ſurrender can be by attorney out of court. 2 Vez. 679.] (*c*) That there is the ſame reaſon that the ſteward ſhould take ſurrenders out of court, and alſo out of the manor, as that the lord ſhould. Salk. 184. pl. 1.† * So R. 9 Co. 76. a. b. 1 Roll. Abr. 501. l. 5.

† A cuſtom that a ſurrender muſt be made in perſon, unleſs in caſe of ſpecial diſability, is not contrary to law. Mitchel v. Neale, M. 1755. 2 Vezey, 679.—A purchaſer of a copyhold is not obliged to accept of a ſurrender by attorney, but may inſiſt on the vendor's ſurrendering in court. *Ibid.*

(E) Of particular Cuſtoms that are good, and peculiar only to ſome Copyholds.

PARTICULAR cuſtoms are to be conſtrued ſtrictly; but the reaſonableneſs of them is not altogether to be conſidered from the rules and maxims of the common law, (for there is no cuſtom but what in ſome point or other overthrows the common law,) but from the conveniency of the thing itſelf.

March, 161. A cuſtom that if a copyholder do not repair, it ſhall be preſented by the homage, the tenant amerced, and that the lord ſhall diſtrain upon the copyholder or under-tenant, is a good cuſtom, for the under-tenant is not a mere ſtranger.

2 Brownl. 85. Noy, 2. Cro. Jac. 368. Moor, 842. 788. But a cuſtom that after the death of tenant for life the lord is compellable to make a grant for life to his ſon, and if no ſon, to the daughter, is a void cuſtom, becauſe it obliges the lord, who hath the intereſt, to grant it to this or that particular perſon, whether he will or no: (*a*) but a cuſtom for a copyholder for life to nominate his ſucceſſor, is good.

(*a*) And a cuſtom that ſuch a copyholder may cut down trees, is good. Noy, 2.

March, 28. Leon. 190. [In the caſe from Leonard, the by-law was by the majority of the tenants.] Cuſtom for the ſteward to make by-laws for the ordering of the common, is good; but an order that the tenant ſhall not put in this or that beaſt, is void, becauſe it takes away his inheritance: but a by-law that he ſhall not do it before ſuch a day, is good, being not reſtrictive of his inheritance, but only directive of it.

Sid. 361. Mod. 77. 2 Keb. 344. 380. 851. Cuſtom that he who lives above ten miles from the manor, upon paying 8*d.*, and 1*d.* to the ſteward, ſhall be excuſed from attendance upon the court, is a good cuſtom, if it be averred that there are ſufficient tenants who live near the manor.

Hut. 101. 126, 127. A cuſtom to deviſe land, the leſſee paying the treble value of the rent, and if he die within the term, that his heir ſhall have it, paying one year's rent; and that if he aſſign, the aſſignee ſhall have it, paying a year's rent; was holden to be a good cuſtom.

Lit. Rep. 233. Moor, 8. pl. 27. That a copyholder ſhall not alien without a licence, is a good cuſtom; ſo is a cuſtom that if a copyholder make a leaſe for one year, and die, that it ſhall be void againſt his heir; (*b*) but a cuſtom that the copyholder ſhall hold the land half a year after the term, is void.

(*b*) A cuſtom that the executors ſhall hold a year after the copyholder's death, is a good cuſtom. Cro. Jac. 36.——That a copyholder may give a warrant of attorney to ſurrender after his death, is a void cuſtom. 2 Roll. Abr. 357.

Lex Cuſtom, 34. That if a copyholder will ſell his land, the next of blood ſhall have the refuſal, or the next neighbour to the *eaſt*, is a good cuſtom.

2 Brownl. 277. Co. Copyh. If there be a cuſtom that a copyholder ſhall not put in his beaſts to take the common before the lord hath put in his, this is a void

a void and unreaſonable cuſtom, becauſe it is in the power of the lord to take away the intereſt of his commoners. (*a*) So a cuſtom that the tenant ſhall pay a fine upon the marriage of his daughter, is void, becauſe againſt the freedom of the ſubject; but if a man obliges himſelf to ſuch a thing by tenure, it is good, being his own contract. 70, 71. (*a*) If the huſband ſhall be tenant by the curteſy, or the woman in dower,

then to pay a fine upon marriage, is reaſonable. Co. Copyh. 73. 2 Roll. Abr. 264, 265.

A cuſtom may be void for the uncertainty of it; as, if it be that the tenants ought not to pay above two years' rent for a fine, but that they may pay ſo much or leſs. 2 Roll. Abr. 264.

My Lord *Coke* ſeems to be of opinion, that, by ſpecial cuſtom, a wife may deviſe copyhold land to her huſband; but he ſays that this cuſtom hath been ſo much impugned, that he cannot juſtify the validity of it. Co. Copyh. 94. *Vide* Moor, 123. where it was debated, whether a

cuſtom that feme covert might deviſe copyhold to her huſband, or any other, was good? and it ſeemed to be the opinion of the court that it was; but the judgment went on a fault in pleading; but *vide* Winch. 27. March, 8. 4 Co. 61. b. where it is holden no good cuſtom.

Copyholders by cuſtom may have *ſolam et ſeparalem paſturam* in the ſoil of the lord, and exclude the owner *; but a copyholder of inheritance cannot, without ſpecial cuſtom, dig for mines; neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyholder's eſtate; but the copyholders may dig marl to lay on the copyhold land, but cannot incloſe where it never was incloſed before. 2 Saund. 326. Sid. 152. Roll. Abr. 888. Winch. 8. Lit. Rep. 234. * A copyholder in fenny lands

may be entitled to dig the lord's ſoil for turf. Dean of Ely v. Warren, T. 1741. 2 Atkyns, 189.—Common of turbary cannot belong to an occupant. *Ibid.*

(*b*) The lord ſhall not have the cuſtody of lunaticks' lands, unleſs there be a cuſtom for it; neither ſhall the king have it, for the prejudice that may enſue to the lord. Hob. 215. Noy, 27. (*b*) But *vide* Cro. Jac.

105. where it was reſolved, that the lord may have the cuſtody of one that was *mutus & ſurdus*, and no cuſtom is laid; and the reaſon given is, that otherwiſe the lord would be prejudiced in his rents; *ideo quære.*

A cuſtom that one copyholder may have common, *&c.* in his lord's ſoil, is good; for all the other copyholders may have forfeited their eſtates. 4 Co. 31. a. b.

Cuſtom, that, upon payment of ten years' rent, the lord ſhould licence to let for ninety-nine years; and if he would not licence, the tenant ſhould leaſe without licence; adjudged a good cuſtom. 2 Keb. 344. 2 Roll. Abr. 450. and yet the licence ſeems unneceſſary here, ſince it may be done without it.

Cuſtom was that the lord might *ſolummodo* grant eſtates in fee; this word *ſolummodo* was expounded to mean that he had only granted eſtates in fee; and ſo it was holden that he may grant for a leſs time. Roll. Abr. 511. But if it had been ſhewn in pleading, that he could not grant otherwiſe; *quære.* Gilb. Ten. 308.

That the widows of copyholders ſhall have dower, or their (*c*) free bench, or a moiety of the lands, is a good cuſtom; and alſo that huſbands of feme copyholders ſhall be tenants by the curteſy; Co. Lit. 59. b. 3 Bulſt. 219. Lex Cuſto-

mar. 156. Co. Copyh. 154, 155. curteſy; that if a copyholder holds lands in fee, that his wife ſurviving him ſhould have them in fee, is a good cuſtom; (*a*) alſo a cuſtom that ſhe ſhould have them *durante viduitate*, is good.

(*c*) The widow of *ceſtuy que truſt* of a copyhold eſtate, ought to have her free bench as much as if the huſband had the legal eſtate in him. 2 Vern. 585. *—* Free bench is a widow's eſtate in ſuch lands as the huſband *dies ſeiſed of*; not that he was ſeiſed of during the coverture, as dower is. Godwin v. Winſmore, H. 1742, 2 Atkyns, 525. [Saliſbury v. Hurd, Cowp. 481.]——If a man, before marriage, ſettles on his wife part of his real eſtate for her jointure, in bar of all dower which ſhe may claim out of any lands, tenements, meſſuages, and hereditaments, of which he is or ſhall be ſeiſed, of freehold or inheritance; ſhe cannot claim her *free bench*, in copyholds purchaſed afterwards. Walker v. Walker, M. 1747. 1 Vezey, 54.—— Tenants in dower, and by curteſy, ſhall pay a fine upon admittance, eſpecially if there be a cuſtom for it. Co. Copyh. 154. but *vide* Lex Cuſtom. 156. where it is ſaid, that in caſe of a widow's eſtate no fine is due; and *vide poſt* of Fine, (I.) and Hut. 18. Roll. Abr. 592. Noy, 29. That the widow is in before admittance, in the ſame manner as the heir at law is. (*a*) A copyholder *durante viduitate* ſows the ground, and takes huſband, ſhe loſeth the corn; but if ſhe had let the lands, her leſſee ſhould have the corn; ſo if ſhe die, her executors or adminiſtrators ſhall have it. 5 Co. 115.

2 Leon. 208, 209. The cuſtom of a manor was, that if a man took a cuſtomary tenant to wife, and out-lived her, he ſhould be tenant by the curteſy. A man took a woman to wife who had no copyhold land then, but ſome deſcended to her during the coverture; and it was adjudged that he ſhould not be tenant by the curteſy, becauſe he is out of the cuſtom.

Cro. Jac. 36. 3 Leon. 81. Co. Copyh. 129. [Cowp. 481. *acc.* And even an unexecuted agreement by him to ſell (where A copyholder may diſpoſe of his lands, and bar his wife of her *free bench*, unleſs there be a particular cuſtom that ſhe ſhall avoid any alienation, *&c.*; and therefore where a copyholder made a leaſe of lands which was warranted by cuſtom, it was holden, that though by the cuſtom the wife was alſo entitled to her free bench, yet that the leſſee's title being purſuant to the cuſtom, was as good as hers, and being prior could not be (*b*) avoided by her.

of courſe there was a dying ſeiſed) hath, in Chancery, been carried into ſpecifick performance, in total excluſion of the widow's claim. 2 Vez. 631.] (*b*) But it ſeems, after the leaſe ended, ſhe ſhould be endowed; but *quære*, whether ſhe ought to be endowed of the third part of the rent during the continuance of the leaſe, becauſe cuſtoms are to be taken ſtrictly. *Vide* head of *Dower*, and that her title doth not commence by the marriage, as it doth in dower at common law. Carth. 276.

Salk. 185. pl. 3. Benſon and Scott. 3 Lev. 385. S. C. adjudged. Skin. 406. pl. 1. S. C. adjudged. Carth. 275, 276. adjudged without difficulty. If a copyholder in fee, where by the cuſtom the widow is entitled to her *free bench*, ſurrenders his copyhold into the hands of two tenants, according to the cuſtom, to *J. S.* in fee, and this ſurrender is preſented at the next court; but after, and before the ſecond court, the ſurrenderor dies, and on the next court after his death *J. S.* and the widow are admitted; the title of the ſurrenderee ſhall prevail; for though the huſband died ſeiſed, yet it was of a defeaſible eſtate, of which quality the wife's eſtate muſt partake, being thereout derived, and by the admittance, which had relation to the ſurrender, being actually defeated.

4 Co. 24. adjudged. 8 Co. 63. cited. 2 Brownl. 208. S. C. If the lord of a copyhold manor, in which are ſeveral copyholders for life, (*c*) takes a wife, and a copyholder dies, and the lord after coverture grants the land again, according to the cuſtom of the manor, for life, and dies; his wife in a writ of dower

ſhall

ſhall not avoid this grant; for though the grant was after her title of dower, yet the cuſtom, which is the life and force of the grant, was long before.

cited. (c) So if he grant a rent-charge. 2 Leon. 109. Moor, 94.

8 Co. 63.; but for this *vide* Leon. 4. 16. 2 Leon. 152. 3 Leon. 39. Godb. 130. Roll. Abr. 684. But the heir's grant the wife ſhall avoid. Moor, 237.

If there be a cuſtom in a manor, that the lord ſhall enter and enjoy the lands, during the nonage of the infant, it is a good cuſtom; for the freehold of the land is in the lord, and he is tenant to the *præcipe;* and an eſtate at will may ceaſe for a time, and revive again, as well as it may deſcend by cuſtom.

Leon. 266. pl. 357. Co. 87.

[A cuſtom in a manor, if there be any ſuch, that copyholds ſhall not be ſurrendered to the uſe of a will, or that being actually ſo ſurrendered, they ſhall not paſs thereby, is a void cuſtom.

Pike v. White, 3 Br. Ch. Rep. 286.

A cuſtom not to preſent mortgages till the third court, is good.

2 Vez. 303.

Though a cuſtom for a copyholder for life (*a*) to commit waſte would not be good; yet it would for a copyholder in fee to do ſo. A cuſtom diminiſhing the value of the lord's eſtate, is not, therefore, bad.]

Id. ibid. (*a*) So, of one who holds to him and his heirs for lives. Mardiner v. Elliot, 2 Term Rep. 746. Otherwiſe, perhaps, if he has a power of nominating his ſucceſſor. *Ibid.*

(F) Of granting Copyhold Lands: And herein,

1. What Perſons may make good Grants.

(*b*) EVERY lord of a manor that hath a lawful eſtate in the manor, whatſoever that eſtate be, whether in fee, in tail, for life, years, or at will, *&c.*, may make voluntary grants of copyhold lands that come into his hands; which grants ſhall bind thoſe that have the inheritance of the manor, whatſoever defects the lord of the manor may be under, that made the grant; (*c*) provided the ancient rent, cuſtom, and ſervices be reſerved; for theſe eſtates and grants derive not their force and effect from the lord's intereſt, but from the cuſtom of the manor by which they have been (*d*) demiſed, and are demiſable, time out of mind; ſo that to ſupport ſuch grant, it is ſufficient if it be done *per dominum manerii pro tempore.*

(*b*) Co. Lit. 58. b. 4 Co. 23. b. Co. Copyh. 79. 107. Moor, 147. Roll. Abr. 499. S. P. 8 Co. 63. b. Noy, 41. (*c*) The ancient ſervices muſt be reſerved, the reaſon whereof is, that there being nothing but cuſtom to warrant the grant by copy, the cuſtom ought to be ſtrictly purſued, as to the eſtate, cuſtoms, ſervices, and tenure, elſe it is not the eſtate that was demiſed before, Co. Copyh. 107, 108. Bro. *Tenant by Copy*, 27. ——Therefore he that hath but a particular eſtate in the manor, cannot grant a copyhold by parcels, or demiſe part, and retain the reſidue himſelf. Cro. Eliz. 662. (*d*) It is one of the pillars of a copyhold eſtate, that it hath been demiſed, or demiſable time out of mind. 4 Co. 24. b. Co. Lit. 58. b. Leon. 56. 3 Leon. 107, 108. 2 Wilſ. 125.

If baron and feme, being ſeiſed of a copyhold manor, in the right of the feme, (*e*) grant a copyhold, this ſhall bind the feme, notwithſtanding her coverture; for the copyholder

4 Co. 23. b. 8 Co. 63. S. P. (*e*) But the is

grant must be made in the name of both. Cro. Jac. 99.

is in by cuſtom, without regard to the eſtate or perſon of the grantor.

4 Co. 23. 8 Co. 63. (a) Noy, 41. S. P. adjudged.

So, a grant made by an (a) infant, *non compos mentis*, biſhop, prebendary, (b) parſon, &c., ſhall bind for ever.

(b) Grants by a parſon before induction, are not good; ſo, if after inſtitution and induction he reads not the articles. Co. Copyh. 48. § 34.*

* *Quære*, and ſee the firſt clauſe under this head, and *poſt*.

4 Co. 23.

So, if the queen be tenant for life of a manor, and a copyhold of inheritance eſcheat, ſhe may grant it by copy, and ſuch grant by the cuſtom of the manor ſhall bind the king; for ſhe was *domina pro tempore*.

Co. Copyh. 97.

If there are two jointenants of a manor, and a copyhold eſcheats, one may grant the whole; for he is *dominus pro tempore*, being ſeiſed *per my & per tout*.

(c) Owen, 115. Co. Copyh. 87. That there ought to be a cuſtom to enable a lord of a manor to grant copyholds in reverſion. March, 6. *Vide* Goulſ. 102, 103. 3 Leon. 226. Godb. 140. (d) Tenant in dower of a copyhold may grant in reverſion, and it ſhall bind the heir after her death. Roll. Abr. 499. Cro. Eliz. 661. S. C. *Vide* Godb. 135. Owen, 4.*

Leſſee for years of a manor grants lands by copy; this by (c) ſome opinions has been holden void, unleſs the reverſion happens before his eſtate for years ended; for by this means he binds the (d) future lord's intereſt, and lets his own go at large: but (e) now by the better opinion, this grant is good; for the firſt grounds of this law, that the lords for the time being may grant copyhold eſtates, was, becauſe copyholders were only tenants at will; and ſo though the lord, for the time being, had but a particular eſtate, and granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor afterwards; for if he had a mind, he might put out the tenant at his own pleaſure: but this uncertainty of the copyholder's eſtate being found inconvenient, it was afterwards adjudged that he ſhould retain his lands, and not be ſubject to the pleaſure of the lord: but the other part of the law was left as before, *viz.* that lords for the time being might grant lands in fee, though they themſelves had but a particular eſtate; and this cuſtom being continued to this day, it is that which warrants the grants by copy; for it is moſt certain thoſe eſtates, granted by lords who have a particular intereſt, cannot be derived from the intereſt of the lord; for if they were, they muſt determine when the lord's eſtate determines; for *nemo poteſt plus juris*, &c.

* But ſee the ſtat. 11 H. 7. c. 20. as to alienations by her of the land of her huſband, being void.

——Guardian in ſocage may grant copyhold in reverſion, and it ſhall bind the ward, though he comes not in poſſeſſion during his infancy. Godb. 143. Cro. Jac. 55. 98. Owen, 115. Roll. Abr. 499. 2 Roll. Abr. 41. S. C. (e) 8 Co. 63. Hetley, 54. Moor, 95. 147. Cro. Eliz. 661.

Co. Lit. 58. b. *Vide* Dyer, 251. a. Co. Copyh. 85. 4 Co. 24. a.

If a lord of a manor deviſes by his will in writing, that his executors ſhall grant copies according to the cuſtom, for payment of debts, and dies, the executor, though he hath no eſtate in the manor, may make grants according to the cuſtom of the manor.

4 Co. 30. adjudged. But it was

If the king, by letters patent, grants the ſtewardſhip of a copyhold manor, and after a copyhold eſcheats, the ſteward (f) ex officio

officio, without any special warrant, may grant it again, and the king shall be bound by the custom of the manor. said, though by law he might do it,

yet it was his duty, before he made any grant, to inform the treasurer, chancellor, and barons of the Exchequer, or some of them, for their direction. (*f*) Much more may the steward of a common person, *ex officio*, make such grants. Co. Copyh. 124. for the steward is in the place of the lord, and, without a command to the contrary, may, &c. Cro. Eliz. 699.

But a steward retained only by the king's auditor or receiver, cannot make such a voluntary grant of a copyhold; for they have not any authority to appoint stewards, the business of the one being to take accounts, and of the other to survey the land. 4 Co. 30. adjudged. Cro. Eliz. 699. S. C. adjudged; but may take presentments, or make admittances, being things of necessity. Cro. Eliz. 699.

If *A.* and *B.* under the seal of the Exchequer are appointed joint stewards of all the lands of a fugitive, and *A.* alone grants copies, though in strictness he had no power without *B.*, yet these grants are good, being made by one that had a colour to keep courts. Moor, 109. 1 Ld. Raym. S. C. cited. Leon. 288. S. P.

If *A.* being tenant for life of a manor, within which are several copyhold tenements grantable for one life in possession, and another in reversion, grants the stewardship thereof, by deed, under his hand and seal to *B.* for life, with the fee of 10*s. per ann.* for the executing thereof, and after *A.* becomes a lunatick, and being found so by inquisition, is committed to, *&c.*; yet *A.*, by his steward, may grant copies. Lev. 47, 48. Resolved by Hobart and Tanfield; but it was ordered the steward should grant none, but with the privity of the committees, and warrant from the court: but there is a note that this was in discretion, and the grant of the steward good.

But the committees cannot grant copies; for they themselves have no estate in the manor, nor are lords thereof. Lev. 48. resolved by Hob. and Tanfield.

If a man makes a feoffment in fee of a manor, upon condition, and the feoffee grants estates by copy, and then the condition is broken, yet the grant by copy shall stand good, though it be a rule that he, who enters for a condition broken, shall be in of the same estate he was before, and shall avoid all mesne incumbrances: and it is the same, though the grant were made (*a*) after breach of the condition; for the feoffor may wave the advantage of it, if he pleases: also, a grant by the feoffee of an infant, which by law he may avoid, is good. Dyer, 344. a. 4 Co. 24. a. Co. Copyh. 82. 88. (*a*) But a grant made by lessee for years, after breach of a condition, is void; for his interest is *ipso facto* determined. Co. Copyh. 88.——A grant made by a feoffee on condition to enfeoff the next day, is good; for he is *dominus pro tempore*. Co. Copyh. 88.

A man seised of a manor in fee hath issue a daughter, and dies, his wife *privement enseint* with a son, the daughter may grant by copy. So, grants made after alienation in mortmain, and before entry of the lord, are good. Co. Copyh. 88, 89.

If a lord of a manor commits felony, and is attainted or convicted by verdict or confession, yet after such attainder, *&c.*, he may make voluntary grants of copyholds. Co. Copyh. 47. § 34.

But if any person that hath a tortious or defeasible estate of inheritance, or a disseisor, or the feoffee of a disseisor, or tenant at sufferance, Co. Lit. 58. b. 4 Co. 24. a.

Co. 140. Poph. 71. Moor, 112. 236. pl. 369. 2 Leon. 45. Owen, 27, 28. Cro. Eliz. 699.

ſufferance, make voluntary grants upon eſcheats or forfeitures, they ſhall not bind him that hath the right; for they are not *domini* within the meaning of the cuſtom; but admittances upon ſurrenders or deſcents, made by ſuch as have defeaſible titles, are good; and ſhall bind him that hath right; for that they were compellable to do, and it was no more than the rightful lord muſt have done.

2. What Acts ſhall deſtroy the Power they had of making ſuch Grants.

(*a*) Roll. Abr. 498. Co. Lit. 58. Cro. Eliz. 699. 4 Co. 31. a. (*b*) 4 Co. 31. a. (*c*) Roll. Abr. 498. 4 Co. 31.

Although lords of manors, who have copyholds come to them by eſcheat or forfeiture, (*a*) may re-grant them again according to the cuſtom of the manor; (*b*) yet by their acts, ſuch power may be deſtroyed; therefore (*c*) if copyholds come into the lord's hands in (*d*) fee, and he make a leaſe of them for life, years, or half a year, or for any (*e*) certain time, by deed or without deed, the copyhold is deſtroyed; becauſe, during thoſe eſtates, it was not demiſed, nor demiſable by copy.

(*d*) But if tenant in tail, for life, &c. makes ſuch leaſe, &c. this ſhall not deſtroy the power of him in reverſion. 2 Roll. Abr. 271. 2 Sid. 35. 37. *Vide* Cro. Car. 521. *cont. per Curiam arguendo.*

(*e*) *Secus* if he leaſes it at will. 4 Co. 31. 3 Leon. 108.

4 Co. 31. a. So, if the lord makes a feoffment thereof in fee, upon condition, and after enters for the condition broken, yet it cannot be granted again by copy.

4 Co. 31. in French's caſe. So, if the land ſo eſcheated, *&c.* is extended upon a ſtatute or recognizance made by the lord, or the wife of the lord, in a writ of dower, hath it aſſigned to her; though theſe interruptions are by act of law, yet it cannot again be granted by copy.

4 Co. 31. a. Co. Lit. 58. b. Cro. Eliz. 699. But if the lord keeps it in his hands, though never ſo long, yet may they be granted again by copy.

4 Co. 31. So, if the lord be diſſeiſed thereof, and the diſſeiſor die ſeiſed, or if the land be recovered againſt the lord by a falſe verdict, or erroneous judgment, though it is not demiſed or demiſable by copy, till it is recovered by the lord, or the judgment reverſed; yet after it is re-continued, it is grantable again by copy, becauſe the interruption was tortious.

4 Co. 31. b. If a copyholder takes a leaſe for years of the manor, by which his copyhold is extinct, yet he may grant it again, if he will; for it was always demiſed or demiſable.

4 Co. 31. b. (*f*) So, if he leaſes the manor, and the ſaid copyhold land, by the name of his tenement, called *H.*; for the manor being demiſed, the copyhold is incloſed as parcel thereof; and the naming of the copyhold is but ſurpluſage. Cro. Car. 521.

So, if a copyhold eſcheats, *&c.*, and the lord aliens the (*f*) manor, his alienee may re-grant the land by copy.

3. What Things may be granted to be holden in Copyhold.

(*g*) A rent-ſervice, rent-charge, or common

Things that lie not in tenure are not grantable by copy, unleſs (*g*) appendant to ſome thing that doth lie in tenure; and therefore things incorporeal, for which there can be no diſtreſs, and which

which are not parcel of the manor, which conſiſt only in demeſnes and ſervices, cannot be demiſable by copy; for of ſuch incorporeal things no ſervice is due; and therefore no court neceſſary to be kept for ſurrenders, admittances, &c.

in groſs, cannot be granted otherwiſe than as they are appendant to things which lie in tenure; Co. Copyh. 116.; and therefore, where my Lord Coke ſays, that any thing concerning lands or tenements may be granted, it muſt be underſtood of things appendant to the demeſnes, or thoſe parcels which make up the manor. *Vide* Co. Lit. 58. Tithes may be demiſed by copy, becauſe they are parcel of the manor, as a rent-charge may. *Per* Roll. Abr. 498. Cro. Eliz. 413. cited to have been adjudged; [and Sandys and Drury, P. 43 El. B. R. Hal. MSS. Co. Lit. 58. b. n. 9. 13th edit.] but Cro. Eliz. 814. S. C. and S. P. *dubitatur*; becauſe not parcel of the manor; and therefore not grantable *ſecundum conſuetudinem manerii*; [and becauſe it did not appear that they had been immemorially granted by copy]. A mill may be granted by copy. 4 Leon. 241. cited to have been adjudged. ——So, a fair appendant to a manor may be granted by copy. 4 Co. 31. a. Co. Lit. 58.

(*a*) *Tonſura prati*, the (*b*) herbage or veſture of land may be demiſable by copy.

(*a*) Roll. Abr. 498. (*b*) Co. Lit. 58. 4 Co. Lit. 31. a. ſo reſolved.

Things grantable by copy muſt be things of perpetuity; otherwiſe it can never be ſhewn that there hath been a cuſtom to demiſe them by copy: yet underwood, without the ſoil, may be demiſed by copy.

4 Co. 30, 31. Becauſe it is a thing of perpetuity, to which the cuſtom may extend. Co. Lit. 58. b. S. P. Cro. Eliz. 413. and Moor, 315. adjudged and affirmed upon a writ of *error*. ——That a man may grant, by copy, twenty loads of wood to be taken by the grantee, is good; for it is not neceſſary that the thing granted have continuance, but only that it be a thing of perpetuity. Co. Copyh. 118. but *quære*.

A cuſtomary manor may be holden by copy of court-roll, *ad voluntat.* &c. and ſuch a lord may grant copies, but it muſt be of ſuch things as have been uſually demiſed by him; for he cannot grant all his demeſnes by copy, without they have been uſually demiſed; for though they have been demiſed time out of mind, by the ſuperior lord by copy, that will not warrant his demiſe by copy; becauſe the cuſtom of the manor muſt be, that time out of mind they have been granted *per dominum manerii*.

Co. Lit. 58. b. 2 Brownl. 40. 11 Co. 17. adjudged; and that ſuch cuſtomary lord may keep courts, and grant copies. Cro. Jac. 327. adjudged. Bulſt. 57. cited; but Cro. Jac. 260. *dubitatur*. ——But he cannot hold a court-baron, for he can have no freeholders; for a copyhold manor is not capable of an eſcheat of a freehold; for if it were, the freehold after the eſcheat muſt become copyhold, which is repugnant and impoſſible. Yelv. 190. Cro. Jac. 259. Bulſt. 54, 55. Theſe caſes, which ſeem to contradict each other, and which *vide*, may perhaps be thus reconciled, that a cuſtomary court may be holden by one that hath ſuch a manor, but not a court-baron; and my Lord Coke's caſe ſeems to go no farther; and *quære*, Whether ſuch a lord may not have freehold ſervices?

4. Of the Operation of the Grant, and the Eſtate and Intereſt that paſs thereby.

Grants of copyholds regularly receive the ſame expoſition which grants of freehold lands do at common law, therefore a grant to one and his heirs male is a fee-ſimple; ſo is a grant to one & *ſanguini ſuo hæreditabili*; but a grant to one & *ſanguini ſuo in perpetuum* is but an eſtate for life.

Co. Copyh. 123. 126. 139.

(*c*) If copyhold lands have been uſually granted in fee, a grant to one and the heirs of his body, or to one for (*d*) life or years, is within the cuſtom.

(*c*) Co. Lit. 52. Godb. 20. S. P. By two Juſtices. Leon. 56. S. P. *per Curiam*. Cro. Eliz. 373. S. P. adjudged. Salk. 188. pl. 7. and 6 Mod. 83. S. P. agreed. (*d*) And after the death of the tenant for life the lord may grant the ſame again in fee; for the grant for life was not any interruption of the cuſtom. Leon. 56. *per Cur.*

4 Co. 29. b. 30. a. Cro. Eliz. 323.

So, where grants have been made by copy for life, a grant *durante viduitate* is good, for that is a leſs eſtate than during the widow's life, but not *vice verſâ*.

Co. Copyh. 142, 243. (*a*) It has been ruled

If a copyhold be granted to three, *habend. ſucceſſivè*, they are jointenants, unleſs by (*a*) ſpecial cuſtom the word *ſucceſſivè* makes the eſtate ſeveral.

in Chancery, that if a copyhold is granted to three *ſucceſſivè*, and there is no cuſtom proved, that the firſt taker had power of diſpoſing of the whole, nor that the firſt taker paid the purchaſe-money, it ſhall not go to the executor of the firſt taker, but ſhall go in ſucceſſion. 2 Vern. 264.

Roll. Abr. 511.

If there be a cuſtom that copyholds may be granted for three lives, a copy may be granted to three for the lives of two, within the cuſtom; for there is not any inconvenience to the lord, though it be for the life of another; for there ſhall not be any occupancy thereof, but the lord ſhall have it, if the tenant *pur auter vie* die, living *ceſtui que vies*; and this is not a greater eſtate than for three lives, which is leſs than the cuſtom warrants.

Salk. 188. pl. 7. Smartle and Penhallow, adjudged. 6 Mod. 63. Ld. Raym. 434. S. C.

So, if the cuſtom of a manor be, that the lands are demiſable by copy to two or three perſons for their lives, and the life of the ſurvivor, *habendum ſucceſſivè ſicut nominantur in charta, & non aliter*, paying a heriot on the death of every tenant dying ſeiſed, a grant to *A.* and his aſſigns for the lives of *B.* and *C.*, and of the ſaid *A.*, is good within the cuſtom; for there can be no occupant againſt the lord, neither will he be prejudiced by the tenant's becoming a bankrupt, for the aſſignees have no other right or intereſt than the bankrupt, and the lord is entitled to his heriot on the death of the tenant, notwithſtanding the aſſignment.

Moor, 677. pl. 922. (*b*) If by the cuſtom it is demiſable in fee, or for life, *ſolummodo ea capienti extra manus domini*;

If by the cuſtom a copyhold may be granted for three lives, and it is granted to one (*b*) for his life, remainder to ſuch woman as he ſhall marry, and to the firſt ſon of his body; both theſe remainders are void, but the eſtate for his own life is good.

yet a ſurrender may be to the uſe of one for life, remainder in tail, remainder in fee. Cro. Eliz. 373. adjudged; though it was objected, the taking ought to be *immediate*, but the particular eſtate and remainders make but one eſtate.

(G) Of Surrenders, Preſentments, and Admittances; And herein,

1. Of the Neceſſity of a Surrender, and where the Copyholder ſhall be ſaid to be in before Admittance.

Co. Lit. 57. a. 60. b. 4 Co. 21. a. (*c*) Though a copyholder cannot alien by deed, yet he

COPYHOLDERS cannot regularly (*c*) transfer their eſtates otherwiſe than by ſurrender; the reaſon whereof is, becauſe they have only an eſtate at will, which is determined when they take upon them to grant it over; for that is a plain declaration of their intention to hold the lands no longer; therefore a ſurrender to the lord is neceſſary, who is to grant another eſtate at will

will; and this he is now compellable (*a*) to do to him, to whoſe uſe the ſurrender is made, ſeeing the tenant hath a ſettled eſtate and intereſt in the land, which his heir ſhall inherit whether the lord will or not.

that hath a right only to a copyhold, may, by deed or copy, releaſe

it to one that is admitted tenant *de facto*. Co. Lit. 59. 4 Co. 25. S. P. adjudged. Hut. 65. S. P. ſaid. Cro. Jac. 101. S. P. *dubitatur*.—But he cannot releaſe to one that ouſts him by wrong, for he gains no cuſtomary eſtate, upon which the releaſe of the cuſtomary right may enure 4 Co. 25. b. Leon. 102. But Q. whether ſuch a leaſe will not enure by way of eſtoppel againſt the copyholder himſelf. Releaſe in fee to one who was admitted for years, will not enlarge his eſtate; for no man can come to the fee of a copyhold without ſurrender and admittance by the lord. Co. Copyh. 97. 98 ——But if a copyholder ſurrenders upon condition, he may after releaſe the condition by deed. Cro. Jac. 36. [(*a*) An action on the caſe will not lie againſt the lord if he refuſe to admit. Cro. Jac. 368. 2 Bulſtr. 337. But the court of King's Bench will compel him by mandamus to admit a ſurrenderee, 2 Term Rep. 484. though not the heir. *Id.* 197. Relief in this caſe, it was formerly thought, could be had only in equity.]

Copyhold lands cannot be (*b*) exchanged by deed, but there muſt be a ſurrender and admittance thereupon: but (*c*) if there be two joint copyholders, and one of them releaſe to the other, this is good without (*d*) any ſurrender or admittance, for the firſt admittance was of them, or either of them, and their ability to releaſe was from the firſt conveyance and admittance.

(*b*) Co. Copyh. 97, 98, (*c*) Winch, 3. adjudged. (*d*) That any conveyance to the lord will paſs the

copyholder's intereſt, for the cuſtom of paſſing by ſurrender is for his benefit, which he may waive. Hut. 65. Winch, 67. Jones, 41. S. C.

Though regularly copyhold eſtates can only be transferred by ſurrender and admittance, yet if the copyholder dies, his (*e*) heir may enter before admittance, and take the profits; for perhaps there may not be a court holden in a great while afterwards: alſo ſuch heir may (*f*) ſurrender to the uſe of another before admittance, but not to prejudice the lord of his fine.

4 Co. 22. b. (*e*) And if he dies, his heir may enter. 4 Co. 23. b. —Though the lord had admitted

another. Noy, 172. adjudged. (*f*) May take the profits, bring treſpaſs, maintain ejectment, have an aſſiſe of *mortd'ancestor* before admittance. 4 Co. 23. Lane, 20. 1 And. 192. Cro. Eliz. 148. Moor, 597. Leon. 100. 3 Term Rep. 169.——But is not complete heir, for he cannot maintain a plaint in nature of an aſſiſe. Co. Copyh. 112. Moor, 272 *cont.* [He hath as complete a title without admittance as with it, againſt all the world, but the lord. 2 Term Rep. 198. If a copyhold be deviſed to the heir, his non-admittance is evidence of his election to take by deſcent, and not by the will. 1 Str. 491.]

But, if upon proclamation the heir does not come in to be admitted, the lord, without any particular cuſtom, may ſeiſe (*g*) *quouſque* the heir come in to be admitted.

Lev. 63. *per Cur.* upon a trial at bar (*g*) But,

without cuſtom he cannot ſeiſe the copyhold as forfeited. Lev. 63. *per Cur.* [See *acc.* 3 Term Rep. 162. And if in ſuch caſe he makes an *abſolute* ſeiſure, he cannot ſupport it afterwards as a ſeiſure *quouſque*. *Ibid.*—A cuſtom to ſeiſe as forfeited, for not claiming to be admitted, doth not bind the heir, if he was beyond ſea, *non compos*, or in priſon, at the time. 8 Co. 100. Cro. Ja. 226. Godb. 268.—If one of ſeveral joint-tenants comes and offers to be admitted, the lord cannot ſeiſe *quouſque*; for the ſeiſure *quouſque* is only till ſomebody comes to be admitted; and joint-tenants being ſeiſed *per my et per tout*, one of them ſupplies the whole tenure to the lord. Roe v. Hutton, 2 Wilſ 162.]

If the cuſtom of a manor be, that the wife of every copyholder for life ſhall have her free-bench *dum caſta & ſola vixerit*, after the death of the huſband, the law caſts the eſtate upon the wife, ſo that ſhe ſhall have the eſtate before any admittance, and may make a leaſe for a year, as another copyholder may.

Hob. 181. Cro. Jac. 573. 2 Roll. Rep. 178. Noy, 29. Roll. Abr. 502. S. C.

So, if the cuſtom of a manor be *quod ſi aliquis vir habet uxorem* ſeiſed in fee *ſecundum conſuetudinem manerii* of cuſtomary lands,

Moor, 271. And. 192. By the bet-

ter opinion of the books.

that he ſhall hold *ad terminum vitæ ſuæ poſt mortem uxoris per legem Angliæ*, and a copyhold tenement deſcend to a feme covert, and the huſband enter, but before admittance his wife die, yet he ſhall be tenant by the curteſy; for though the lord before admittance ſhall claim no duty as fealty, homage, relief, rent, &c., yet his delay ſhall not prejudice a third perſon.

Godb. 46. Cro. Jac. 199. [See Holder v. Preſton, 2 Wilſ. 400. S. P.]

If a man ſurrender a copyhold to the uſe of his will, by which he deviſes it to his wife for life, and that after his death, his wife or her executors ſhall ſell the land; or if the deviſe be, that ſhe ſhall chooſe two attornies, and make ſale of the land according to the beſt advantage; by theſe deviſes the wife hath but a bare authority, and there needs no ſurrender to make the ſale; for upon the nomination of the vendee he ſhall be in by the will of the deviſor.

Holdfaſt v. Clapham, 1 Term Rep. 600. Berry v. Greene, Cro. Eliz. 349. Davy v. Beardſham, 9 Mod. 75.

[The title to a copyhold relates back from the time of admittance to the ſurrender againſt all perſons but the lord: and therefore the ſurrenderee may recover in ejectment againſt the *ſurrenderor* on a demiſe laid between the times of ſurrender and admittance. Before admittance, however, the ſurrenderee can maintain no poſſeſſory action; for, before that, the eſtate is not out of the ſurrenderor; but he holds it as truſtee for the ſurrenderee. And *qu.* Whether he can maintain an ejectment againſt the lord or a ſtranger?

Roe v. Hicks, 2 Wilſ. 13.

So, in the caſe of a deviſe of a copyhold, nothing veſts in the deviſee or ſurrenderee, or in the lord before admittance; for, until then, the eſtate is in the ſurrenderor; and therefore, if a ſurrenderee be attainted of felony and executed before admittance, no forfeiture can accrue to the lord.]

2. Where the Want of a Surrender will be ſupplied in Equity.

[By ſpecial cuſtom a deviſe of a copyhold may take effect without ſurrender.

Although copyholds, by the ſtrict rule of the common law, can only be conveyed by ſurrender, yet in equity, this rule receives a relaxation, and the want of a ſurrender will be ſupplied in the following inſtances. Lit. Rep. 26. *arguend.* cites Wrot's caſe, P. 35 Eliz. C. B.]

2 Chan. Rep. 218. Abr. Eq. 122. (*a*) So, if he had refuſed; for if a man

1. In favour of purchaſers; as if *A.* contracts with *B.* for the purchaſe of a copyhold eſtate, and pays the purchaſe-money, and *B.* agrees to ſurrender the premiſes at the next court, but (*a*) dies before the next court, or any ſurrender made, equity will ſupply the want of a ſurrender (*b*).

covenants to ſurrender, equity will compel him to a ſpecifick performance, and by decree, not only bind the perſon, but likewiſe the lands. Abr. Eq. 122. —— [(*b*) It will alſo ſupply againſt the aſſignees and creditors of the party, if he becomes bankrupt. Taylor v. Wheeler, 2 Vern. 565.]

Abr. Eq. 124. admitted in ſeveral caſes.

2. In favour of creditors; as where a man deviſes copyhold lands for the payment of his debts, this ſhall be good without any ſurrender.

Abr. Eq. 123, 124. Rafter and Stock.

But, if a man ſeiſed of freehold and copyhold land, deviſes (*c*) both for the payment of debts and legacies, without ſurrendering

dering the copyhold to the uſe of his will, and the freehold is ſufficient for payment of the debts; equity will not ſupply the want of a ſurrender, and lay the legacies on the freehold, and the debts on the copyhold, as is done when there are ſimple contract creditors, and bond or judgment creditors, and perſonal aſſets not ſufficient to pay both; nor will equity ſupply the want of a ſurrender for the ſake of legatees, eſpecially if they be ſtrangers, as they were in this caſe,

decreed. (c) Where a man deviſed all his real and perſonal eſtate for the payment of his debts, Lord Chancellor refuſed to

ſupply the want of a ſurrender as to his copyholds, becauſe it did not ſufficiently appear to have been his intention to charge thoſe. Abr. Eq. 124. [But where a general deviſe of real eſtate was preceded by a direction to pay debts; and the teſtator left no real eſtate, but his copyholds, Lord Hardwicke ordered a defective ſurrender of the copyhold to be ſupplied in favour of the creditors. Tudor v. Anſon, 2 Vez. 582. By the law of courts of equity, as now received, the want of a ſurrender will be ſupplied in favour of creditors, *ſo far only* as may appear *neceſſary* for the payment of debts; and, conſequently, while any freehold eſtate remains applicable to that purpoſe, the want of the ſurrender of the copyhold ſhall not be ſupplied, notwithſtanding the expreſs intention of the teſtator to charge the copyhold rateably with, or in preference to the freehold. Drake v. Robinſon, 1 P. Wms. 443. Haſlewood v. Pope, 3 P. Wms. 322. Mallabar v. Mallabar, Ca. tem. Talb. 78. Hellier v. Tarrant, *id.* 3d edit. 188. note. Coombes v. Gibſon, 1 Br. Ch. Rep. 273. Lindopp v. Eberall, 3 Br. Ch. Rep. 188. Bixby v. Eley, 2 Br. Ch. Rep. 325.] ——That equity will not in favour of a wife ſupply the want of a ſurrender for payment of debts, when the heir at law would be diſinherited thereby. Abr. Eq. 124.

3. Equity will ſupply the want of a ſurrender in favour (*a*) of younger children againſt an heir at law; but if the caſe be ſo circumſtanced, that by that means the younger children would be in a better condition (*b*) than the heir at law, equity will not interpoſe.

Vern. 132. adjudged; and that there were ſeveral precedents of the kind.

2 Vern. 163. 1 Salk. 187. 1 Atk. 387. S. P. [(*a*) So, in favour of a wife. 1 Vez. 228. 2 Vez. 164. And this, though her intereſt be limited, and it cannot be extended to the deviſees over. Marſton v. Gowan, 3 Br. Ch. Rep. 170. (*b*) But it is not material whether the heir be totally *diſinherited by his father*, ſo that he hath ſome proviſion. Hawkins v. Leigh, 1 Atk. 387. Chapman v. Gibſon, 3 Br. Ch. Rep. 170. Pyke v. White, *id.* 286. Nor is it material (although formerly doubted, as in Roſs v. Roſs, 1 Eq. Caſ. Abr. 124.), whether the younger children are otherwiſe provided for, or not. Kettle v. Townſhend, 1 Salk. 187. Carter v. Carter, Moſ. 370. Cook v. Arnham, 3 P. Wms. 283. and Ca. temp. Talb. 35. S. C. Tudor v. Anſon, 2 Vez. 582. Pyke v. White, *ubi ſupr.* So, with reſpect to the wife. Briſcoe v. Cartwright, Gilb. Eq. Rep. 121. Smith v. Baker, 1 Atk. 386. But if the heir at law be *not a child* of the teſtator, &c. although *wholly unprovided for*, the defect ſhall be ſupplied in favour of the wife. Chapman v. Gibſon, 3 Br. Ch. Rep. 170.—If only part of the copyholds deviſed be ſurrendered, equity will ſupply the defect in favour of a younger child as to the reſidue, if it be manifeſtly the intention of the teſtator that they ſhould paſs. Banks v. Denſhaw, 3 Atk. 586. *Secùs*, if there are words in the will reſtrictive of the deviſe to the part ſurrendered. Barker v. Barker, cited *ibid.*]

As where a man deviſed his copyhold, being of the nature of *borough-engliſh*, to his eldeſt ſon, and deviſed houſes to his youngeſt; which houſes were ſoon afterwards burnt down, and never entered upon by the heir in *borough-engliſh*; as this caſe was circumſtanced, the court would not ſupply the want of a ſurrender in favour of the (*c*) eldeſt ſon.

2 Vern. 265. Cooper and Cooper decreed. (c) Such eldeſt ſon entitled to the ſame

favour that a younger child is againſt an heir at common law. 2 Vern. 163.

Nor will equity ſupply the want of a ſurrender in favour of a grandchild, much leſs in favour of any other collateral relation.

Salk. 187. pl. 6. decreed by my Lord Somers, that the want of a ſurrender ſhould be ſupplied in favour of a grandſon, it depending on the ſame

law of nature and reaſon; but reverſed in the Houſe of Lords. Preced. Chan. 475. S. C. cited, and the law and practice now according to the judgment of reverſal. [See *acc.* 2 Vez. 582. 3 Atk. 508. 2 Wilſ. 161.] *Contra*, 1 P. Wms. 61.

Abr. Eq. 223. Furſaker and Robinſon. Gilb. Eq. Rep. 139.

Alſo, in caſe of a natural daughter, the court of Chancery refuſed to ſupply the want of a ſurrender; for though the father might have great affection for ſuch child, and might by the law of nature be obliged to provide for it, yet ſuch a one was not to be conſidered as a child in law, nor will ſuch affection raiſe an uſe at law for ſuch child; for in a civil ſociety, where the ſolemnities of marriage are eſtabliſhed, it would be abſurd in the courts to allow privileges to children not born within thoſe rules.

Preced. Chan. 322. agreed by counſel on both ſides.

4. If copyhold lands are in mortgage, the (*a*) mortgagor may deviſe the equity of redemption without any ſurrender, for he has no eſtate in them whereof he can make any ſurrender.

(*a*) *Ceſtui que truſt* of a copyhold eſtate, having an equitable intereſt only, may deviſe it without ſurrender. Greenhill v. Greenhill, 2 Vern. 680. King v. King, 3 P. Wms. 358. [Macey v. Shurmer, 1 Atk. 390. Tuffnell v. Page, 2 Atk. 37. and Barnard. Ch. Rep. 9. Car v. Elliſon, 3 Atk. 73. Allen v. Poulton, 1 Vez. 121. Macnamara v. Jones, 1 Br. Ch. Rep. 481.]

Vide title *Charitable Uſes.*

5. In caſe of a deviſe to a charitable uſe, the courts of equity ſupply the want of a ſurrender, and go upon the word *appoint* in the ſtatute of *charitable uſes*.

2 Co. 17. 4 Co. 25. Cro. Eliz. 252, 443.

6. In caſe of neceſſity, as where the king, or lord of a manor grants the fee-ſimple of the copyhold eſtate to one in fee, there the copyholders cannot convey, becauſe the alienee hath no court in which he can make ſurrenders, *&c.*; but leſt this ſhould turn to the prejudice of the copyholders, Chancery ſupplies the defect, and makes good the alienation.

3. What Perſons may ſurrender.

Leon. 95. Poph. 39. *Vide* head of *Infants.*

All perſons who may make grants, or convey their eſtates, may by ſurrender paſs copyhold lands: if an infant ſurrenders copyhold lands, he may at his full age diſagree, and enter thereupon; for this is not a conveyance of equal ſolemnity with a feoffment, which works a diſcontinuance, and which notwithſtanding the infant may avoid at his full age.

Cro. Eliz. 717.

A feme covert may ſurrender lands (*b*), being ſolely examined by the ſteward; and if there be a cuſtom for her to be examined before two tenants out of the manor, it is good.

[(*b*) And this, it ſeemeth, without any particular cuſtom. 1 H. Bl. 344. "A cuſtom for a feme covert to ſurrender "her lands without the aſſent of her huſband, is bad." This was the point which the court of Common Pleas profeſſed to determine in the caſe of Stevens v. Tyrrell, 2 Wilſ. 1. But the caſe ſeems to warrant no more than an opinion, that a ſurrender by a feme covert, in which the huſband neither joins nor aſſents, cannot be good. And even this opinion is conſiderably ſhaken by the reaſoning of Lord Loughborough, C. J. in the caſe of Compton v. Collinſon, 1 H. Bl. 342-3. The point, in the caſe of Compton v. Collinſon, was, whether a married woman living apart from her huſband, under articles of ſeparation, by which he covenanted that ſhe ſhould enjoy to her own uſe all ſuch eſtates as ſhould come to her during the coverture, and that he would join in all neceſſary conveyances, and in ſurrendering the copyholds to ſuch uſes as ſhe ſhould appoint; could ſurrender the copyholds without the huſband joining, and without a ſpecial cuſtom for that purpoſe? And the court was of opinion that ſhe could; for that the wife is tenant of the copyhold, and not the huſband; that the eſtate can be forfeited or ſurrendered only by her acts, not by his; that the authority which he acquires by his marital rights to direct and control her acts, was, by his covenant in the preſent inſtance, annulled, or at leaſt, ſuſpended; and there was then no impediment to the validity of an act paſſed in the court of the manor, between her and the lord.]

Co. Lit. 50. b. Roll. Abr.

If there are two jointenants, and one of them ſurrenders his moiety to the uſe of his laſt will, and dies before the ſurrender is

is preſented, having made his will, this is a ſeverance of the jointure, for being preſented it relates to the time of the firſt ſurrender. 501. S. C.

A copyholder ſurrenders to the uſe of another, who before admittance ſurrenders to another who is admitted; no intereſt is hereby veſted in him; for the firſt ſurrenderee had (*a*) nothing in him to give over, and the admittance of the ſecond ſurrenderee did not amount to an admittance of the firſt. Yelv. 144. Browni. 143. S. C. [2 Term Rep. 484. S. P.]

(*a*) But an heir before admittance may ſurrender to another, becauſe he hath a legal eſtate and intereſt in him. 4 Co. 22. b. Cro. Ja. 36.

If there be baron and feme copyholders, to them and the heirs of the baron, and the baron die, the heir may ſurrender his reverſion into the hands of two tenants of the manor (who by cuſtom have power to take ſurrenders) before admittance, and (*b*) during the life of the feme; and this is a good ſurrender; for the reverſion was caſt upon him by deſcent, before any admittance. Roll. Abr. 500. Cro. Eliz. 662. S. C. Yelv. 145. and Browni. 143. S. P. [So, during the life of a widow who is admitted to her free-bench, the heir may incur a forfeiture of his eſtate by being attainted of felony. 1 Leon. 1.]

(*b*) If there be tenant for life of a copyhold, the remainder in fee, he in remainder may ſurrender his eſtate, if there be no particular cuſtom to the contrary. 3 Leon. 239. 4 Leon. 9. ——— Tenant for life, remainder for life to another, he in remainder enters upon tenant for life, and ſurrenders; nothing paſſes, for he is a diſſeiſor, and hath no cuſtomary eſtate in him which can paſs by ſurrender. Mod. 199. 2 Mod. 32. 2 Danv. Abr. 199. pl. 8. 205. pl. 5. [A ſurrender by an heir apparent in the lifetime of his anceſtor, whom he ſurvives, will not eſtop his heir from claiming againſt the ſurrenderee. 3 Term Rep. 365.]

4. What Perſons may accept ſuch Surrenders, and make Admittance.

A copyholder may ſurrender to a diſſeiſor, abator, intruder, tenant at ſufferance, or any others that have defeaſible titles, and their admittance will be good, and ſhall (*c*) bind him who hath right, for that ſuch particular tenants are compellable to do, and it was no more than the rightful lord muſt have done. Moor, 236. Co. Lit. 58. b. 2 Leon. 45. Owen, 27. Co. 140. Poph. 71.

Moor, 112. 3 Leon. 239. 4 Leon. 9. 2 Roll. Rep. 185. Roll. Abr. 503. 4 Co. 240. b. Vent. 360. (*c*) *A.* was tenant for life of a copyhold, the remainder to *B.* for life; and *B.* ſurrendered to the uſe of the diſſeiſor of the manor *ut dominus inde*, &c. 2 Mod. 287. *dubitatur*, Whether the right of *B.* was extinct, becauſe *A.* continuing always in poſſeſſion, the diſſeiſor had gained no reverſion in this copyhold tenement, and by conſequence was not capable of taking a ſurrender thereof to his own uſe. [It was adjudged in the Common Pleas, that the ſurrender was void, and that judgment afterwards affirmed by the court of King's Bench. Sir Thomas Jones, 153. and 2 Show. 156. 1 Ventr. 359. Skin. 28. Freem. 245. S. C. but no deciſion.]

If leſſee for life, years, or at will, a guardian, &c., accept a ſurrender, and their intereſt determine, the next lord ſhall be compelled to admit. Co. Lit. 59. b. Roll. Abr. 503.

A ſurrender to the ſteward, to the uſe of the ſteward, is good, to give the ſteward an intereſt, for the ſurrender is in truth to the lord, and not to the ſteward. Cro. Eliz. 717.

5. What Words or Acts amount to a Surrender.

(*d*) Any words ſpoken in court, expreſſing the copyholder's intention of ſurrendering, and that he deſigns not to hold it any longer, (*d*) Jones, 42. Winch, 57, 67.

(a) Hutt. 65. (b) My Lord Coke ſays, that the word *ſurrend.* is *vocabulum artis*, and therefore where a ſurrender is requiſite, no other words will ſupply the want of it; as the words, *give*, *grant*, or the like. Co. Copyh. 102. But Q.

longer, will amount to a ſurrender; as (a) if he ſays, that he is weary of his copyhold, and requeſts his lord to take it again, this is a (b) ſufficient ſurrender.

Roll. Abr. 502. Hutt. 81.

But to ſay that he renounces his copyhold is no ſurrender, becauſe he limits it to nobody; ſo if he ſays, that he is content to ſurrender, yet it is no ſurrender, for that only expreſſes his inclination to do it, not that he actually doth it.

1 Leon. 191. 1 And. 199. S. C. (c) *Note*: the communication does not appear to have been in court; and Q. Whether any words ſpoken out of court will amount to a ſurrender?

A., lord of a manor whereof *B.* was copyholder in fee, pretended that his copyholder had forfeited, and thereupon entered into communication with him about it, and it was agreed, that *B.* ſhould pay 5*l.* to the lord; and that in conſideration thereof *C.* ſhould enjoy the ſaid cuſtomary lands (except a wood) for his life, and alſo of *A.*'s wife, *durante viduitate*, and that *C.* ſhould have election, whether he would have thoſe lands aſſured to him by copy or by bill, and he choſe by bill, which was accordingly done; the court held this a good ſurrender for life only, and that the lord had the wood diſcharged of the cuſtomary intereſt, the (c) communication amounting to a ſurrender.

3 Bulſt. 80. Shephard and Adams. Roll. Abr. 501. S. C. And there ſaid, that it was no ſurrender, for that a copyhold cannot be ſurrendered by a ſurrender in law, but only by actual ſurrender. ——But in other places in Roll., as Roll. Rep. 265., Roll. Abr. 171, 172., the S. C., it is as in Bulſt., holden to be a ſurrender, and the reverſion ſtill in the copyholder.

Copyholder in fee comes into court, and there accepts a copy to himſelf for life, then to his wife for life, then to his ſon for life; this is tantamount to a ſurrender to theſe uſes; but he hath his old reverſion in him; for there is no ground to make a ſurrender of that by conſtruction, becauſe he hath made no diſpoſition of it.

Raym. 402. adjudged, and affirmed upon a writ of error. (d) But the right to it may be extinguiſhed by fine. Carter, 24. (e) If the copyholder joins with his lord in a feoffment of the manor, his copyhold is thereby extinct. Godb. 11. *Vide poſt*, letter (K).

If *A.* being ſeiſed in fee of a copyhold manor, grants certain cuſtomary lands, parcel thereof, to *B.*, *habend.* to *B.*, *C.*, and *D.*, for their lives ſucceſſively, as they are named in the grant, at the will of the lord, according to the cuſtom of the manor, and *B.* is admitted; and within the manor there is a cuſtom, that the firſt perſon in ſuch copy named may ſurrender all the lands, and thereby determine and deſtroy the title and eſtate of the other perſons therein named; and *A.* and *B.* covenant to levy a fine of the manor, and of the cuſtomary lands, by name, to the uſe of a ſtranger in fee, and the fine is levied accordingly, yet this does not amount to a ſurrender within the cuſtom, ſo as to bar the eſtate of *B.* and *C.*; for the cuſtom extends only to the copyhold eſtate, and that cannot (d) paſs by the (e) fine.

6. What Acts amount to an Admittance.

3 Bulſt. 219.

Any thing that expreſſes the lord's conſent to a ſurrender, amounts to an admittance; for if his conſent to take the ſurrenderee as his tenant appears, it does not ſeem material whether it be

be done by a *dominus conceſſit & admiſſus eſt*, or by other acts which amount to as much.

Therefore if a copyholder ſurrenders to the uſe of another, and after the lord, having notice thereof, accepts the rent from the ſurrenderee, this by implication and conſtruction of law amounts to an expreſs admittance. Roll. Abr. 505. Freſwell and Welch. *Note:* This caſe is differently reported in ſeveral books; in 3 Bulſt. 215. 237. S. C. acceptance of rent from the hands of the tenants, into whoſe hands the ſurrender was made, doth not amount to an admittance of *ceſtui que uſe*, for the lord may take the rent of them, without deſigning any thing thereby to a third perſon; but had it been ſhewn that the lord had accepted the rent as of his copyholder, then it had been a good admittance. Cro. Jac. 403. S. C. reports it, that acceptance of rent of *ceſtui que uſe* is no admittance; but by Godb. 268. S. C. that it is an admittance, the lord knowing of the ſurrender; *ſecùs* if he accepts it as a duty generally. In Bridg. 49. 52. S. C. it does not appear the lord had notice of the ſurrender when he accepted the rent. *Vide* 2 Sid. 61. S. P. *per* Twiſden *arguend.* admitted, and Style, 146. S. P. *per* Roll. Ch. Juſt.

So, if a fine (*a*) be accepted of one as of a copyholder, this amounts to an admittance. 3 Bulſt. 239. *arguendo.*

(*a*) *Secùs* if the ſteward had only aſſeſſed the fine. 3 Bulſt. 239. *arguendo.*

But if a copyholder in fee ſurrenders to the uſe of *B.* in fee, and *B.* ſurrenders to the uſe of *C.* for life, who is admitted, the admittance of *C.* ſhall not by implication be taken to be an admittance of *B.* for the admittance ought to be of a tenant certainly known by the ſteward, and entered on a roll by itſelf. Yelv. 144, 145. Wilſon and Weddal, adjudged. Brownl. 143. S. C. But *vide* Roll. Abr. 505. Cro. Eliz. 504. *cont.* and 3 Bulſt. 237. S. P. *dubitatur.*

If a copyholder, according to the cuſtom of the manor, ſurrenders into the hands of two cuſtomary tenants to the uſe of *J. S.* and his heirs, and this is preſented at the next court, and by the ſteward entered in the rolls of the court, in theſe words, *viz. ad hanc curiam compertum eſt per homagium*, that the copyholder *ſurſum reddidit, &c., ad uſum J. S. & hæredum ſuorum*, and the ſteward afterwards delivers a copy thereof to *J. S.*, yet this does not amount to an admittance; for here is no act done by which it appears the lord hath conſented that *J. S.* ſhould be admitted, or that he ſhould have the land according to the ſurrender. Bridg. 81, 82. adjudged. Poph. 127. S. C. adjudged. 3 Bulſt. 237. *adjornatur*; and after ended by mediation of friends.

If a woman that hath right to her free bench, comes into court, and prays to be admitted, and is (*b*) denied, (ſuppoſing nothing veſts in her before admittance,) the law will ſupply the admittance. (*b*) Hob. 181. Noy, 29. If the ſteward refuſes to admit, but the ſurrenderee enters, and occupies the land; in an ejectment brought by the lord, he may well plead not guilty. Yelv. 16.

7. Of the Conſtruction to be made when the Surrender, Preſentment, and Admittance differ.

If *A.* ſurrenders for life, and the admittance is in fee, the eſtate of the copyholder is according to the ſurrender, not according to the admittance; for the lord hath only a cuſtomary power to make admittances according to the ſurrender; and ſo far as he executes that power the admittance is good; but where he Co. Copyh. 110. 4 Co. 28. b.

he goes beyond that power, he acts without a warrant, and then his acts are void.

Co. Copyh. 110. So, if the surrender be absolute, and the admittance conditional, the admittance is good, and the condition void; for when the lord acts according to his power in one thing, but beyond it in another, for what he acts according to his power he hath a warrant; but for what he acts beyond it he hath no warrant, and so it is void.

4 Co. 25. Roll. Abr. 501. If a conditional surrender be presented, and the steward in entering thereof omits the condition, (*a*) upon sufficient proof thereof the surrender shall not be avoided, but the roll shall be amended.

(*a*) So, the mis-entry of the date of the court shall not prejudice the copyholder, but he may give in evidence the truth of the matter, and shall not be bound by the Rolls. Leon. 290.

Co. Copyh. 110. If the surrender be to the use of *J. S.*, and the lord admits *J. N.*, this is void; and he afterwards may admit *J. S.* So if he admits *J. S.* and a stranger, *J. S.* takes all, for the stranger's admittance is void.

Lex Custom. 137. 4 Co. 29. Cro. Jac. 403. If a surrender be made, and there is a wrong presentment of this surrender, if the admittance is according to the surrender it is (*b*) good.

(*b*) For an admittance upon a surrender without any presentment at all, is good; and a void presentment is as none. Co. Copyh. 105.

8. Of the Time of making the Surrender, Presentment, and Admittance, and where they shall be effectual, though any of the Parties die before they are completed.

Co. Copyh. 105. Style, 275. By the general custom of manors every surrender ought to be presented on the next court-day after it is made; but, by the special custom, it may be good, if done on the second or third court-day: the reason hereof is to prevent disputes, and for the security of purchasers, who may be otherwise defeated, if it were admitted to have an old surrender trumped up, and presented at any time.

4 Co. 29. Cro. Jac. 403. S. P. 3 Bulst. 214. S. P. adjudged. Roll. Abr. 501. S. P. If a copyholder in fee surrenders our of court, and dies before it is presented in court, yet the surrender being presented after his death, according to the custom, is good.

Co. Lit. 62. Cro. Jac. 403. 3 Bulst. 214. So, if the customary tenants, by whose hands the surrender was, die, yet if the surrender be presented, upon good proof thereof, it will be sufficient.

adjudged, the custom being found generally, that it must be presented at the next court, without saying by whom. 4 Co. 29. b.

4 Co. 25. a. 29. b. 2 Sid. 38. 61. Dyer, 192. So, if he to whose use the surrender was, die before admittance, yet his heir shall be admitted; for upon admittance the estate is in *cestui que use* from the surrender, by relation.

(H) Of the Operation of the Surrender in paſſing the Eſtate: And herein,

1. Of the Perſons to take, and what ſhall be ſufficient Certainty in the Deſcription of them.

SURRENDERS have the ſame operation and effect in paſſing copyhold eſtates, as grants have at common law, and muſt regularly be directed by the rules and maxims of the common law, in the transferring thereof. Co. Copyh. 97. Cro. Jac. 376.

If a copyholder ſurrenders to the uſe of the right heirs of *J. S.*, he being (*a*) alive, the ſurrender is void; for it cannot take effect *in præſenti* as he would have it. Leon. 102.

(*a*) If a man ſurrenders to the uſe of his own right heirs, whether the lord ſhall not hold it till his death, *Qu.* and *vide* Co. Copyh. 97. Lit. Rep. 17, 18.———If a ſurrender be made to the uſe of *B.* and his heirs, to the uſe of ſuch perſon as *A.* ſhould name by his will; *Q.* Whether ſuch perſon can take? 2 Bulſt. 274.

If *B.*, a copyholder, ſurrenders into the hands of the lord, by the hands of tenants, according to the cuſtom, *&c.*, without ſaying to whoſe uſe the ſurrender ſhall be; and at the next court *B.* is admitted, *habend.* to him and his wife in tail, the remainder to the right heirs of *B.*; the ſubſequent admittance explains the general ſurrender, and the wife ſhall take by the ſurrender, though not named in the premiſes, but in the *habendum* only; though it was agreed it was otherwiſe in feoffments and grants at common law. Poph. 125. adjudged. Cro. Jac. 434. S. C. 2 Roll. Abr. 67. S. C.

A man may ſurrender copyhold lands immediately to the uſe of an infant *in ventre ſa mere;* for a ſurrender is a thing executory, and nothing veſts before admittance; and therefore if there be a perſon to take at the time of the admittance, it is ſufficient, and not like a grant at common law, which putting the eſtate out of the grantor, muſt be void, if there be nobody to take. Co. Copyh. 9. Roll. Rep. 109. 138. 253. *Vide* Moor, 637. *cont.*

A copyhold is granted to the father and his ſon, he having but one ſon, this grant is good, for the apparent certainty of it; but if the father hath (*b*) ſeveral ſons, or if a ſurrender be to the uſe of a man's couſin or friend, or to the uſe of *J. S.* or *J. N.*, all theſe ſurrenders are void for incertainty. Cro. Jac. 374. Co. Copyh. 95. *vide*; and whether ſuch uncertainty may be helped by any averment.

[(*b*) That a ſurrender of a copyhold to uſes is not to be conſtrued with the ſame ſtrictneſs as a common law conveyance, was expreſsly determined by two judges againſt Holt, C. J. in the caſe of Fiſher v. Wigg, 1 P. Wms. 14. 1 Ld. Raym. 622. 2 Vez. 257.; but ſee Idle v. Cooke, 1 P. Wms. 70. The diſtinction, however, hath been recognized in later caſes. Rigden v. Valliere, 2 Vez. 257. Goodtitle v. Stokes, 1 Wilſ. 341.]

If a ſurrender be made to the lord, without expreſſing any uſe, it ſhall be to the uſe of the lord; for it cannot be imagined that the ſurrender was made to no end or purpoſe whatſoever. Co. Copyh. 95. 2.

2. What ſhall be ſaid to paſs by the Surrender.

In this likewiſe the ſame rules obtain as in the expoſition of grants; for a man may, with the ſame certainty in a ſurrender, deſcribe whatever he intends to paſs, as he may in any other conveyance.

A man

3 Leon. 18. A man ſeiſed of copyhold lands, deviſed part thereof to his wife for life, the remainder to his brother and his heirs; and afterwards, in the preſence of three perſons of the court, ſaid to them, I have made my will as I will have it, and here I ſurrender all my copyhold lands into your hands accordingly; in this caſe only thoſe mentioned in his will ſhall paſs; for he had reſpect to that in making his ſurrender, and he ſaid, he ſurrendered all his copyhold lands accordingly; which ſhewed his intent was to paſs thoſe lands that were deviſed by the will only.

Dyer, 251. (*a*) A ſurrender of a houſe *cum pertinentiis* will paſs only the houſe, *A.* covenants with *B.* to aſſure him all his copyhold lands, and after he ſurrenders divers parcels by name, and ſome by abuttals and boundings; at the next court the ſurrender is preſented and enrolled, but with this addition, by the name of all his copyhold land; there no more ſhall paſs than what was (*a*) named in the ſurrender.

orchards, yards, and not the lands; for copyhold and freehold, as to this, muſt be conſtrued alike. Cro. Jac. 526. adjudged. Kitchen, 81. Co. Copyh. 93.

3. What Eſtate or Intereſt paſſes by the Surrender.

4 Co. 21. b. Roll. Abr. 828. A copyholder having a fee-ſimple, according to the cuſtom of the manor, may make what diſpoſition of it he pleaſes, and may ſurrender it abſolutely, or for any limited time.

1 Roll. Rep. 109. 138. 253. Co. Copyh. 97. But ſuch diſpoſition is not to receive the ſame favourable interpretation that wills and deviſes do at common law; for a man may as well order a ſurrender in his life-time, according to the rules of law, as he may any deed to paſs a freehold eſtate.

Cro. Car. 366. Brownl. 127. Noy, 152. adjudged. Therefore, if a copyholder in fee ſurrenders to the uſe of *A.* and *B.*, and the longer liver of them; and that for want of iſſue of *A.* the lands ſhall remain to the youngeſt ſon of *J. S.*; in this caſe *A.* has but an eſtate for life, for an eſtate-tail in copyhold lands ſhall not paſs by implication.

Cro. Jac. 376. Sympſon and Southern, adjudged. Bulſt. 272, 273. S. C. Roll. Rep. 109. 137. 253. S. C. adjudged. So, if a copyholder ſurrenders, (*b*) *habend. a tempore mortis* of the copyholder, to the uſe of another and his heirs, this is merely void; for a copyholder in fee can no more ſurrender, *habend.* after his death, than a tenant in fee can convey his lands, *habend.* after his death; for then he ſhould leave a particular eſtate in himſelf, which is (*c*) againſt the rules of law.

Godb. 264. S. C. adjudged, that a ſurrender can no more commence at a day to come, than a livery. (*b*) So, if he ſurrenders *poſt mortem ſuam in manus domini ad uſum*, &c. 4 Leon. 8. Cro. Eliz. 29. Roll. Rep. 254. Bulſt. 274. Godb. 451. (*c*) For this *vide* Roll. Abr. 828.

4 Co. 29. b. (*d*) The ſurrender was to the uſe of a ſtranger for ever, and the lord admitted the ſurrenderee, *habend.* to him and his heirs, and what eſtates he had, Godb. 137., *dubitatur.* If the limitation of the uſe be (*d*) general, then *ceſtui qui uſe* taketh but an eſtate for life; for copyhold eſtates, as a neceſſary conſequence upon the cuſtom, ſhall be directed by the rules of law, unleſs within the manor there be a ſpecial cuſtom to the contrary; as that *ſibi & ſuis*, or *ſibi & aſſignatis*, or ſuch like words, ſhall create a fee.

Sand. 149. Sid. 360. 2 Keb. 341. If *A.* be tenant for life, the remainder to *B.* in fee of copyhold lands, and *B.* ſurrender to the uſe of *A.* for his life, the remainder

mainder to *C.* this ſhall enure as an immediate ſettlement upon *C.*, and not by way of remainder; for though it is void as to *A.*, and his eſtate is not increaſed thereby, yet being in the nature of a limitation of an uſe, the intereſt veſts in *C.* immediately. S. C. adjudged.

4. Of the Power and Authority of the Lord and Steward, and therein of the Difference of their Acts.

Every lord of a copyhold manor hath, as (*a*) incident to ſuch manor, a court, which he is (*b*) compellable to hold for determining the (*c*) controverſies of his (*d*) tenants, accepting their ſurrenders, &c.

(*a*) If there is an honour conſiſting of ſeveral manors, and there are ſeveral copyholders belonging to the ſeveral manors, though there is but one court held for them, yet they are *quaſi* ſeveral and diſtinct courts Cro. Car. 366. Jones, 342. S. C. (*b*) Not by action on the caſe, but by *ſubpœna* in Chancery. Cro. Jac. 368. 2 Bulſt. 336. (*c*) A copyholder ſurrenders to the uſe of *A.* in truſt, that he ſhall hold the land until he hath levied a certain ſum of money, and that afterwards he ſhall ſurrender to the uſe of *B.*; the money is levied; *A.* refuſes to ſurrender; *B.* exhibits a bill to the lord of the manor againſt *A.*, who, upon hearing the cauſe, decrees againſt *A.* that he ſhall ſurrender; *A.* refuſes; the lord may ſeiſe, and admit *B.*, for he is chancellor in his own court. 1 Leon. 2. (*d*) But not where he is a party intereſted himſelf. Salk. 185, 186.

The lord himſelf may make admittances or grants at any place (*e*) out of the manor, for he is not confined any more than any other perſon, from granting an eſtate at will when he pleaſes. 4 Co. 26. b. Co. Lit. 59. a. b. (*e*) But a copyholder cannot ſurrender to the lord into the hands of tenants, &c. out of court, without a particular cuſtom. Co. Lit. 59.

But it being only cuſtom which enables the ſteward to make ſuch admittances or grants, that which he doth he muſt do (*f*) upon the manor, (*g*) unleſs there be a cuſtom to keep a court out of the manor. 4 Co. 26. b. 27. a. (*f*) But of this there are diverſity of opinions.

By Co. Copyh. and 4 Co. 26, 27. Roll. Abr. 527. The ſteward cannot make any grants or admittances at a court held off the manor. By Cro. Eliz. 103. If the lord grants the freehold of the copyhold lands, the grantee may hold a court where he will to make admittances and grants. By Co. Copyh. 121. Leon. 289. Roll. Abr. 505. The ſteward may make admittances at a court holden off the manor. By Cro. Ja. 526. Surrenders to the ſteward out of court, adjudged good; and by 1 Salk. 184. a ſteward of a manor, with power to make a deputy, makes *B.* his deputy: *B.*, by writing under his hand and ſeal, makes *C.* his deputy to take a ſurrender of *G.* *C.* takes the ſurrender out of court, and well. Ld. Raym. 658. S. C. Com. 84, 85. S. C. 12 Mod. 466. S. C. There is as much reaſon that the ſteward ſhould take ſurrenders out of the manor as the lord; *per Cur.* (*g*) As if a lord being ſeiſed of two or three manors, hath, time out of mind, within one of his manors, kept courts for all his ſaid manors, &c. Co. Lit. 58. Cro. Car. 367.

A ſteward retained by parol is a good ſteward to (*h*) all intents and purpoſes, either to take ſurrenders or make admittances upon voluntary grants; but if the retainer be (*i*) general, the lord may diſcharge him at pleaſure. 4 Co. 30. b. Cro. Jac. 536. Godb. 142. Leon. 227.

(*h*) Things of neceſſity done by a ſteward, though he acts by a counterfeit authority, or one that is voidable, are good; as admittances upon deſcent or ſurrender; for if in ſhew and appearance he is ſteward, it is ſufficient, for he acts only as cuſtom's inſtrument. Co. Copyh. 124. But voluntary grants by ſuch a ſteward are not good; ſo, if a lord commands his ſteward not to grant ſuch lands by copy, and he doth, it is void; ſo, if in his grants he diminiſhes the ancient rents and ſervices. Co. Copyh. 125.—Alſo, if one, who has no manner of pretence or colour for keeping courts, aſſumes the ſteward's place, whatever he doth will be void, eſpecially if a precept be not given to the bailiff of the manor to give him warning. Co. Copyh. 125, 126. (*i*) But a general retainer by patent is for life. 4 Co. 30.

A ſteward

Co. Copyh. 129. Noy, 2. 29. (a) The grant of a ſtewardſhip to an infant

A ſteward cannot *de communi jure* make an under-ſteward, unleſs he have power by his patent, or be an infant, that hath the office by (a) deſcent, or a perſon of that quality, that it will be a diſgrace to him to hold the courts; as if he be an earl, &c. in reverſion, *exercend. per ſe vel per ſufficient. deputat. ſuum*, held good. Cro. Car. 556.

Cro. Eliz. 48. Leon. 289. S. C. ill reported. (b) A copyholder being in *Ireland*, the ſteward of a man made a commiſſion to one to receive a ſurrender from him there; and it was holden a good ſurrender. 4 Leon. 111.——If one cannot come into court to ſurrender in perſon, the lord may appoint a ſpecial ſteward to go to him and take the ſurrender. Leon. 36.

A lord of a manor makes a ſteward *ad exequend. per ſe vel ſufficient. deputat. ſuum*, who makes *A.* his deputy *hâc vice* to take a ſurrender of baron and feme, to the uſe of the baron and feme for their lives, remainder over in fee, & *ulterius ad faciend. & exequend. quantum in me eſt;* it was holden, that the deputation (b) *pro hâc vice* was good, and that, by force of the words & *ulterius*, &c. the lord was to grant the copyhold to the baron and feme for life, with remainder over, notwithſtanding the conditional ſurrender to the deputy.

(I) Of Fines payable by Copyholders: And herein,

1. Where a Fine ſhall be ſaid to be due, and by whom, and to whom payable.

[(c) It is due, it ſeems, without any ſpecial cuſtom.

A Fine may be due by cuſtom on every change (c) of the tenant, whether by act of God or the party, and on every change of the lord, by act of God (d) only.

Dougl. 729. But Lord C. B. Gilbert queſtions whether it be due without a particular cuſtom, upon the alteration of the lord by death. Gilb. Ten. 275. The executor of a copyholder, for a long term of years, is compellable to be admitted, and to pay a fine. Earl of Bath v. Abney, 1 Burr. 260. The great point of this caſe was, whether the fine became due *on change of the tenant*, or *on change of the eſtate* only.] Co. Lit. 59. b. Roll. Abr. 562. (d) For a cuſtom to have a fine on the change of the lord of the manor, by alienation or demiſe, is againſt law; for by this means the tenant might be oppreſſed by a multitude of fines. Co. Lit. 59. b.

Duke of Somerſet v. France, 1 Str. 654. Fort. 41.

[Where by the cuſtom of a manor, general fines are due on the death of the laſt admitting lord; huſband, tenant for life under a marriage-ſettlement, is entitled to a fine upon the death of his wife, the laſt admitting lady.]

Roll. Abr. 505. 9 Co. 107. Co. Copyh. 157.

If a copyholder in fee ſurrenders to the uſe of one for life, and tenant for life dies, he may enter without any new admittance, or paying any fine, for he has his old eſtate in him.

Roll. Abr. 505. Moor, 358. 465. Cro. Eliz. 504. S.C. 3 Lev. 308. S. P. adjudged.

If a copyholder in fee ſurrenders to the uſe of one for life, the remainder to another for life, remainder to another in fee, by this but (e) one fine is due, for the particular eſtates and remainders are but one eſtate.

[(e) In Ventr. 260. it is reſolved, that the lord may aſſeſs one fine for the particular eſtate, and another for the remainder. And in the ſame caſe, 1 Mod. 120. Holt, C. J. ſaith, "If a fine be aſſeſſed for the whole eſtate, there is an end of the buſineſs: but if a fine be aſſeſſed only "for a particular eſtate, the lord ought to have another."]

3 Leon. 9.

Tenant for life, and he in remainder join in a grant of their copyhold, but one fine is due; for if a ſurrender be made, and after-

after a recovery be had by plaint, in nature of a writ of entry in the poſt, for the better aſſurance, &c., but one fine is due.

Tenant in (*a*) dower, or by the curteſy, of copyhold lands where the cuſtom allows of ſuch eſtates, ſhall pay a fine. Co. Copyh. 154, 155.

(*a*) In caſe of a widow's eſtate, it is ſaid to be reſolved and agreed in Lex Cuſtomar, 156., that no fine is due; but qu. of this; for though the eſtate be adjudged in the woman, yet that is no argument ſhe ſhall pay no fine; for the eſtate is in the heir by deſcent, and yet he ſhall pay a fine.

If there be a cuſtom for a copyholder's lands to be extended, the extendor, upon his admittance, ſhall pay a fine. Co. Copyh. 154, 155.

If there are two jointenants of copyhold lands, and one dies, the ſurvivor ſhall have all without admittance or paying a fine. Co. Copyh. 158.

[But tenants in common ſhall be ſeverally admitted, and pay ſeveral fines. 1 P. Wms. 21. 1 Ld. Raym. 631.

The lord is entitled to a fine from the aſſignees of a bankrupt; to avoid which, it was recommended by Lord *Hardwicke* to except copyholds out of the deed of aſſignment, that when a purchaſer ſhould be found, the commiſſioners might aſſign to him in the firſt inſtance.] Drury v. Mann, 1 Atk. 95.

2. At what Time and Place payable.

No fine is due, either upon a (*b*) deſcent or ſurrender, (*c*) till admittance, for that is the cauſe of the fine; and therefore, if (*d*) after, the tenant deny to pay, it is a forfeiture. Roll. Abr. 506. 4 Co. 28. a. Hob. 135. Co. Copyh. 160. 2 Wilſ. 401.

(*b*) And therefore if the heir waves the poſſeſſion, and refuſes to be admitted, ſhe ſhall pay no fine. Sid. 58. If the heir, as he may, ſurrenders before admittance, qu. Whether the lord be obliged to admit the ſurrenderee before the heir has paid his fine? and if he does, what remedy the lord has afterwards for ſuch fine? *Vide* 4 Co. 22. b. 23. b. Leon. 174.—[(*c*) In ſome manors no fine is due upon the admiſſion of the heir. 3 Term Rep. 162. *A fortiori*, not upon a mere covenant by the copyholder to ſurrender, though ſuch covenant be preſented by the homage. Rex v. Lord of the Manor of *Hendon*, 2 Term Rep. 484.] (*d*) If the fine be uncertain, the tenant is not bound to pay it preſently, becauſe he could not tell what it would be; but he muſt pay it in convenient time, elſe the lord may appoint a day for him to pay it in; but a fine certain he muſt pay preſently upon admittance. 4 Co. 28. a. 13 Co. 2. Co. Copyh. 160.—But by Cro. Eliz. 779., Moor, 622., when a fine is certain, the heir ought to tender it upon his prayer to be admitted.

Although the admittance of tenant for life, is an admittance of him in remainder to veſt the eſtate in him; yet the lord, where by cuſtom he is entitled to a fine from ſuch remainder man, ſhall not have it before the death of tenant for life, for then the remainder man becomes his tenant. 4 Co. 22. Mod. 120.

[As the lord may aſſeſs a fine out of the manor, ſo alſo may he make it payable out of the manor.] Yaxley v. Rainer, 1 Ld. Raym. 44.

3. Of the Certainty and Reaſonableneſs of the Fine.

Fines (*e*) uncertain muſt be (*f*) reaſonable, and (*g*) their reaſonableneſs ſhall be diſcuſſed (*h*) by the juſtices, (*i*) upon the true circumſtances of the caſe, for (*k*) if the fine is unreaſonable, the copyholder is not bound to pay it. Co. Lit. 59. b. 60. a.

(*e*) A few inſtances of uncertain fines ſhall not deſtroy the cuſtom for fines certain. Godb. 265. For there are ſcarce any copyholds on the rolls of which it does not appear, that ſometimes more, and ſometimes leſs has been paid. Lit. Rep. 252. *Vide* 2 Bulſt. 32. (*f*) What ſhall be adjudged a reaſonable fine or not, *vide* 13 Co. 3. Roll. Rep. 75. Cro.

Cro. Car. 196. Cro. Jac. 671. And where lords ſhall be reſtrained in equity from demanding arbitrary and unreaſonable fines. 2 Chan. Rep. 134. 2 Vern. 367. Abr. Eq. 120. [A bill in equity cannot be brought by a ſingle copyholder to be relieved againſt an exceſſive fine, in regard the fine inſiſted on to be exceſſive, ought to be tried by a jury. But Lord Chancellor King admitted, that a bill might lie in order to ſettle a general fine to be paid by all the copyhold tenants of a manor, to prevent a multiplicity of ſuits. Cowper v. Clerk, 3 P. Wms. 156.] (*g*) The lord is not bound to aver or ſhew that the fine aſſeſſed is reaſonable; but it is on the copyholder's part to ſhew from the circumſtances of the caſe, that it is unreaſonable. Hob. 135. (*h*) For this *vide* Roll. Abr. 123. 2 Roll. Abr. 578. (*i*) Appearing upon demurrer, or upon evidence to a jury, upon confeſſion or proof of the yearly value of the land. 4 Co. 27. [The court and jurors ſhall be judges of the fine without ſuit in Chancery. Moor, 623. But the modern practice is to reſort to equity. Dougl. 726-7.] (*k*) 4 Co. 27. b. S. P.

13 Co. 3. *Vide* 2 Bulſt. 32. [The lord cannot at this day ſet a fine at more than *two years value* upon an admittance on an alienation. *Per Cur.* 2 Wilſ. 401. And two years improved value, without any deduction, for the land-tax, is now fixed as the ſum aſſeſſable for an arbitrary fine. Grant v. Aſtle, Dougl. 727.]

Two years value for a fine for an admittance upon a ſurrender, was adjudged to be unreaſonable; but in caſes where copyholds are only for life, and come into the lord's hands, there the intereſt paſſes from the lord, and ſo *arbitrio domini res æſtimari debet*; but in caſe of a ſurrender he is only an inſtrument.

Carth. 12. adjudged between Parkins and Titus. 2 Show. 507. pl. 471. Skin. 247. pl. 2. Comb. 43. 3 Lev. 255. 3 Mod. 132. S. C. [That the fine was to be according to the *improved* value was ruled by Lord Hardwicke, C. J. at *niſi prius*. Halton v. Haſſel, 2 Str. 1042.]

A cuſtom to pay on admittance *tantam denariorum ſummam, quantam terræ vel tenementa valebant tempore talis admiſſionis, & non amplius*, is a good and reaſonable cuſtom, although objected, that the value of land is uncertain, and it would be in the power of the tenant to make the fine of a very low value, by not cultivating the land.

4 Co. 28. a. Hubard and Hammond. Cro. Eliz. 779. Moor, 622. S. C. reſolved by the name of Dalton and Hammond. See *acc.* Dougl. 722.

Where a copyholder hath ſeveral parcels of land by ſeveral tenures, the lord ought to aſſeſs and demand his fine ſeverally for both; for the fine for one may be reaſonable, and for another unreaſonable; and if ſuch a copyholder ſurrenders to the uſe of another, and he is admitted *tenend. per antiqua ſervitia*, the fine muſt be ſeverally aſſeſſed.

[4. Remedy for the Fine.

1 Lutw. 597. Cliff, 244. 3 Lev. 261.

If a copyholder refuſe payment of a fine, debt lies againſt him. And it will lie at the ſuit of the lord's executor.

Whitfield v. Hunt, Dougl. 727. n. Grant v. Aſtle, *id.* 731. n.

General *indebitatus aſſumpſit* will alſo lie. But in *aſſumpſit* for the recovery of an arbitrable fine, the plaintiff muſt prove that the ſum ſtated in his count to have been aſſeſſed, amounts to two years value of the eſtate, becauſe he cannot recover a leſs ſum than that laid in the declaration.

Id. ibid.

If the action be for ſeveral fines, the declaration may ſtate generally, that the defendant was indebted to the plaintiff in ſuch a ſum, (*viz.* the amount of all the fines due,) for reaſonable fines due and payable to him. But if, in ſuch caſe, any count ſtate *one* fine, although the others ſtate *ſeveral*, and there are entire damages, and judgment for the plaintiff, it is error.

And

And assumpsit will lie for a fine assessed on the admission of an infant, as it seemed to *Yates*, J., *whilst he is an infant;* but certainly after he comes of age, and continues to enjoy the estate.] Evelyn v. Chichester, 3 Burr. 1717.

(K) Of the Extinguishment of the Copyhold: And herein,

1. Where the whole Copyhold shall be extinguished or suspended.

IF a copyholder in fee (*a*) accepts a lease for years of the (*b*) same land from the lord, this determines his copyhold estates. 2 Co. 16. b. Godb. 11. 101. Moor, 184. and *vide* 2 Leon. 72. Lev. 70. Latch. 213. Cro. Jac. 84. 3 Bulst. 81. Brownl. 32. 4 Co. 31.

(*a*) So, if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is extinct. 2 Co. 17. Leon. 170. And. 191. Goulst. 34. Roll. Abr. 510. S. C.

(*b*) But if he takes a lease for years of the manor, that is only a suspension of his copyhold during the term. *Per* Cro. Jac. 84. Sav. 70. But *per* Cro. Eliz. 7. Moor, 185. it is extinguished.——But the lessee may re-grant the copyhold again to whom he pleases. 4 Co. 31. b.——If the copyholder joins with his lord in a feoffment of the manor, his copyhold is thereby extinct. Godb. 11.

If a copyholder accepts to hold of his lord by bill under the lord's hand, this determines his copyhold: so, if he accepts an estate for life by parol, if livery be made; otherwise, not; for else nothing but an estate at will passes, which cannot merge an estate at will. And. 199. Latch. 213.

If a copyholder release to his lord, this extinguisheth the copyhold: so, if the lord sell the freehold of the inheritance of the copyhold to another, and then the copyholder (*c*) release to the purchaser, this extinguisheth the copyhold interest. Hut. 81. Keb. 808. Leon. 102. Cro. Eliz. 21.

(*c*) For though a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's mind to hold the land no longer; and the rule is, that any thing amounting to a determination of the copyholder's will to hold no longer, extinguisheth his copyhold. *Vide* the authorities *supra*.

If *A.* is tenant in tail of a copyhold, and it is found, that by the custom it cannot be barred but by seizure of the lord, for forfeiture, & *non aliter nec alio modo*, and *A.* accepts a feoffment of his copyhold lands; the copyhold is suspended but not destroyed, *quoad* his issue: but if *A.* afterwards levies a fine of the land, though the copyhold interest cannot pass, yet it may be barred and extinguished by the fine. Carter, 6. 22, 23. Taylor and Shaw, adjudged. If one seised of a manor in right of his wife, lets lands by

indenture for years, this doth not destroy the custom as to the feme; for, after the death of her husband, she may demise it by copy again. Cro. Eliz. 459.——A copyholder intermarries with the feme seignoress, this is no extinguishment, but only a suspension. Sav. 66. Co. Copyh. 172.——So, if the copyholder hath the manor in execution. Co. Copyh. 172.

If a copyholder bargains and sells his copyhold to the lessee for years of the manor, his copyhold is thereby extinguished. Hut. 65. Winch. S.C. adjudged.

1 Jones, 41. S. C. adjudged; for, that in respect of the lord his estate may be determined by any act that shews it to be the will of the tenant to hold no longer by copy.

2 Sid. 82. If a copyhold is in the hand of a ſubject, who after becomes king, the copyhold is extinct; for it is below the majaſty of a king to perform ſuch ſervile ſervices; yet after his deceaſe, the next that hath right ſhall be admitted, and the tenure revived.

2 Co. 17. [4 Co. 24. b. Cro. Eliz. 103. 252. 2 Leon. 208.] The ſeverance of the freehold, and inheritance of the land holden by copy of the manor, does not (*a*) extinguiſh or determine the copyhold eſtate; for the cuſtom hath eſtabliſhed his eſtate, ſo that the lord cannot ouſt him ſo long as he pays and performs his cuſtoms and ſervices.

(*a*) But ſuch copyholder cannot after alien otherwiſe than by decree in Chancery; by which it is ſaid, the intereſt in the land is not bound, but the perſon only. 4 Co. 25. a. Cro. Eliz. 252.

4 Co. 26. b. adjudged. *Vide* Cro. El. 395. and 443. By which laſt report it appears he had copyholds in other places granted. If a lord of a manor, having (*b*) many ancient copyholds in a town, grants the inheritance of all thoſe copyholds to another, the grantee may keep a court for the cuſtomary tenants, and accept ſurrenders, and make admittances and grants; for though it is not a manor in law for want of freeholders, yet as to the copyhold tenants, the grantee hath ſuch a manor that he may keep courts.

(*b*) Diverſity where the inheritance of many, and whereof one ſingle copyhold only is granted. 4 Co. 27. a.

2. Where Part only, or what is incident to it, ſhall be extinguiſhed.

Sav. 66. Co. Copyh. 172. If a copyholder hath had time out of mind, *&c.* a way over another's copyhold, and he purchaſes the inheritance of his own copyhold, yet the way remains.

8 Co. 63. Moor, 811. S. C. adjudged. Brownl. 231. S. C. adjudged, becauſe the leaſe being for years, the trees excepted remained parcel of the manor; otherwiſe, if the leaſe had been for life. If the king is ſeiſed of a manor, parcel of the duchy, in which by the cuſtom copyholders may take fire-wood, *&c.* growing upon their copyholds, to be ſpent in their houſes, and for fences, *&c.*, and by leaſe under the duchy ſeal he demiſes the manor, *exceptis omnibus boſcis, ſubboſcis, arboribus, & maerem., &c.*, for twenty-one years, and after grants the reverſion *& præmiſſa ſic except.* to *J. S.* and his heirs; and after the aſſignee of the leſſee makes a voluntary grant of a copyhold for life, according to the cuſtom of the manor; this grantee ſhall have the eſtovers; for the eſtate of the copyholder is not derived out of the eſtate of the lord, for he is but an inſtrument to make the grant; but by the cuſtom of the manor it is eſtabliſhed and made firm to the grantee.

8 Co. 63. reſolved *per Cur.* Moor, 812. S. C. Brownl. 211. S. C. [By a grant of a manor with an exception of So, if copyholders for life, according to the cuſtom, have uſed to have common in the waſte of the lord, or eſtovers in his woods, or other profit apprender in any parcel of the manor, and the lord aliens his waſtes or woods, *&c.* to another in fee, and after grants a copyhold meſſuage, *&c.* for life, ſuch grantee ſhall have common, eſtovers, *&c.*, notwithſtanding the ſeverance; for the title of the copyholder is paramount, and the cuſtom unites the common, *&c.*, which are but as acceſſories or incidents, long

so long as the messuage, &c., being the principal, is maintained by the custom. the wastes, the wastes are severed

from the manor, though the copyholder continues to have a right of common thereon by immemorial custom. And after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands, when inclosed, will be freehold, and not copyhold. Revell v. Johnson, 2 Term Rep. 415.]

If by custom all the copyholders for life have common in the (*a*) waste of the lord, and the lord grants and confirms to one of them and his heirs, all his copyhold messuage and land *cum pertinentiis*, he shall not have common; for by the custom, that was annexed to his customary estate, which being destroyed by his own act in making it a freehold, his common is destroyed also, and cannot continue without (*b*) special words. Cro. Jac. 253. Marsham and Humber, adjudged. Yelv. 189, 190. S. C. Noy, 136. Bulst. 2. Brownl. 220. 2 Brownl. 209. S. C. adjudged; though the lord granted the messuage, &c. and all common thereto appertaining, for the common appertained to the customary estate, which is determined. Cro. Jac. 253. cited. (*a*) Otherwise if they have common in the soil of a stranger. 2 Sid. 84. *per* Glin. Hob. 190. (*b*) *Viz.* All commons before used. Bulst. 2. *Vide* 2 Vern. 250. where it was decreed, that the copyholder should enjoy the common before, though it was extinct at law.

[Where a copyholder claims common in the wastes of a manor, it properly and strictly belongs to his estate, and if he enfranchise his copyhold, in that case his common is lost: but where he claims it out of the manor, it belongs to the land, and not to the estate, and if he enfranchise the estate, the common continues.] 1 Salk. 366. *per* Holt, C. J.

(L) Of Forfeiture: And herein,

1. Of Forfeiture for Non-attendance at Court, and not doing Service.

IF a copyholder, being (*c*) duly summoned, refuses to appear in court, it is a (*d*) forfeiture of his copyhold; for unless the copyholders attend, there can be no court holden. Roll. Abr. 506. (*c*) By some opinions, a general warrant within the parish is sufficient; but now by the better opinion, a general notice is not sufficient, but there must be a personal summons to make a forfeiture. Mo. 350. 3 Bulst. 80. 268. Cro. Eliz. 505. Noy, 58. (*d*) The forfeiture is a determination of the will, and the estate is immediately in the lord, as his reversion, and he may grant it to another before seisure. Lev. 26. adjudged. Jones, 249.——Where there may be relief in equity against a forfeiture. *Vide* Abr. Eq. 121. Chan. Ca. 95. Skin. 142. pl. 13. Preced. Chan. 574 to 586. 2 Vern. 537. 64.

But if a copyholder is in debt, and is afraid to be arrested, or is a bankrupt and keeps his house, it is a good (*e*) excuse for his not coming. Co. Copyh. 159. (*e*) So is weakness, or a great office. Co. Copyh. 159.

Also, if the lord comes to the copyholder, and requires him to do his (*f*) services, and the copyholder answers, if they are due he will do them, but it shall be tried at law first, whether they are due by law; this is no forfeiture, being no wilful refusal. Roll. Abr. 506. Roll. Rep. 429. 3 Bulst. 80. 268. 4 Co. 21. b.

(*f*) For the non-performance of services the lord may either distrain or seise the land. Noy, 135.

So, if the copyholder says, if it be a court he will appear at it; (*g*) if not, he will not; this is no forfeiture. Style, 241. (*g*) But if there were no controversies about the court, but that is only used as a shift, then it seems a forfeiture, *ibid*; and *vide* 1 Leon. 104., that continual default at court amounts to a wilful refusal.

Dyer, 211. Roll. Abr. 506. Where

If the jury or homage refuſe to preſent the articles according to their oath, this is a forfeiture of the copyholds.

it is neceſſary that the cauſe of forfeiture ſhould be found by the homage, *vide* Godb. 47. Palm. 417. Latch. 227. 2 Vent. 38. [It is holden by Lord Coke, that a preſentment is neceſſary to make a forfeiture in thoſe caſes, where the lord cannot be preſumed to have notice of himſelf, as if the tenant commit felony. But it is ſaid, *per Cur. alibi*, that preſentment is not of neceſſity, but only for the lord's better inſtruction, and he may take notice himſelf, if he will. And indeed the reaſon given by Coke is of no cogency, *viz.* that becauſe the lord cannot by intendment have notice of them himſelf, that therefore he ſhall have no advantage of them without preſentment; for if he can take notice of them, why ſhould he not, ſince preſentment is not that which gives title, but only lets him know what he hath a title to. However, it is ſafe to get ſuch things preſented; and if there be a cuſtom for it, it muſt be purſued. Gilb. Ten. 231.]

2. Of Forfeiture for Non-payment of Rent.

Roll. Abr. 506. (*a*) Non-payment at the day is no forfeiture

If a copyholder be to pay a certain rent yearly by his copy to his lord, and the lord come upon the land and demand his rent at the day, and the copyholder being preſent (*a*) refuſe to pay it, this is a forfeiture.

without a refuſal to pay. Moor, 622. Lit. Rep. 268. ——And *note*, that for non-payment of rent, fines, &c. where a value may be ſet on them, and a compenſation made the lord for any laches in point of time, &c. equity will relieve. *Vide* Prec. Chan. 568, 569.

Co. Copyh. 162. (*b*) But this caſe does not ſeem to be law; it is contradicted by a ſolemn reſolution;

My Lord *Coke* ſays, that (*b*) if the lord demands his rent of the copyholder, and he ſays, that he wants money, and entreats the lord to forbear till he be provided, that this is a forfeiture; and that (*c*) if the lord makes a continual demand upon the land, and the copyholder is not there, this is a forfeiture; but if he demand once, and nobody is there, this is no forfeiture.

for his deſigning to pay, ſignifies the continuance of his will, and cannot any way amount to a wilful refuſal. Roll. Abr. 506. Moor, 623. Latch. 122. Cro. Eliz. 505. But if he appoints him to pay it at a day after, at a certain place within the manor, and he neglects, this is a forfeiture. Latch. 122. cited. N. Dyer, 211. in margin. (*c*) This likewiſe ſeems not to be law, being only a denial at law, which cannot amount to a wilful refuſal; for which *vide* Hob. 135. Noy, 58. Latch. 14. 122. Roll. Abr. 506. Cro. Eliz. 350. 505.

Lit. Rep. 268.

A widow had copyhold lands, and divers perſons came for the rent, whom ſhe put off with delays; at laſt comes a young gentleman and demands it; ſhe anſwered, that ſhe did not know him, but if he would dance before her, if ſhe liked his dancing ſhe ſhould pay him: this denial was adjudged no forfeiture, not being wilful.

1 Roll. Abr. 507. 3 Lev. 309. Co. Ent. 647.

[The non-payment of a reaſonable fine, upon demand, is a cauſe of forfeiture. *Secùs*, if it be unreaſonable; or it be doubtful whether it be reaſonable; or whether it be due or not; or if there were no expreſs refuſal; or, though there were ſuch, if it be paid within the limited time.]

3. Forfeiture in the Copyholder's taking upon him to diſpoſe of the Copyhold, and make Leaſes.

Co. Lit. 59. a. Co. Copyh. 163.

If a copyholder takes upon him to convey his copyhold eſtate to a ſtranger, it is a determination of his will, and conſequently a forfeiture; for thereby he would introduce a tenant on his lord without his admittance, and alſo deſtroy the evidence of its being copyhold.

But

But if a man makes a (*a*) charter of feoffment of his copyhold eſtate, or a leaſe for life, but makes (*b*) no livery, it is no forfeiture, becauſe nothing paſſes till then. Co. Lit. 59. a.

(*a*) If a man bargains and ſells his copyhold, it is ſaid to be a forfeiture, though the deed be not enrolled; for this would determine an eſtate at will. Roll. Abr. 507. (*b*) That if he makes a letter of attorney to give livery, it is a forfeiture. Roll. Abr. 507.

My Lord *Coke* ſays, that if tenant for life of a copyhold ſuffer a recovery by plaint in the lord's court, as a copyholder of inheritance, this is a forfeiture. Co. Copyh. 163. But by Lex Cuſtom. 206. adjudged no

it was otherwiſe adjudged in the caſe of Bird and Kirk, and Mod. 199, 200. 2 Mod. 32. forfeiture; for the lord is party to it, and can take no advantage of it.

If a copyholder makes a leaſe for years not warranted by the cuſtom, and without the lord's licence, this is a forfeiture, but yet it is no diſſeiſin; for ſuch a leaſe is good againſt every body but the lord. Moor, 184. Salk. 186. pl. 5. 187.

Alſo, a leaſe for years by parol to commence *in futuro* is a forfeiture, becauſe of the unlawful contract made to the lord's diſheriſon: Cro. Eliz. 498. Roll. Abr. 507. Moor, 392. Gilb. Ten. 219.

A leaſe, that will amount to a forfeiture, ought to have a certain beginning and certain end, elſe the leaſe is void, and carries but an eſtate at will at moſt, which is no forfeiture. Bulſt. 189.

If a copyholder for life makes a leaſe for a year, and then makes another leaſe to the ſame perſon for another year, to commence one day after the firſt year, and then ſurrenders his copyhold to the lord; this ſecond leaſe not being warranted by the cuſtom is a forfeiture, for the land is charged with a double intereſt, the one *in præſenti*, and the other *in futuro*. But for this *vide* Roll. Abr. 508. 510. Bulſt. 189. 215. Jones, 249. Cro. Jac. 301. 308. Gilb. Ten. 218.

But if *A.* makes a leaſe of his copyhold to one for a year, and then (*c*) covenants that the leſſee ſhall enjoy it *de anno in annum*, this is no forfeiture, being only a covenant and not a leaſe. Cro. Jac. 301. By the better opinion of the book; but the judg-

ment was given principally on another point. (*c*) For though theſe words by conſtruction may make a leaſe where the lands may be let; as in Cro. Car. 207., Cro. Jac. 92.; yet it would be an injurious conſtruction to make words, which only import a covenant, a leaſe, and ſo a forfeiture. 2 Keb. 267. And this ſeems to be law, though it has only the authority of Keb.

4. Of Forfeiture in committing Waſte; and herein of the Lord's and Tenant's Intereſt in the Trees.

If a copyholder (*d*) erects a new (*e*) houſe upon the land without licence, it is no forfeiture; becauſe it is for the melioration of the ſtate of the lands; but then this houſe muſt be ſubject to all the cuſtoms of copyhold land, and therefore if he pulls it down again it is a forfeiture. Roll. Abr. 507. Hut. 103. Lit. Rep. 266. 4 Leon. 241.

(*d*) That nothing ploughed lands to hop ground or a piſcary, is a forfeiture. [Lit. Rep. 267-8. Hetl. 8. S. C. cites the opinion of Popham, that turning it into hop ground is not waſte. Gilb. Ten. 221.]——Whether a copyholder in fee may dig for mines. Sid. 152. *Q. & vide* Winch. 8. *Vide* title *Waſte*. [Buller, J. thought the lord cannot dig for mines on the copyholder's lands. 2 Term Rep. 707.]

(*e*) So as if he erects a mill. Latch. 123. N. Dyer, 211. Bulſt. 50, 51. adjudged.

Co. Lit. 63. a.

Waſte (*a*) voluntary or permiſſive, is a forfeiture of copyhold lands, unleſs there be a cuſtom to cut trees, *&c.*

(*a*) Voluntary waſte is a forfeiture by the common law, but negligent waſte is not, without a cuſtom. Noy, 51. —By Owen, 18., it is adjudged, that permiſſive waſte, without any ſpecial cuſtom, is a forfeiture.—But this muſt be underſtood of waſte in letting the houſe decay, &c. for if a ſtranger, or the copyholder's leſſee, commit waſte in cutting down trees, it is no forfeiture, for every forfeiture ought to be the wilful act of the copyholder, ſo as it may amount to a determination of his will. 4 Co. 27. a. Lit. Rep. 267, 268. Roll. Abr. 508. But Moor, 49. Dalſ. 49. *cont.*

13 Co. 68. Roll. Abr. 508. Godb. 172. 2 Brownl. 329. But Cro. Eliz. 5. *cont.*

By the common law, every copyholder may take houſe-bote, hedge-bote, fire-bote, and plough-bote on the copyhold lands, though this power may be reſtrained by cuſtom, as that a copyholder ſhall not take it, unleſs by the aſſignment of the lord, or his bailiff.

but ſaid, that a cuſtom to take, is good; but *vide* 2 Salk. 638. pl. 6. where the caſe in Croke is denied to be law.

13 Co. 68. Leon. 272. Where it is treſpaſs for cutting trees.

The lord of the manor may cut down the timber trees growing upon the copyhold lands, provided he leave (*b*) ſufficient for houſe-bote, *&c.*: alſo, by cuſtom, where a copyholder of (*c*) inheritance may take the ſhrowds of trees, by cuſtom he may cut them down; for otherwiſe the timber may ſtand and rot, and nobody be the better for it.

(*b*) A copyholder for life alleged that his houſe was in decay, and that there was not ſufficient, &c.; and on demurrer, it was adjudged in B. R. that the copyholder had an intereſt in trees, that the fruit, acorns, &c. belonged to him; and judgment accordingly: but reverſed in the Houſe of Lords; for as the tenant could not cut down the timber, if the lord could not, it muſt rot. 2 Salk. 638. pl. 6. [1 Ld. Raym. 551. Com. Rep. 71. 12 Mod. 378. S. C. determined by a majority of a ſingle lord.] And *vide* 8 Co. 64., that if a copyholder be entitled to ſhrowds of the trees by cuſtom, if the lord takes the body, an action on the caſe lies againſt him. (*c*) But a cuſtom that every copyhold tenant may cut down trees at his will and pleaſure, is unreaſonable. *Vide* Winch. Cro. Jac. 30. Cro. Car. 229. Bulſt. 50. Noy, 2. Roll. Abr. 560. 650.

3 Bulſt. 281.

Where a copyholder may take trees for reparation, the loppings and top belong to him, and though he cannot repair with them, he may ſell to help to defray the charges.

Roll. Abr. 508. Cro. Eliz. 499. Moor, 508.

If a copyholder cut down trees for repairs, and employ ſome, and keep the reſt ready to be employed in reparations, this is no forfeiture; for he could not, perhaps, preciſely know what would do.

S. C. adjudged, though employed five years after cut down, and after an entry for a forfeiture.

2 Roll. Abr. 508. Moor, 392. S. P. *per Cur.*

But if a copyholder cut trees to repair his houſe, and after do not employ them accordingly, but ſuffer them, after the cutting, to be rotten and periſh; this is a forfeiture.

5. Forfeiture by Incloſure.

Lit. Rep. 267. Chan. Precd. 571.

Incloſing copyhold lands one from another, and alſo defacing land-marks are forfeitures; for by theſe means the evidence of their being copyhold will be deſtroyed.

Hut. 102. adjudged. Hetl. 5. S. C. *adjornatur.* Lit. Rep.

But if *A.* is ſeiſed in fee of fifteen acres, by copy of court-roll, and there is a cuſtom within the manor, that the lord hath had a fold-courſe within the manor for 500 ewes, in the field in which the fifteen acres lie, from *Michaelmas* to *Lady-day*, and that

that no copyholder might incloſe without the licence of the lord; and that if any incloſed without licence, then a reaſonable fine ſhould be aſſeſſed by the lord, or his ſteward, if the lord would accept thereof; and if not, that then the copyholder ſo incloſing ſhould be puniſhed at every court till he opened the incloſure; and *B.* incloſes the fifteen acres, with an hedge and fence of quickſet three feet deep and ſix feet broad, and leaves four ſpaces of nine feet broad in the ſaid fifteen acres; this is no forfeiture, becauſe a prejudice only to the lord's fold-courſe; and that which makes a forfeiture ought to be ſo to the copyhold tenement; and this is no incloſure, becauſe all is not incloſed; and forfeitures, which are odious in law, ſhall be taken ſtrictly.

267. S. C. adjudged; becauſe by the cuſtom the copyholder may be amerced, till, &c. ſo that the lord had another remedy: But it was reſolved, that notwithſtanding the gaps, this was an incloſure againſt the cuſtom.

6. Forfeiture for Treaſon and Felony.

If a copyholder commits treaſon or (*a*) felony, it is a forfeiture of his copyhold to the lord, without any particular cuſtom; otherwiſe a copyholder becoming a traitor or felon, would have no puniſhment in his poſterity.

Co. Copyh. 150. 164. 13 Co. 3. Leon. 1.

(*a*) If convicted of manſlaughter, and allowed his clergy, does not forfeit without a ſpecial cuſtom. Lev. 263. 2 Keb. 451. Nor for outlawry, unleſs it be for a capital crime. Lit. Rep. 234. Hetl. 127. and *vide* Leon. 99.

By an attainder of treaſon or felony, of common right the copyhold is forfeited, (*b*) but not by a conviction only; but (*c*) by cuſtom it may be forfeited for treaſon or felony, even without a conviction. 13. *acc.* 2 Brownl. 217 to 220. 2 Ventr. 38. *acc.* Godb. 267. *contr.*

(*b*) 1 Lev. 263. 2 Keb. 252.

(*c*) 1 Bulſt.

If a copyhold is granted to *A.* for life, and after, according to the cuſtom, the reverſion is granted to *B.* for life *immediate poſt mortem, foriſfacturam ſive aliam determinationem ſtat. prædict. A.*, and *A.* is attainted of felony, by this his eſtate is determined; for being in the eye of the law but an eſtate at will, his will is determined by the attainder, for by the attainder he cannot hold an eſtate, and *B.* may take advantage thereof without any entry made by the lord.

3 Lev. 94. Strode and Deniſon, adjudged upon a writ of error, and the firſt judgment affirmed accordingly. Skin. 8, 9. S. C. *adjornatur.*

7. In what Caſes a Forfeiture of Part ſhall be a Forfeiture of the Whole.

Where a copyhold is holden by one tenure, it is ſaid, that a forfeiture of any part is a forfeiture of the whole, for there is a condition in law annexed to the whole eſtate.

4 Co. 27. a.

Therefore if ſuch a copyholder commits waſte in cutting down a ſingle tree, this is a (*d*) forfeiture of his whole copyhold; for by the cutting of the tree which is to be employed in repairing the houſes, *&c.*, the whole copyhold is impaired.

Roll. Abr. 509.

(*d*) But Q. For though committing waſte in part of the houſe may be a forfeiture of the whole houſe, yet it ſeems unreaſonable, that committing waſte in one acre, ſhould be a forfeiture of the whole; but *vide* title *Waſte.*

4 Co. 27. a. but *vide* 1 Roll. Abr. 509. *cont.* Alſo it is ſaid, that if a copyholder makes a feoffment of an acre of land, parcel of his tenement, that this is a forfeiture of the whole.

and that if a copyholder by licence lets for years, and the leſſee makes a feoffment, he only forfeits his leaſe. Hob. 177.

4 Co. 27. Taverner and Cromwel. But if a copyholder hold three ſeveral acres by three ſeveral copies, and commits waſte in one acre, he ſhall forfeit that acre only; for though they are all in one hand, yet every acre is ſeverally holden, and to every acre there is a ſeveral condition in law tacitly annexed.

4 Co. 28. So if ſuch copyholder, that holds three acres, by three ſeveral copies, ſurrenders to the uſe of *A.* and his heirs, and the lord admits *A. tenend. per antiqua ſervitia inde prius debita & de jure conſueta*, and after *A.* commits waſte in one acre, he ſhall forfeit that acre only, for the *tenend.* continues the ſeveral tenures, though the parcels are now all put in one copy.

4 Co. 28. b. *per Curiam.* 3 Leon. 109. S. C. and S. P. *per Cur.* Cro. Eliz. 353. S. C. and S. P. adjudged; there being to each parcel a ſeveral *habendum* and *reddendum*. So, if ſeveral copyholds eſcheat to the lord, and he grants them again *tenend. per antiqua ſervitia* to one, and he commits a forfeiture in part, this extends not to the whole.

8. Who ſhall be affected by a Forfeiture, or take Advantage thereof.

Roll. Abr. 509. Cro. Eliz. 598. 880. Noy, 42. *vide* Moor, 49. and Dalſ. 49. *cont.* If there be a tenant for life, the remainder in fee of a copyhold, and the tenant for life commits a forfeiture, (*a*) this ſhall not bind the remainder-man.

(*a*) But by the ſpecial cuſtom it may bind the remainder. 9 Co. 107.

9 Co. 107. Roll. Abr. 568. But though this ſhall not affect the remainder man, yet if there be a copyholder for life, the remainder to another for life, or in fee, and the firſt copyholder commits a forfeiture, he in remainder ſhall not (*b*) enter, but the lord ſhall hold it during the life of the firſt copyholder; for copyhold eſtates are not like thoſe at common law, where in ſuch caſe the eſtate for life being ended, he in remainder may enter immediately.

(*b*) But if there be a copyholder for life, and the lord make a leaſe to commence after the end, forfeiture, or determination of the eſtate for life, and the copyholder commit a forfeiture, and the lord will not enter, the leſſee may. 2 Leon. 73. 9 Co. 107.

Cro. Eliz. 879. If a ſurrender be made to the uſe of *A.* for life, the remainder to *B.* in fee, and *A.* ſuffer three proclamations to paſs, and make no claim, yet ſhall not *B.* forfeit his remainder, for the cuſtom ſhall be taken ſtrictly.

Roll. Abr. 509. *Vide* Hob. 177. Palm. 384. If a copyholder leaſe for years by licence of the lord, and after the leſſee make a feoffment, this ſhall forfeit (*c*) only his eſtate, and not the eſtate of the copyholder.

2 Roll. Rep. 372. (*c*) If a copyholder make a leaſe for a year, and another leaſe in reverſion not warranted by any cuſtom, though this ſecond leaſe be a forfeiture, yet the firſt leaſe is good. Roll. Abr. 508. Cro. Car. 234.

Co. Copyh. 135. *Vide* Sid. 314. 2 Sand. 422. If a copyholder tenant in tail commit a forfeiture, his iſſue is bound by it.

Leſſee

Leſſee for years ſhall take advantage of a forfeiture committed by a copyholder of the manor, for he is *dominus pro tempore*. Roll. Abr. 509.

If there be a lord of a manor, in which there are copyholders tenants of the manor, and the lord grant to a ſtranger the freehold of a copyhold in fee; though by this the tenement is divided from the manor, and not demiſable by copy again, yet the (*a*) grantee of the freehold ſhall take advantage of a (*b*) forfeiture committed (*c*) after by the copyholder, for he ought to pay his rent to the grantee. Brownl. 132. Cro. Eliz. 499. Roll. Abr. 509.

(*a*) So, if the grantee makes a leaſe for years of the freehold, the leſſee ſhall take advantage of a forfeiture committed after. Roll. Abr. 510. Cro. Eliz. 499. Moor, 393. Owen, 63.——After the leaſe made, and before the commencement of it. Moor, 393. (*b*) Such forfeitures as accrue by reaſon of the cuſtom, are diſcharged, but not forfeitures at common law; as waſte, &c. Moor, 393. Owen, 63. 4 Co. 24. b. 25. a. (*c*) But not of a forfeiture committed before the grant; for the grant of the freehold made by the lord before entry, implies an aſſent that the copyholder ſhall continue his eſtate, and ſo is in nature of a confirmation. Owen, 63. and *vide* Latch. 227. Palm. 416.—The copyholder commits treaſon, and the lord aliens the manor; and after the copyholder is attainted by act of parliament, whether the alienee ſhall take advantage of the forfeiture, 2 Vent. 38, 39. *dubitatur*.

If a copyholder commit a forfeiture, and the lord of the manor die before entry or ſeiſure for the forfeiture, he in reverſion or remainder ſhall not take advantage of the forfeiture committed before his time. Cro. Jac. 301. Bulſt. 190. S. C. Mod. 200. S. P. reſolved *per Cur.* The ſucceeding lord ſhall not take advantage of waſte done in the time of the preceding lord; but if there be lord and two coparceners copyholders, and one makes a feoffment in fee of her part, and then the lord makes a leaſe of the manor; though the leſſee can take no advantage of the forfeiture, yet the heir of the leſſor may. Palm. 446. Latch. 227. adjudged. Q. The diverſity between a feoffment and other forfeitures; and Q. If the leſſor outlives the leaſe, whether he may take advantage of the forfeiture. [If there be a tranſmutation of poſſeſſion by a feoffment or fine, it diveſts the lord's right, becauſe it gains a fee-ſimple to the perſon to whom it is made or levied. In that caſe, therefore, and in that caſe only, the ſucceeding lord may take advantage of the forfeiture, becauſe the act of forfeiture deſtroys the eſtate. Doe v. Hellier, 3 Term Rep. 173.]

If a copyhold manor deſcends on two coparceners, and a copyholder commits waſte, and makes a leaſe, which are agreed to be forfeitures, and after one of the ſiſters dies, the ſurviving coparcener ſhall not take advantage of the forfeiture; for the election to take advantage of the forfeiture muſt be made by them both, which cannot be after the death of one of them. Salk. 186. pl. 5. Eaſtcourt and Weeks, adjudged by Treby, C. J. Nevil and Blenco, *cont.* Powel; who held alſo, that where there are two coparceners, and one will take advantage of a forfeiture, and the other not, there muſt be an apportionment. *Vide* title *Coparceners*.

9. What Perſons ſhall be excuſed from a Forfeiture.

There were ſeveral caſes, in which feme coverts and infant copyholders, *&c.* were obliged, on pain of forfeiting their copyholds, to obſerve the cuſtoms of the manor. Cro. Eliz. 499. Moor, 393. Roll. Abr. 509.

As, if the huſband denied to pay rent, or do ſuit, this was holden a forfeiture for ever; for the lord muſt have his ſervices.

So, if the huſband commits (*d*) waſte, and dies, this ſhall bind the wife. Roll. Abr. 509. Palm. 384.

2 Roll. Rep. 372. (*d*) *Secùs*, if he made a leaſe, unleſs ſhe did any thing to confirm it after his death. Gilb. Ten. 228. Saverne v. Smith, Cro. Car. 7. Palmer, 383. S. C. 2 Roll. Rep. 344. 361. 372. S. C. Godb. 345. S. C. 1 Roll. Abr. 509. S. C. See too, Hedd v. Chalener, Cro. Eliz. 149.

Alſo

But for this *vide* 8 Co. 100. Style, 387. Cro. Jac. 101. 226. Leon. 100. 4 Leon. 30, 31. Carth. 41 to 45. Comb. 118.

Alſo in copyhold manors, where the cuſtom is, that the heir ſhall come in and be admitted, and if he doth not, proclamation ſhall be made for him to come in, and ſo on in the two next courts, otherwiſe that the lord ſhould ſeiſe as forfeited; it was holden, that a feme covert was bound; and by ſome opinions, the lord, after ſuch proclamations, might ſeiſe the copyhold of an infant heir till he came in and was admitted, and might receive the meſne profits without being anſwerable for them.

But now by 9 *Geo.* 1. *cap.* 29. it is enacted, "That no infant "or feme covert ſhall forfeit any copyhold meſſuages, &c. for "their neglect or refuſal to come to any court or courts, to be "kept for any manor whereof ſuch meſſuages, &c. are parcel, "and to be admitted thereto; nor for the omiſſion or denial to "pay any fine or fines impoſed or ſet upon their or any of their "admittances to any ſuch copyhold meſſuages, &c." But *vide* the ſtatute, and the remedies therein appointed for the lord for his fines, &c.

10. Where the Forfeiture ſhall be ſaid to be diſpenſed with.

Brownl. 149. (*a*) Altho' it is not eſtreated or levied. Leon. 104.

If the tenant appear not in court after perſonal warning, and the lord (*a*) amerce him, (*b*) this is a diſpenſing with the forfeiture.

(*b*) Acceptance of rent after a leaſe made, is a diſpenſation; ſo is the accepting of any ſervices. Keb. 15.——If the lord does not enter before the tenant repairs, the forfeiture is purged: alſo it hath been adjudged, that employing trees in repairs five years after they were cut down, was a purgation of the forfeiture. 2 Sid. 8.

Cro. Car. 233. Jones, 249. adjudged. Roll. Abr. 510. S. C.

But if a copyholder makes a leaſe for years, and after ſurrenders to the uſe of the lord, and he, (*c*) not having notice of the leaſe, accepts the ſurrender; this is no diſpenſing with the forfeiture.

(*c*) But the lord ſhall be preſumed to have notice of the failure of ſuit of court, non-payment of rent, &c. 2 Vent. 38.

Lev. 26. adjudged. Keb. 25. S. C. adjudged. (*d*) Winch. 67. Cro. Jac. 101.

If he that is *dominus pro tempore* of the manor, admits one to a copyhold, he thereby diſpenſes with all precedent forfeitures, not only as to himſelf, but alſo as to him in reverſion, (*d*) for ſuch new grant and admittance amounts to an entry for the forfeiture and a (*e*) new grant (*f*).

(*e*) If a copyholder commits a forfeiture, and then he that hath right releaſes to him; this is a diſpenſation, for now he hath, as it were, another eſtate, of which he hath committed no forfeiture. Moor, 393. Latch. 227. [(*f*) Any acts equally ſolemn will amount to a diſpenſation; as preſentment by the homage of the death of the tenant who committed the forfeiture, proclamations for the heir to come in and be admitted. And *qu.* Whether the ſtatute of limitations will not operate as a bar to the lord's right of entry after twenty years? 3 Term Rep. 171, 2, 3.]

Lev. 26. *per Curiam.*

But the lord by wrong or diſſeiſin cannot by ſuch admittance purge the forfeiture as to the rightful lord.

(M) Copyholds, where and how to be ſued for and recovered.

IN all real actions, or that concern the realty, a copyholder cannot (*a*) emplead or be empleaded any where but in the lord's court, for there being a court for that purpoſe, and the lord judge thereof, it is his duty and intereſt to determine the controverſies of his tenants, and therefore not cognizable at common law. Co. Lit. 60. a. 4 Co. 21. b. Moor, 68.

(*a*) Shall make their plaint in the lord's court, and make proteſtation to follow it in nature of one of the king's writs, as formedon, aſſiſe, &c. Co. Lit. 60. a. Co. Copyh. 142, 143.

But actions (*b*) merely perſonal, the copyholder may ſue at common law. Co. Copyh. 143.

(*b*) If leſſee for years of a copyholder cuts down the trees, the copyholder ſhall ſue in the lord's court to puniſh this offence. Co. Copyh. 143. Where a copyholder may have caſe againſt the lord or a ſtranger, for an an injury done the common belonging to his copyhold, *vide* Roll. Abr. 196. 2 Leon. 201, 202. 2 Brownl. 146.

The lord of the manor (*c*) may plead or be empleaded, and avow for the rent or ſervices of his copyholder in any court of *Weſtminſter;* for he hath an eſtate at common law in the rent, and it is due to him, on the ſame grounds in law as the rent of freehold lands. Cro. Eliz. 524. Roll. Abr. 374.

(*c*) For otherwiſe he would be judge and party. Salk. 186. pl. 5.

If upon a plaint in the lord's court an erroneous judgment be given, no writ of falſe judgment lies, in reſpect of the baſeneſs of the eſtate, being in the eye of the law but an eſtate at will; (*d*) but he ſhall have a petition to (*e*) the lord in nature of a writ of falſe judgment, and therein aſſign errors, and have remedy according to law. Co. Lit. 60. a. 4 Co. 21. b. Moor, 68. F.N.B. 12.

(*d*) Or ſuch judgment may be reverſed by a bill in Chancery. Lane, 98. Roll. Abr. 373.——But a bill exhibited in Chancery to compel the lord to receive a petition for reverſing a common recovery was diſmiſſed. Vern. 367. And the diſmiſſion affirmed in the Houſe of Lords; for common recoveries not being adverſary ſuits, but common aſſurances, equity ought rather to ſupply defects, than aſſiſt in annulling them. Show. P. C. 67.

(*e*) Where the king is lord, the tenant may be relieved by bill, or petition to the king in the Exchequer-chamber. Roll. Abr. 539. Lane, 98.

If a copyholder ſurrenders to the uſe of *B.* upon truſt, that he ſhall hold the land until he hath levied certain money, and that after he ſhall ſurrender to the uſe of *C.;* the money is levied, and *B.* is required to make a ſurrender to the uſe of *C.*, and refuſes, and *C.* exhibits his bill to the lord of the manor againſt *B.;* if *B.* refuſes, the lord may ſeize, and admit *C.* to the copyhold; for in ſuch caſes he is (*f*) chancellor in his own court. Leon. 2. Owen, 63. Dalſ. 70. Roll. Abr. 539. 4 Co. 30. b.

(*f*) And may do right according to conſcience.

—So, if a ſurrender be made to the uſe of another, without expreſſing what eſtate he ſhall have, a cuſtom, that the lord may grant it in fee to him for whoſe uſe the ſurrender was made, is good; for he is chancellor in his own court, and therefore it is reaſonable that he ſhould determine a thing left thus uncertain. Cro. Eliz. 392.

A (*g*) leſſee of a copyholder for a year ſhall maintain an ejectment, for the common law warrants his term, and therefore gives 4 Co. 26.

(*g*) If the lord com-

mits the cuſtody of the body and lands of an

gives him remedy in caſe he be ouſted: ſo, may leſſee by (*a*) licence: alſo, where by cuſtom a copyholder may make a leaſe, ſuch leſſee may maintain an ejectment.

infant according to cuſtom, till, &c. and the committee is ejected, he may have an *ejectione cuſtodiæ*. Leon. 328. Cro. Eliz. 224. (*a*) For by the licence, the lord gives up his power of judging or determining about the leaſe: But Q. Whether a leaſe without licence, and not warranted by the cuſtom, being good againſt all perſons except the lord, the leſſee may maintain an ejectment; and *vide* Cro. Eliz. 462. 676. Moor, 569. pl. 776. Owen, 18. Stile, 380. Hetl. 127. By which, it ſeems, he may; but Cro. Eliz. 395. 469. Moor, 50. Brownl. 40. *cont.* See Gilb. Ten. 213-4-5.

4 Co. 30. b. Moor, 410. S. C. by three judges againſt one; and at another day it

If the wife of a copyholder in fee, by ſpecial cuſtom recovers dower by plaint in the court of the manor, and 50*l.* damages, an action of debt will not lie at common law for the damages.

was holden by three judges, that the action lay, becauſe the court baron could not award execution for ſo great damages, though they were well aſſeſſed there. Cro. El. 426. S. C. *adjornatur*. Roll. Abr. 600.

Coroners.

(*b*) 4 Inſt. 271. 2 Inſt. 31. (*c*) 2 Inſt. 3. S. P. C. 48. 49.

CORONERS, ſo called (*b*) becauſe they deal principally with pleas of the crown, are very (*c*) ancient officers at common law; who, in former days, were the principal (*d*) conſervators of the peace within their counties: there ſtill ought to be a certain number of them in every county, in ſome more, in others leſs, according as the uſage hath been.

(*d*) And the coroner may

now bind any perſon to the peace who makes an affray in his preſence. 2 Hawk. P. C. c. 8. § 5. F N. B. 397. 2 Inſt. 175. 4 Inſt. 271.

2 H. H. P. C. 53.

[Coroners are of three kinds, *viz.* 1. *Virtute officii.* 2. *Virtute cartæ ſive commiſſionis.* 3. *Virtute electionis.*

(*e*) The other judges of this court are ſovereign coroners. 4 Inſt. 173. (*f*) 4 Co. 57.

1. The coroner *virtute officii* is the chief juſtice of the King's Bench (*e*), who by virtue of his office is chief coroner of *England*. And though no man who is killed in open rebellion can forfeit lands or goods, for he cannot be attainted after his death; yet, it is ſaid (*f*), that if the chief juſtice of the King's Bench, as ſupreme coroner, upon view of the body of one killed in rebellion, makes a record of it, and returns it into the King's Bench, he ſhall forfeit his lands and goods. But Lord *Coke* is miſtaken as to the forfeiture of lands: goods indeed may be forfeited by ſuch a record.

2. Coroners *virtute cartæ ſive commiſſionis*, are where by a grant to a lord or a corporation, they have power to make or be coroners within their franchiſe. Thus, the mayor of *London* is,

by charter, coroner of *London;* the biſhop of *Ely* has, by charter of *H.* 7., power to make coroners within the iſle of *Ely;* and Queen *Catherine* had the hundred of *Cobridge* granted to her by the king in 35 *H.* 8., with power to nominate coroners. And in ſtat. 28 *E.* 3. *c.* 6., which confirms the election of coroners to the counties, there is a ſaving to the king and others, who ought to make coroners within their franchiſes.

There are two great precincts too, that by the king's grants have power of granting or having coroners, *viz.* the juriſdiction of the admiralty, and the verge; the former, for inquiſitions of death on the high ſeas; the latter, within the verge. The coroner of the admiralty is appointed by the lord high admiral: the appointment of coroner of the verge is ſettled in perpetuity in the lord ſteward, or lord great maſter of the king's houſe for the time being.

The admiralty claim a juriſdiction upon arms of the ſea *infra corp. com.*; but this, at moſt, is only a concurrent juriſdiction with the county coroners. 2 Str. 1097.

3. Coroners *virtute electionis*, are thoſe who by ſtat. *Weſt.* 1. *c.* 10. and ſtat. 28 *E.* 3. *c.* 6. are eligible by the county in the county court by the king's writ *de coronatore eligendo.*]

(A) Of the Qualifications, and Manner of chooſing and appointing a Coroner.

(B) In what Places he hath Juriſdiction.

(C) Of his Authority and Duty in taking Inquiſitions.

(D) Of traverſing and quaſhing ſuch Inquiſitions

(E) Of his Power as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon.

(F) Where the Act of one Coroner ſhall be as effectual as if done by all.

(G) Of the Fees that he may lawfully take.

(H) Of diſcharging him, and for what Miſdemeſnours puniſhed.

(A) Of the Qualifications, and Manner of chooſing and appointing a Coroner.

BY *Weſtm.* 1. made 3 *Ed.* 1. *cap.* 10. it is enacted, "That "through all ſhires ſufficient men ſhall be choſen to be co- "roners, of the moſt loyal and wiſe (*d*) knights, which know, "will, and may beſt attend upon ſuch offices, and which law- "fully ſhall attach and preſent pleas of the crown."

(*a*) In ancient time, none under this degree were choſen. 2 Inſt. 32. 176. The ſtatute of *Merton*, made before this act, ſuppoſes them to have been knights. 23 Aſſ. pl. 7.—And in the writ *de coronatore exonerando*, his not being a knight is mentioned as a ſufficient cauſe for the diſcharge of a coroner. Regiſter, 177. F. N. B. 164. 4 Inſt. 271. But as the chief intent of this ſtatute was to prevent the chooſing of perſons of mean ability, it ſeems the deſign of it is ſufficiently anſwered, by chooſing men of ſubſtance and credit; and as the conſtant uſage for ſeveral ages paſt has been accordingly, it ſeems to be no objection at this day, that the perſon choſen is not a knight. 2 Leon. 160. 2 Hawk. P. C. c. 9. § 3.

By the 14 *E.* 3. *ſtat.* 1. *cap.* 8. it is enacted, "That no coro- "ner be choſen unleſs he have land in fee ſufficient in the ſame "county, whereof he may anſwer to all manner of people."

By the 28 *E.* 3. *cap.* 6. it is enacted, "That all coroners of "the counties ſhall be choſen in the full counties, by the (*b*) com- "mons of the ſame counties, of the moſt meet and lawful people "that ſhall be found in the ſame counties, to execute the ſaid "offices; (*c*) ſaving always to the king, and other lords who "ought to make ſuch coroners, their ſeignories and franchiſes."

(*b*) But none but freeholders have votes. F. N. B. 164. S. P. C. 19. 2 Hawk. P. C. c. 9. § 10. For none but ſuch are ſuitors to the county-court. 2 Inſt. 99. 1 Roll. Abr. 121 (*c*) Such franchiſe may be claimed by the king by preſcription; but is a privilege of ſo high a nature, that no one can well entitle himſelf otherwiſe than by grant from the crown. Co. Lit. 114. a. 2 Hawk. P. C. c. 9. § 11.

2 Hawk. P. C. c. 9. § 5. Although they are choſen by the county, yet it muſt be purſuant to the king's writ iſſuing out of and returnable into Chancery; but as their authority proceeds from the election, it does not determine by the demiſe of the king: hence alſo, if they

2 Inſt. 174. prove inſufficient to anſwer the fines and duties incumbent on them, the county, as their ſuperior, ſhall anſwer for them.

2 Hawk. P. C. c. 9. § 6. The writ for the election of a coroner firſt recites the death or diſcharge of one or more former coroners, and then commands the ſheriff to cauſe one other, or more as the caſe is, to be choſen in a full county-court, by the aſſent of the county, according to the form of the ſtatute in that caſe made and provided; who having taken his (*d*) oath in the uſual manner, may do all things which belong to the office of a coroner, *&c.*; and then it concludes with commanding the ſheriff to (*e*) certify to the court the name of the perſon choſen.

(*d*) Shall be adminiſtered to him by the ſheriff. 2 Hawk. P. C. c. 9. § 7.

(*e*) See the form of ſuch certificate in Raſt. Ent. 133.

(B) In what Places he hath Jurisdiction.

A Coroner hath no jurisdiction of offences committed on the (*e*) open seas, between the high and low-water mark, when the tide is in; but he hath an authority over offences committed in such places when the tide is out. 3 Inst. 113. 5 Co. 107. 2 Hawk. P. C. c. 9. § 14.

(*a*) By some it is laid down as a rule, that he may inquire of a felony committed on the arms of the sea, where a man may see from the one side to the other. Owen, 122. Moor, 892. H. P. C. 171. [It is said, that this is not part of the sea. Fitz. Coron. 399. 4 Inst. 140. 2 Roll. Abr. 169.] S. P. C. 51. [An information was granted against a captain of a man of war lying in *Portsmouth* harbour, for refusing to let the coroner of *Portsmouth* come on board to hold an inquest on the body of a person who had destroyed himself in the cabin. R. v. Solgard, 2 Str. 1097. Andr. 231.]

At common law, the coroner of the county could not intermeddle with offences done within the verge of the king's court; nor the coroner of the hostel or king's house, with those committed in the county without the verge; which proved inconvenient, by reason of the removal of the king's court before an inquest could be taken. 2 Inst. 550. 2 Hawk. P. C. c. 9. § 15.

By the statute of *articuli super chartas*, *cap.* 3. it is ordained, "That from thenceforth in cases of the death of men, whereof "the coroner's office is to make view and inquest, it shall be "commanded to the coroner of the county, that he, with the co- "roner of the king's house, shall do as belongeth to his office, "and enrol it, *&c.*"* * See the last clause under this head.

If an indictment, taken before the coroner of the county and the coroner of the king's house, do not appear, on the face of it, to have been of an offence within the verge, it is insufficient; for it shall not be said to be good, as taken before the coroner of the county; and void as taken before the other; for it was taken entirely before them both, and perhaps the coroner of the house was the principal actor, and the jury mostly swayed by his directions. 4 Co. 46. Wyat and Wigges. 2 Inst. 550. 2 Hawk. P. C. c. 9. § 16.

If the same person be coroner of the county, and also of the king's house, an indictment of death within the verge, taken before him as coroner both of the county and of the king's house, is good †. 4 Co. 46. a. 3 Inst. 134. 2 Leon. 160. S. C. but no resolution. 2 Hawk. P. C. c. 9. § 17.

agreed, because the mischief is remedied as well when both offices are in the same person, as when they are in divers. † But it must be laid to be within the verge. 2 Hawk. P. C. c. 9. § 16.

By the 33 *H.* 8. *cap.* 12. it is enacted, "That all inquisitions "upon the view of persons slain within any of the king's palaces "or houses, or any other house or houses, at such time as his "majesty shall happen to be there demurrant or abiding in his "royal person, shall be taken by the coroner for the time being "of the king's household, without any adjoining or assisting of "another coroner of any shire within this realm, by the oath of "twelve or more of the yeomen, officers of the king's household, "returned by the two clerks controllers, the clerks of the check, "and the clerks marshals, or one of them for the time being of

"the

" the ſaid houſehold; to whom the ſaid coroner of the ſame houſe-
" hold ſhall direct his precept; which coroner ſhall be from time
" to time appointed by the lord great maſter, or lord ſteward
" for the time being; and that the ſaid coroner ſhall certify under
" his ſeal, and the ſeals of ſuch perſons as ſhall be ſworn before
" him, all ſuch inquiſitions before the ſaid lord maſter, or lord
" ſteward."

(C) Of his Authority and Duty in taking Inquiſitions.

BY the 4 *E.* 1. *ſt.* 2., commonly called the ſtatute *De Officio Coronatoris*, it is enacted, " That the coroner, upon informa-
" tion, ſhall go to the place where any be ſlain, or ſuddenly
" dead, or wounded, and ſhall forthwith command four of the
" next towns, or five or ſix, to appear before him in ſuch a
" place; and when they are come thither, the coroner, upon the
" oath of them, ſhall inquire in this manner, that is, to wit, if
" they know where the perſon was ſlain, whether it were in any
" houſe, field, bed, tavern, or company, and who were there;
" likewiſe it is to be inquired who were culpable, either of the
" act, and who were preſent, either men or women, and of what
" age ſoever they be, (if they can ſpeak, or have any diſcretion,)
" and how many ſoever be found culpable by inquiſition, in any
" the manners aforeſaid, they ſhall be taken and delivered to the
" ſheriff, and ſhall be committed to the gaol; and ſuch as be
" founden and be not culpable, ſhall be attached until the coming
" of the juſtices, and their names ſhall be written in the co-
" roner's rolls: If it fortune any ſuch man to be ſlain, which is
" found in the fields, or in the woods; firſt, it is to be inquired,
" whether he were ſlain in the ſame place or not; and if he
" were brought and laid there, they ſhall do as much as they
" can to follow their ſteps that brought the body thither, whe-
" ther he were brought upon an horſe or in a cart; it ſhall be
" inquired alſo, if the dead perſon were known, or elſe a ſtranger,
" and where he lay the night before; and if any be found cul-
" pable of the murder, the coroner ſhall immediately go into his
" houſe, and ſhall inquire what goods he hath, and what corn
" he hath in his grange, and if he be a freeman they ſhall in-
" quire how much land he hath, and what it is worth yearly;
" and further, what corn he hath upon the ground; and when
" they have thus inquired upon every thing, they ſhall cauſe all
" the land, corn, and goods to be valued in like manner, as
" if they ſhould be ſold incontinently; and thereupon they ſhall
" be delivered to the whole townſhip, which ſhall be anſwerable
" before the juſtices for all; and likewiſe of his freehold, how
" much it is worth yearly, over and above the ſervice due to the
" lord of the fee, and the land ſhall remain in the king's hands
" until the lords of the fee have made fine for it; and imme-
" diately upon theſe things being inquired, the bodies of ſuch
" perſons being dead or ſlain, ſhall be buried: in like manner it
" is

" is to be inquired of them that be drowned or ſuddenly dead, " and after ſuch bodies are to be ſeen, whether they were ſo " drowned or ſlain, or ſtrangled, by the ſign of a cord tied ſtrait " about their necks, or about any of their members, or upon " any other hurt found upon their bodies; whereupon they ſhall " proceed in the form aforeſaid; and if they were not ſlain, " then ought the coroner to attach the finders, and all other in " company.

" Alſo all wounds ought to be viewed, the length, breadth, " and deepneſs, and with what weapons, and in what part of " the body the wound or hurt is, and how many be culpable, " and how many wounds there be, and who gave the wounds; " all which things muſt be enrolled in the roll of the coroners; " alſo horſes, boats, carts, &c., whereby any are ſlain, that pro- " perly are called deodands, ſhall be valued and delivered unto " the towns, as before is ſaid."

In the conſtruction of this ſtatute, the following points ſeem to be agreed on:

That the ſtatute being wholly directory, and in affirmance of the common law, the coroner is not thereby reſtrained from any branch of his power, nor excuſed from any part of his duty not mentioned in it, which was incident to his office before; and therefore though the ſtatute mentions only inquiries of the death of perſons ſlain, drowned, or ſuddenly dead, yet the coroner ought alſo to inquire of the death of thoſe who die in priſon. 2 Hawk. P. C. c. 9. § 21. Fitz. Coron. 421. 3 Inſt. 52. 91. Bro. Coron. 168. S. P. C. 51.

An inquiſition of death, by the oaths of lawful men of the county, is (*a*) ſufficient, without ſaying that they were of the next towns; ſo (*b*) that it appears at what place, and by what jurors, by name, it was taken, and that ſuch jurors were ſworn. (*a*) 1 Sid. 204. Keb. 727. 744. *cont.* Latch. 166. Poph. 210.

Co. Ent. 354. (*b*) Cro. Eliz. 31. 2 Hawk. P. C. c. 9. § 22.

It is clearly (*c*) agreed, that the inqueſt ſhall be taken on the view of the dead body, although the ſtatute be ſilent in this matter; and that an inqueſt otherwiſe taken by the (*d*) coroner, is void. (*c*) Fitz. Coron. 107. S.P.C. 51. 2 Lev. 141. Latch. 166. Noy, 87.

2 Hawk. P. C. c. 9. § 23. (*d*) Therefore where the body cannot be found, or is ſo putrified that a view would be of no ſervice, the coroner, without a ſpecial commiſſion, cannot take the inqueſt; but in ſuch caſes it ſhall be taken by juſtices of peace, or other juſtices authoriſed, by the teſtimony of witneſſes. H. P. C. 170. Vent. 352. 2 Hawk. P. C. c. 9. § 23. [If the coroner take his inquiſition on view of the body, after long putrefaction, it is in the diſcretion of the court of K. B. whether they will receive it or not. R. v. Cauſey, Hil. 3 Geo. 1.]

If a dead body, whereon an inqueſt ought to be taken, be interred, or ſuffered to putrify, before the coroner hath viewed it, the gaoler or townſhip ſhall be amerced. Fitz. Coron. 329. 339. 421. H.P.C. 170. S.P.C. 51. 1 Keb. 278. [It is indictable as a miſdemeſnour to bury the body before, or without ſending for the coroner. 1 Salk. 377. 7 Mod. 10.]

Alſo it hath been (*e*) reſolved, that a coroner may lawfully, within (*f*) convenient time after the death, take up a dead body (*e*) 21 E. 4. 70. b. 2 R. 3. pl. 5.

S.P.C. 51. H.P.C. 170. Bro. Coron. 167.

body out of the grave, in order to view it, not only for the taking of an inqueſt, where none hath been taken before, but alſo for the taking of a good one, where an inſufficient one hath been taken before (*a*).

(*f*) As the ſpace of fourteen days. 2 Hawk. P. C. c. 9. § 23. and in Carth. 72., where the coroner, after an inquiſition that was quaſhed for inſufficiency, took a ſecond *ſuper viſum corporis* a year after the body had been buried; and the court refuſed to quaſh it, for *factum valet quod fieri non debet*; and *note*, that this ſeems to be a matter diſcretionary in the court into which the inquiſition is returned. [(*a*) But this he cannot do without the leave of the King's Bench, Str. 167. the granting of which is diſcretionary in the judges, according to the time and circumſtances. 1 Salk. 377. 1 Str. 22. 533.]

Latch. 166. 2 Hawk. P. C. c. 9. § 25. S. C. *Vide* Poph. 209.

It is not neceſſary that the inquiſition be taken in the very ſame (*b*) place where the body was viewed; and it hath been reſolved, that an inquiſition taken at *D.* on the view of the body lying dead at *L.*, may be good.

(*b*) But the coroner cannot, by way of puniſhment, for not finding according to the evidence, adjourn the jury to places at a great diſtance from where the fact was committed; but an adjournment to the aſſiſe is proper, and well enough. Comb. 386. *per* Holt, Ch. Juſt.

4 H. 7. 18. b. Keilw. 67. Daliſ. 32. Moor, 29. pl. 95.

A coroner cannot inquire of any acceſſories after the fact; and therefore it hath been reſolved that an indictment of *J. S.* before a coroner, for having received and comforted one who had been guilty of a murder, is void.

2 Hawk. P. C. c. 9. § 27. 2 Lev. 141.

But he may make inquiry of the acceſſories before the fact; and alſo may enquire whether any ſo guilty have fled for the ſame; for which they forfeit all their goods and chattels.

Keilw. 61. 2 Hawk. P. C. c. 9. § 28. (*c*) Allen, 51.

A coroner may, and ought to inquire of all the circumſtances of the party's death, and alſo of all things which occaſioned it; and (*c*) therefore it is ſaid, that if it be found by his inqueſt, that the perſon deceaſed was killed by a fall from a bridge into a river, and that the bridge was out of repair, by the default of the inhabitants of ſuch a town, and that thoſe inhabitants are bound to repair it, the townſhip ſhall be amerced.

2 Burr. 17.

[If the coroner neglects to take an inquiſition, it may be done by juſtices of gaol-delivery, oyer and terminer, or of the peace: but it muſt be done openly: if it be done ſecretly, it may be quaſhed.]

(*d*) S.P.C. 51. H.P.C. 171. 4 Inſt. 271. 2 Inſt. 147.

According to (*d*) ſome opinions, a coroner *ex officio* hath no power to take any indictment, except of the death of a man.

[In *Northumberland* he may, by cuſtom, inquire of other felonies. 35 H. 6. 27. But, without cuſtom he hath no authority to take any inquiſition other than on death. 2 H. H. P. C. 65.] But by others, he ought to inquire of the breakers of houſes. 2 Hawk. P. C. c. 9. § 35. And by the 4 E. 1. ſt. 2. *de officio coronatoris*, he may inquire of rape, and the breach of a priſon. Britton, 3.——And by the ſaid ſtatute, a coroner ought to inquire of treaſure that is found, who were the finders, and likewiſe who is ſuſpected thereof; and that it may be well perceived, where one liveth riotouſly, haunting taverns, and hath done ſo of long time; hereupon he may be attached for this ſuſpicion, by four, or ſix, or more pledges, if he may be found.——Alſo, it is ſaid, that a coroner may inquire of royal fiſhes, as ſturgeons, whales. S. P. C. 51. Bracton, 120. 2 Hawk. P. C. c. 9. § 37.

(D) Of Traverſing and Quaſhing ſuch Inquiſitions.

THE law gives ſuch high credit to an inquiſition of death, found before a coroner, that (*a*) anciently the judges would not receive a verdict, acquitting a perſon of the death of a man found againſt him by the coroner's inqueſt, unleſs the jury finding ſuch acquittal, had alſo found what other perſon did the fact, or by what other means the party came to his death; becauſe it appeared by the coroner's view, on record, that a perſon was killed.

(*a*) 13 Ed. 4. c. 3. pl. 7. and 2 Hawk P. C. c. 9. § 33. that this opinion is now exploded.

Alſo, it has been formerly holden, that if a perſon were ſlain, and upon the coroner's inqueſt *ſuper viſum corporis*, it were found that *J. S.* fled, though *J. S.* were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inqueſt is ſo ſolemn, that it is not traverſable: alſo, when the goods are once lawfully veſted in the king, by that inqueſt the property of them cannot be deveſted.

13 H. 4. 13. pl. 6. 5 Co. 109. Dyer, 238. H. P. C. 29. 2 Inſt. 147. 3 Keb. 366. 564. 2 Lev. 141. But by 2 Hawk. P. C. c. 9. § 54., this opinion is harſh and unreaſonable, that a man ſhall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inqueſt taken in his abſence, without either hearing him, or giving him an opportunity of defending himſelf.

The coroner's record of an abjuration, or of the confeſſion of breaking priſon, or of the confeſſion of a felony by an approver, eſtops the party, not only from traverſing the confeſſion, but alſo from alleging that it was taken from him by *dureſs*, *&c.* And it is ſaid, that if the party plead that he is not the ſame perſon, he ſhall be concluded by the coroner's recording that he is the ſame perſon: yet in theſe caſes, it ſeems, that the judge may in diſcretion, to inform his conſcience, take an inquiry from the people living next the place, of the whole circumſtances of the matter.

Vide 2 Hawk. P. C. c. 9. § 52. and the authorities there cited.

If it be found by a coroner's inqueſt, that a murder was committed in ſuch a town, and that the murderer eſcaped untaken, the townſhip cannot traverſe ſuch eſcape, becauſe it makes them only liable to an amercement, *& de minimis non curat lex.*

S. P. C. 34. 2 Hawk. P. C. c. 9. § 53.

Alſo, it is ſtrongly holden in ſome books, that an inqueſt of ſelf-murder, found before a coroner, cannot be traverſed: but the contrary opinion being alſo holden by books of as great authority, and ſeeming alſo to be more agreeable to the general tenor of the law, in other caſes, it ſeems to be the better opinion, that ſuch inqueſt being moved into the *King's Bench* by *certiorari*, may be there traverſed by the executor or adminiſtrator of the perſon deceaſed; or, in caſe the coroner's inqueſt find him to have been a lunatick, by the king or the lord of the manor.

Bro. Coron. 151. 2 Lev. 141. 152. 2 Keb. 859. 2 Jones, 198. Vent. 278. 3 Keb. 564. 566. 604. 800. Skin. 45. pl. 16. 2 Hawk. P. C. c. 9. § 55. [The court will not oblige the coroner to return the depoſitions he hath taken upon an inquiſition of *felo de ſe*, if there be nothing depending before them to make it neceſſary. 2 Str. 1073.]

(a) Cro. Eliz. 371. 3 Keb. 800. 856. Mod. 82. Salk. 190. 2 Keb. 859. Vent. 181. 352. 3 Mod. 80. 300. 238. *cont.* 2 Jones, 198.

(a) If a coroner appear to have been corrupt in taking an inqueſt, it ſeems that a *melius inquirend.* ſhall go to ſpecial commiſſioners, who ſhall proceed not on view, but upon teſtimony, and the coroner ſhall have nothing to do with ſuch inqueſt; but (b) where his inqueſt is quaſhed for want of form only, he ſhall take a new one in like manner as if he had taken none before.

(b) 2 Roll. Abr. 32. pl. 5. 21 E. 4. 70. b. Salk. 190.

(E) Of his Power, as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon.

2 Hawk. P. C. c. 9. § 39.

BY the common law, the coroner might, without the concurrence of any other, receive an appeal of felony or mayhem, on the plaintiff's finding ſufficient pledges to the ſheriff for the proſecution; but it being provided by *Weſtm.* 1. *cap.* 10. that the ſheriff ſhall have counter-rolls with the coroner, it ſeems that no appeal, ſince that ſtatute, is well commenced before the coroner, unleſs the ſheriff be preſent to take a counter-roll of the proceedings; yet the coroner ſeems ſtill to be the only judge.

H.P.C. 171. S.P.C. 52. 2 Hawk. P. C. c. 9. § 40.

A coroner cannot receive a bill of appeal of an offence done out of the county, becauſe there can be no trial thereof by the county; but he may receive the appeal of an approver, or take the abjuration of one who confeſſes a felony done in any county; becauſe after ſuch confeſſions there is no need of any trial.

2 Hawk. P. C. c. 9. § 41. and ſeveral authorities there cited.

A coroner may certainly award proceſs, till the exigent on a bill of appeal before him, and ſuch proceſs ſhall be awarded by him only, and not by him and the ſheriff jointly, and he may proceed thereon till outlawry; but ſince *Magna Charta*, by which it is enacted, *cap.* 17., *That no ſheriff, conſtable, coroner, or other bailiff of the king, ſhall hold pleas of the crown*, he cannot proceed to the trial of the appellee.

H.P.C. 171. 2 Inſt. 176.

An appeal before the coroner may be removed into the *King's Bench* or *Chancery*, by *certiorari*, directed to the coroners and ſheriff, but not by one directed to the ſheriff only.

2 Hawk. P. C. c. 9. § 43.

The coroner may receive the appeal of an approver for an offence in the ſame or in a different county; and if the appellee be in the ſame county, he may award proceſs againſt him to the ſheriff till it come to the *exigent*: but if the appellee be in a foreign county, the coroner cannot award proceſs againſt him, but muſt leave it to the juſtices of gaol-delivery, or others before whom the appeal is afterwards recorded.

2 Hawk. P. C. c. 9. § 44.

A coroner may take the confeſſion and abjuration of a felon, and alſo the confeſſion of any felony by an approver. And as to abjuration, it is to be obſerved, that at the common law, if a perſon accuſed of any felony, (except ſacrilege,) whether in the ſame or any other county, for which he was liable to judgment of

of death, and not charged with treaſon, had fled to any church or church-yard, and within forty days confeſſed himſelf guilty before the coroner, and declared all the particular circumſtances of the offence, and thereupon taken the oath in that caſe provided, (the ſubſtance whereof was, that he abjured the realm, and would depart as ſoon as poſſible at the port which ſhould be aſſigned him, and never return without leave from the king, &c.) he ſaved his life, if he obſerved the terms of the oath, by going with all convenient ſpeed the neareſt way to the port aſſigned, &c.; but he was attainted of the felony by ſuch abjuration, without more, and conſequently forfeited his lands, goods, &c. And now by 21 *Jac.* 1. *cap.* 28. it is enacted, *That no ſanctuary, or privilege of ſanctuary, ſhall be admitted or allowed in any caſe.*

(F) Where the Act of one Coroner ſhall be as effectual as if done by them all.

(a) WHEREVER coroners are authorized to act as judges, as in the taking of an inquiſition of death, or receiving an appeal of felony, &c., the act of any one of them who firſt proceeds in the matter, is of the ſame force as if all had joined in it: but it is ſaid, that after ſuch proceeding by one of them, the act of any other will be void; alſo, it is certain that (b) where coroners are empowered only to act miniſterially, as in the execution of a proceſs directed to them, upon the default or incapacity of the ſheriff, all their acts will be void wherein they do not all join.

(a) S.P.C. 53. a. 14 H. 4. 34. (b) 39 H. 6. 40. b. Comb. 435. & *quære.* [One coroner may execute the writ, as in caſe of an exigent: but if there be more coroners than one for the county, the return muſt be in the name of all. 2 H. H. P. C. 56.]

(G) Of Fees that he may lawfully take.

BY *Weſtm.* 1. *cap.* 10. it is enacted, "That no coroner demand "or take any thing of any man to do his office, upon pain "of great forfeiture to the king." *Vide* 2 Inſt. 176. that this ſtatute was made in affirmance of the common law.

But it is enacted by 3 *H.* 7. *cap.* 1. "That a coroner have for "his fee, upon every inquiſition taken upon the view of a body "ſlain, 13*s.* 4*d.* of the goods and chattels of the ſlayer or mur-"derer, if he have any goods; and if he have no goods, of "ſuch amercements as ſhall fortune any townſhip to be amerced "for the eſcape of the murderer, &c." By 25 G. 2. c. 29. for every inquiſition (not taken upon view of a body dying in gaol) he ſhall have 20*s.* and 9*d.* for every mile he ſhall be compelled to travel from his uſual place of abode to take ſuch inquiſition; to be paid by order of juſtices in ſeſſions, out of the county rates; for which order no fee ſhall be taken. See the act for exception to the coroner of the king's houſehold, &c.

But

But the coroners endeavouring to extend this ſtatute to perſons ſlain by miſadventure, it was enacted by 1 *H.* 8. *cap.* 7. "That upon a requeſt made to a coroner to come and inquire "upon the view of any perſon ſlain, drowned, or otherwiſe dead "by misfortune, the ſaid coroner ſhall diligently do his office, "without taking any thing therefore; upon pain to every "coroner that will not endeavour himſelf to do his office, "(as afore is ſaid,) or that taketh any thing for doing his office "upon every perſon dead by miſadventure, for every time forty "ſhillings *."

* But ſee preceding note, *ante*.

(H) Of diſcharging him, and for what Miſdemeſnours puniſhed.

F.N.B. 163. S.P.C. 48. 8 Co. 41. 2 Inſt. 32. (*a*) *Vide* Godb. 105. That by chooſing another, the power and authority of the firſt, *ipſo facto*, ceaſes. [As it is an office of freehold, the court of Chancery will not ſuffer this writ to iſſue, but on affidavit that the defendant hath been ſerved with notice of the petition for it. 3 Atk. 184.]

IF any coroner be ſo far engaged in any other publick buſineſs in the county, that he cannot have leiſure enough to attend the office of a coroner; or if he be choſen verderor of a foreſt; or if he have not ſufficient lands in the ſame county whereon to live according to his ſtate and degree; or if he be diſabled, either by old age or any inveterate diſeaſe, as the palſy, or the like, to execute his office as he ought; and, as ſome ſay, if he follow any common trade, he (*a*) may be diſcharged by the writ *de coronatore exonerando*, which being directed to the ſheriff, after a recital of the particular cauſe of the diſcharge of ſuch coroner, commands him to cauſe another to be choſen in his room.

Regiſter, 117. b. 178. a. F.N.B. 164. S.P.C. 49.

But if any writ of this kind be grounded on an untrue ſuggeſtion, the coroner may procure a commiſſion from the Chancery to inquire of the truth of it, and to return the inquiry before the king into Chancery; and if upon ſuch commiſſion the ſuggeſtion be diſproved, the king may make a *ſuperſedeas* to the ſheriff, that he do not remove ſuch coroner, or if he have removed him, that he ſuffer him to execute the office as he did before.

S.P.C. 51. Salk. 377. pl. 21. H.P.C. 170.

If a coroner be remiſs in coming to do his office when he is ſent for, &c., he ſhall be (*b*) amerced by virtue of the abovementioned ſtatute *de coronatoribus*.

(*b*) That if he returns a wrong preſentment, an information will be granted againſt him. Comb. 386. [If he impoſes an improper inquiſition upon the jury, he will be committed. 1 Str. 69.]

And by 25 Geo. 2. c. 29., if any

Alſo by the 3 *H.* 7. *cap.* 1. "If any coroner be remiſs, "and make not inquiſitions upon the view of the body ſlain or "murdered,

" murdered, he ſhall forfeit for every default one hundred " ſhillings."

coroner not appointed by an annual election, or whoſe office is annexed to any other office, ſhall be convicted of extorting more than his lawful fees, or of wilful neglect of his duty, or miſdemeſnour in his office, the court may adjudge him to be amoved from his office; and ſee the ſtatute for the manner of chooſing another.

And by the 1 *H.* 8. *cap.* 7. it is enacted, " That if any coroner " ſhall not endeavour himſelf to do his office upon any perſon " dead by miſadventure, he ſhall forfeit forty ſhillings."

Alſo by the 3 *H.* 7. *cap.* 1. it is enacted, " That if any coro- " ner do not certify his inquiſition, he ſhall forfeit one hundred " ſhillings."

END OF THE FIRST VOLUME.